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CORRECTIONS.

PAGE.

"Was caused," in sixth line of syllabus, should be "was *not* caused" . . . 61
"Notation," in fourth line from foot of page, should be "violation" . . . 74
Insert "as" after "That" in next to last line of syllabus 97
"Attacked *by* fraud," in fourth line of syllabus, should be "attacked *for* fraud" 131
"Waive," in third line from foot of page, should be "revive" 168
"C.," in sixth line from foot of page, should be "A." 175
The opinion in Smith v. Commonwealth, p. 215, published by mistake; rehearing subsequently granted and new opinion delivered. See . . . 1005
"City," wherever it occurs in sixth line of syllabus, should be *levy* . . . 310
"Him," in seventh line from top of page, should be "them" 360
"Will not," in fourth line of syllabus, should be "will" 423
"Chain," in fourth line of syllabus, should be "claim" 629
"Of," in third line of syllabus, should be "or" 646

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KENTUCKY COURT OF APPEALS.

SMITH, &c. v. BELL & CO., &c.

(Filed November 12, 1881.)

1. In an action for mesne profits after a recovery in ejectment, the plaintiff is not entitled to recover attorney's fees expended by him in obtaining the restoration of the property.

The case of Trustees of Augusta v. Perkins, 8 B. M., 198, overruled in so far as it allows the recovery of attorney's fees in such an action.

2. While the defendant in such an action can not recover from the plaintiff for improvements, and is not entitled to a lien on the land therefor, yet the plaintiff is entitled only to the rents which the land would have produced had no improvements been made by the defendant, and to such damages as he has sustained by reason of waste or injury to the land; and in estimating the damages from waste of the timber or otherwise, and the rent which results solely from the defendant's improvements, the value of such valuable and lasting improvements should be deducted from such damages and rent.

Roe & Roe for appellants.

B. F. Bennett for appellees.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Hargis.

Pending an action for division of the land, appellant John W. Smith entered on it, was made a party to the action and adjudged to be without title and a trespasser.

While the action named was undetermined, the appellees sued Smith for rents and damages to the land and subsequently filed an amended petition disclosing a final determination of the first action, and seeking to recover attorney's fees alleged to have been expended in its prosecution to final recovery, and also rents up to the time of filing the amendment.

It appears that Smith had cleared about 95 acres of the land, cut and used 3,800 cords of wood, and occupied the land eleven years.

The cause was referred to the master commissioner to ascertain the value of the rents, damages to the land and attorney's fees, but Smith's motion to require the commissioner to ascertain and

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report the value of the lasting and valuable improvements made by him upon the land was overruled and he excepted.

On the coming in of the report of the commissioner both parties excepted, and the court declining to act separately on the exceptions, rendered judgment for $2,520, with interest from the date of the judgment, subject to credits hereinafter noticed. The judgment is made up of the following items, to wit:

8,800 cords of wood at	$570 00
Rent for the land	1,250 00
Reasonable attorney's fees	700 00
	$2,520 00

This judgment is inconsistent with the exceptions of each of the parties, and in substance overrules all of Smith's and part of appellees, and Smith appeals, asking its reversal on several grounds, which, so far as material, we will consider in the order most fitted to our conception of the case.

We can not say, from the evidence, that the value of the wood and rent is unreasonable, but the court erred in refusing to allow the appellant, Smith, to prove the value of lasting improvements, as he should have been credited therewith on the cord wood and the amount of rents produced by reason of the improvements to the extent they increased the rental value of the land above what it would have produced had appellant made no improvements.

While it is true that appellant, Smith, cannot recover from appellees for improvements, nor is he entitled to a lien on the land therefor, yet the appellees are only entitled to the rents which the land would have produced, had no improvements been made by appellant, and to such damages as they have sustained by reason of waste or injury to the land.

But in estimating the damages from waste of the timber or otherwise, and the rent which results solely from appellant's improvements, any valuable and lasting improvements made by him should be deducted from such damages and rent, as the appellees are not damaged beyond the loss they have sustained, and it can not be said they have sustained any loss beyond what is left after thus deducting the improvements which they necessarily receive under the judgment.

In no state of case, however, can the value of the improvements be allowed to be paid out of the land or deducted from the rents, which it would have borne, had the appellant refrained from trespassing on or improving it. Nor is he entitled to judgment for any excess of his improvements, beyond the waste or rents accruing on the land, before or after its improvement.

We do not perceive on what principle the appellees were adjudged $700 for the attorney's fees, which they allege were incurred in prosecuting the first suit named.

Reasonable attorney's fees may be recovered where they have been contracted by reason of a malicious prosecution of the plaintiff by the defendant, or the defendant has maliciously attached the plaintiff's property, and in all cases of like nature, but mere resistance to the recovery in an action of ejectment, or an action of that character, we are of the opinion no attorney's fees, except those allowed by the statute, can be recovered unless some peculiar and a different state of facts from those relied on were shown.

It was error to render judgment against the appellants, Bush, G. W. Smith, Felty, and W. R. Smith, for the sum of $858.05 on the forthcoming bond executed by them for the property levied on under the attachment, as they were not parties to the action,

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and no suit had been instituted against them or rule awarded to compel them to deliver the attached porperty to the sheriff or pay its value into court. The judgment against them was without citation or allegation, and can not stand. There is nothing in the record showing their appearance in the action or consent to the judgment.

Wherefore, the judgment is reversed with directions to allow the value of the rent and wood to stand as reported by the master, but to refer the cause to him with directions to hear proof and ascertain the character and value of the improvements, also the rental value of the land, with and without such improvements, from the time John W. Smith took possession of it, reject the attorney's fee, and for further proper proceedings.

[The attention of the court having been called to the case of the Trustees of Augusta v. Perkins, reported in 8 B. M., 198, in regard to attorney's fees, in conflict with this case, that case, or so much of it as allows attorney's fees, is overruled, and this case ordered to be reported. Ordered by a full bench. June 6th, 1887.]

WESTERN ASSURANCE CO. v. RECTOR.

(Filed March 5, 1887.)

1. Insurance—Where a policy of insurance upon a stock of "general merchandise" provides that it shall be void if the insured keeps gunpowder in the premises without written permission in the policy, the mere fact that gunpowder is usually kept as part of such a stock of goods, or that the agent who took the application told the insured that he could keep gunpowder for sale, will not preclude the company from relying on the condition in the policy. The rule excluding parol testimony to vary or contradict a written contract applies.

2. Same—Where an agent taking an application for insurance undertakes to write in the application the answers of the insured to the questions propounded to him, and the insured having answered truthfully, the agent, nevertheless, writes false answers, the company will be estopped from relying upon such misrepresentations to avoid the policy.

In this case the insured, in response to a question propounded to him as to his title to the property, stated that he held a bond for title with a lien on the property for $200. The agent, in writing the answer to the question, made him state that he held a fee simple title. Held—That the company is estopped to rely upon the misrepresentation.

Wm. Lindsay and Jas. A. Mitchell for appellant.

Richards & Hines, Wilkins & Sims and W. T. Cox for appellee.

Appeal from Warren Cicruit Court.

Opinion of the court by Chief Justice Pryor.

This was an action instituted in the court below to recover upon a policy of insurance issued by the appellant upon the storehouse and goods of the appellee.

On the trial of the case, numerous special interrogatories were propounded to the jury, and, upon the return into court of the special findings, each party moved for a judgment.

The motion of the appellant was overruled and the case is here

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on appeal. Many questions are presented by the record, only one of which is necessary to be considered.

By the terms of the policy the appellee, Rector, was insured to the extent of $2,000 as follows: "$400 on his one-story, shingle roof, frame storehouse building, occupied by the assured for general merchandising, situated seven miles from Bowling Green, on the Scottsville road; $800 on his stock of dry goods and clothing while contained therein; $250 on his hats, caps and notions while contained therein; $400 on his boots and shoes while contained therein, and $150 on his hardware, queensware and groceries while contained therein."

It is further provided on the face of the policy that "if in said premises there be kept gunpowder, fireworks, nitro-glycerine, phosphorous, salt peter, nitrate of soda, petroleum, naptha, gasoline, benzine, or benzine varnish, etc. (except the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and lamps filled by daylight), without written permission in this policy, then, and in every such case, this policy shall become void."

The testimony conduced to show that the appellee kept gunpowder in his store, and the jury, by their special finding, said that Richardson, the agent of the company, knew that fact when the application was prepared, and informed the appellee that keeping gunpowder for sale would not affect his policy. The jury also said that gunpowder was an article usually kept in a country store of general merchandise.

It is admitted by the answer of the appellee that he had gunpowder in his store, and, besides, he testified that he made no efforts to save anything, as he was afraid of the powder, as there was eighteen or twenty pounds of it near the fire in the building at the time of the loss. The only evidence, however, before this court consists in the special findings of the jury upon the evidence adduced on the trial.

The motion for a new trial was not entered until the motion for a judgment on the special verdicts made by the appellant had been overruled, and this was some eight or ten days after the verdict, so this court can look alone to the pleadings and the findings by the jury in disposing of the errors complained of.

It is admitted that some eighteen or twenty pounds of gunpowder was in the store, and that the appellee had kept it for sale since and before the policy issued. This was expressly prohibited by the contract, but the appellee, to avoid this defense, alleges in his petition or reply that when the application for insurance was made the agent of the general agents of the appellant saw the powder, and told him he had the right to sell gunpowder, and that this provision of the contract had no binding force when it was usual or customary to sell gunpowder from retail stores. That when regarded as a part of the ordinary merchandise kept in the establishment insured it could be sold to customers.

The fact that such a representation was made by the agent at the time is sustained by the special finding.

It is also maintained by counsel for the appellee that although the keeping of gunpowder is prohibited by the terms of the policy, that "when such goods as are usually kept in country stores" are insured, it includes gunpowder, and gives the insured the right to sell. That the term general merchandise embraces gunpowder, and the right to sell is implied, although the prohibition is express.

There is neither fraud or mistake alleged in the execution of the policy in question, but on the contrary it is conceded that the appellee, the insured, knew what the policy contained, and his right to keep and sell powder in his storehouse is based on

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the representations made by the agent at the time of the application that this provision of the policy did not prevent him from selling it as he did the other merchandise in his storehouse. The policy was signed and delivered by the company containing stipulations forbidding the use of certain inflammable substances, including gunpowder, within the storehouse, and that certainly if kept enhanced the risk, and now it is urged that this part of the contract may be disregarded by showing that the agent had made representations at the time of the application that destroyed the efficacy of that part of the contract. In other words, that what the agent said at the time the application was made is to govern, and not the stipulations embraced in the policy itself.

We perceive no reason why the rule excluding parol evidence contradicting or varying the terms of a written contract, should not apply to contracts of insurance as well as to any other written contract evidencing the purpose and intention of the parties.

Here the verbal statement made by the agent prior to or at the delivery of the policy is held sufficient to establish a contract entirely inconsistent with the writing, in the absence of either fraud or mistake in its execution.

Cases in reference to insuarnce policies may be found where the policy or its meaning has been interpreted in the light of the circumstances surrounding its execution that would seem to be at variance with this rule, as where a building insured is being used for the manufacture of certain articles that required the use of inflammable material, and without which the building and the business in it would be useless, it was held that the right to keep and use everything necessary to the manufacture of the articles existed, although the policy forbade it, consent having been given by the insurance company that the building insured might be used for the purpose of manufacturing the particular article. (Veile v. Germania Insurance Co., 26 Iowa, 9; Archer v. Merchants Insurance Company, 43 Mo., 434.)

In this case no such question can arise, and, because powder is usually kept in a country retail store, it is maintained that the insured has the implied consent of the company to keep and sell that which is expressly forbidden by the written contract. The fact that an insurance is obtained upon the stock of merchandise, and that powder is usually kept and sold, or classed with the articles composing the merchandise, will not authorize the sale of powder if, by the terms of the contract, it is prohibited, and the policy declared void if violated in that particular.

As said by the court in the case of the Birmingham Fire Insurance Co. v. Kroegher, 83 Penn., 64: "The reason for the prohibition may arise from the fact that the custom of selling gunpowder does exist in a country store, and if such articles were never found among such stocks, this provision in the policy would be useless."

The keeping of gunpowder certainly increased the hazard, and its prohibition from sale was a material part of the contract, and the statement made by the agent is so much at variance with this policy that if permitted to supplant the writing it seems to us would be opening the door to an assault upon every written contract, by the mere verbal statement of the parties or their agents made at the time of its execution. That a written contract may be cancelled or reformed upon a state of pleading that would admit parol proof of its terms will not be denied, but when the written contract is plain in its meaning, and purports to express the intention of the parties, it would be a departure from a well recognized rule of evidence applicable to all contracts to permit the introduction of parol evidence to show that the

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parties intended to give no force to certain stipulations of a contract, that, if enforced as written, must, from its terms, have been regarded as an essential part of the contract, and perhaps without which the contract would never have been executed. Applications for insurance policies, although signed by the insured, are sometimes written out, or the answers to the questions propounded reduced to writing by the company's agent, and when the agent has himself made a false statement by writing that which he knew was false and different from the statement given him by the assured, the company will be estopped from taking advantage of its own wrong or that of its agent, and the principal, as said by Mr. Justice Miller, in the case of the Insurance Co. v. Wilkinson, 13 Wallace, 222, is, "that where one party has, by his representation or conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himslef of that advantage," It then becomes the statement of the company and not that of the applicant, and the rule recognized proceeds on the idea "that the application thus made is not the instrument of the party whose name is signed to it."

Here is an instrument that the insurance company signed and delivered at its obligation to pay in the event of loss by fire. It contains a stipulation, unmistakable in its meaning, by which the policy is to be void if gunpowder is kept and sold in the storhouse. This fact is known to the appellee, but he has seen proper to follow the interpretation of such contracts given by the sub-agent of the local agents, or by the local agents, made at the time of the application, that, notwithstanding such provisions, you (the insured) can disregard them and sell as if no such writing had been executed.

In this case the answers purporting to have been made by the applicant to the questions propounded are held not to affect him, although untrue and material to the risk, because the agent of the company, in reducing the answers to writing, made a false statement as to the title, which he knew was untrue, and when, if he had written the response as given by the assured, the company could not have been deceived. The insured stated to the agent that he held a bond for title with a lien in the property for $200, when the agent made him state that he had a fee simple title. The answer was made truly by the assured and in good faith, and the falsehood stated was by the agent, and not the assured. The latter did not perhaps know the difference between an equitable and a fee simple estate, and the doctrine of estoppel should apply.

But the court has gone further, and made the policy of insurance, signed by the company, with its written stipulations, subject to the interpretation given by the agent of the language used. That is, the stipulation that if gunpowder is kept and sold by the insured, without the consent in writing of the company, the policy shall be void, means that you may sell if gunpowder is usually sold in such stores. If such testimony is admissible, in the absence of some appropriate pleading to reform or cancel the writing, every stipulation contained in the policy may be disregarded in the same manner, and each party left to determine at last the terms of the insurance by such parol proof as would be competent to establish a contract if no writing had been executed.

The mere fact that the party insured has gunpowder in his store at the time, and the agent knew it, or that he intended to keep it, will not estop the company, as some of the opinions indi-

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cate, from enforcing the terms of the policy. If there is no powder kept or sold in the dry goods or grocery store, there is no necessity for any such clause in the policy, but as the keeping of gunpowder is especially hazardous, where there is a contract forbidding its sale, it should be enforced. That part of the contract may, it is true, be waived, but there is no such question raised in this case, and, applying the rule of evidence to this class of contracts that is applied to all other written instruments, it must be held that the mere statements of the agent can not vary the terms of the written contract between these parties.

In the case of Steinbach v. Insurance Co., 13 Wallace, 183, where a like character of argument was presented, the court, in response, said: "But the plaintiff contends that they are included in the description of 'other articles in his line of business.' The answer to this is, that the policy itself requires that fireworks shall be specially written in it."

In the present case the company and the insured enumerated all the articles to be insured and their value: First, the storeroom at $400; stock of dry goods, $800; hats and caps, $250; boots and shoes, $400; hardware and queensware, $150, amounting in all to $2,000. With this specific character of goods and wares insured, it is claimed, was included the powder, that, instead of being insured, forfeited the policy if kept and sold.

Courts have gone far in protecting the insured against statements made by overzealous and always importunate insurance agents, but we are not disposed, however great the hardship of the case, to remove all safeguards embodied in the contract of insurance for the protection of the company, because an interpretation of its meaning has been given by an agent contrary to the plain import of the language used. In our opinion the pleadings and special findings entitled the appellant to a judgment.

The judgment is reversed and cause remanded that such a judgment may be entered.

LOUISVILLE & NASHVILLE R. R. CO. v. BALLARD.

(Filed March 5, 1887.)

1. Railroads—Duty to passengers—Exemplary damages may be recovered of a railroad company for an injury to a passenger resulting from a violation of duty by one of its employes in the conduct of the train, if the violation of duty be accompanied with oppression, fraud, malice, insult or other willful misconduct, evincing a reckless disregard of consequences. As to female passengers, the rule goes further, and there is as to them an implied undertaking upon the part of the company that it will protect them against obscenity, immodest conduct or wanton approach. Mere "indecorous" conduct, however, even toward a female passenger, is not sufficient to authorize exemplary damages.

In this action by appellee to recover for an injury resulting from being taken past a station to which she had purchased a ticket, it was error to instruct the jury that if any of the employes of the company were "indecorous" or insulting, they should award the plaintiff "damages in their discretion" not exceeding the amount claimed in the petition.

2. Evidence—Testimony as to the conduct of a brakeman was competent, although only the conduct of the conductor was specifically complained of in the petition.

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3. Same—Any circumstance attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence with a view of affecting the question of damages, save where the circumstances within themselves constitute an independent cause of action.

Wm. Lindsay and Rountree & Lisle for appellant.

Hill & Rives for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The appellee, Lou. E. Ballard, after purchasing a proper ticket, took passage from one intermediate station to another upon a passenger train of the Louisville & Nashville Railroad. It failed to stop at the platform at her place of destination, which was a flag station. It was a down grade at that point, and there is some evidence tending to show that the car brakes did not operate well, in consequence of which the train ran some fifty or sixty yards beyond the platform, where it was stopped and the station then announced by the proper person, but the appellee did not get off the train. Upon the other hand there is testimony tending to show that this stop was not made, and that no effort was made to stop the train until it was done at the request of the appellee at a point between her destination and the next station. The weight of the evidence shows that the conductor then informed her, that she could either go on to the next station, or he would stop the train and she could get off there, and that upon his so telling her the second time he did stop it and she got off at that point, which was a lonely place and about a mile beyond her station. She says that the conductor "seemed very impatient, and his tone was rather rough for a gentleman; that he did not assist her in getting off with her baggage, which consisted of a valice and bundle, and that as she jumped from the lower step of the platform to the ground he stood upon the platform, while a brakeman of the train, who was standing by, looked at her and 'grinned.'"

Upon the other hand there is evidence to the effect that the conductor did assist her out of the car, and was altogether kind and polite in his manner.

There was no request upon her part that the train should be backed to her station, but this should have been done under the circumstances.

The appellee was compelled to walk back to her station, and from thence three-quarters of a mile to her home, in consequence of which she was confined to her bed the most of the time for three or four days, and unable to teach her school for a week.

The jury in this action by her for damages returned a verdict for $3,000.

Manifestly, it can not be sustained, upon the ground that it did not include exemplary damages, and was compensatory only for the breach of the contract for transportation.

If upheld it must be upon the ground that she was entitled to exemplary damages, and that this question was submitted to the jury by proper instructions.

They were told:

"If the jury believe from the evidence that the defendant's agents or employes, or any of them in charge of defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting either in words, tone or manner,

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they should find for the plaintiff and award her damages in their discretion, not exceeding five thousand dollars, the amount claimed in the petition."

A corporation can act only through natural persons. It of necessity commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad the safety and comfort of passengers is necessarily committed to them. They act for it. Its entire power, pro hac vice, is vested in them, and as to passengers in transitu, they should be considered as the corporation itself. It is, therefore, as responsible for their act in the conduct of the train and the treatment of the passengers, as the officers of the train would be for themselves if they were the owners of it.

Public interests require this rule. They also demand that the corporation should be, and it is, liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employes in the conduct of the train if it be accompanied by oppression, fraud, malice, insult or other willful misconduct, evincing a reckless disregard of consequences. (Dawson v. L. & N. R. R. Co., 6 Ky. Law Rep., 668.)

As to female passengers the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct or wanton approach. (Commonwealth v. Power, 7 Met., 596; Craker v. Railway Co., 36 Wis., 657; Nieto v. Clark, 1 Clifford, 145; Chamberlain, &c. v. Chandler, 3 Mason, 242.)

It was improper, however, to instruct the jury, as was in effect done in this instance, that "indecorous" conduct alone is sufficient to authorize exemplary damages. The term is too broad. It may embrace conduct which would not authorize their infliction.

It is true that the peculiar element, which, entering into the commission of wrongful acts, justifies the imposition of such damages can not be so definitely defined perhaps as to meet every case that may arise.

It has been said that they are allowable where the wrongful act has been accompanied with "circumstances of aggravation;" Chiles v. Darke, 2 Met., 146; or if a trespass be "committed in a highhanded and threatening manner;" Jennings v. Maddox, &c., 8 B. M., 430; or where the tort is "accompanied by oppression, fraud, malice or negligence, so great as to raise a presumption of malice;" Parker v. Jenkins, 3 Bush, 587; or as was said in Dawson v. Railroad Company, supra, where the wrongful act is accompanied by "(insult, indignity, oppression or inhumanity.)"

It would, however, be extending the rule unwarrantably to hold that they could be imposed, provided the conduct was merely "indecorous." This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily or indeed generally involve an insult. The latter assumes superiority and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

In the case now under consideration the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next one; or in merely telling her that she could walk back

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to her station, yet none of these things amounted to "insult, indignity, oppression or inhumanity."

The lower court properly refused the request as made for special findings. The interrogatories offered merely required the jury to say what amount they found as compensatory and what sum as exemplary damages. They involved mixed questions of law and fact.

Upon a retrial the question of limiting the finding to compensatory damages should be presented to the jury under proper instructions, and the difference between them and those which are exemplary defined.

The evidence as to the conduct of the brakeman was competent. It is true that it was not specifically complained of in the petition, but only that of the conductor. The brakeman was, however, one of the agents of the railroad company in the management of the train upon which the appellee was a passenger. It is not necessary that a petition should enumerate specifically that this or that person connected with the management of the train was guilty of improper conduct in order to authorize the admission of evidence as to this or that particular party. It is sufficient to aver the breach of duty upon the part of those in control of the train. Besides, in this instance, the conduct of the brakeman complained of was in the immediate presence of the conductor, and occurred at the time of the other alleged acts of which the appellee complains. We do not mean to say whether he was guilty of improper conduct or not, but it was a part of the res gestæ, and, therefore, admissible. Circumstances attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence with a view of affecting the question of damages, save where they, within themselves, constitute an independent cause of action. (Sedgwick on Measure of Damages, side page 538, note 3.)

For the reason indicated the judgment below is reversed and cause remanded for a new trial, and further proceedings consistent with this opinion.

WORTHINGTON v. MILLER'S ADM'R.

(Filed March 8, 1887.)

Evidence as to transaction with decedent—In an action against a firm by the representative of a decedent, one of the partners can not, by permitting judgment to go against him, render himself a competent witness for the other partners as to a transaction with the decedent.

In this case the partner against whom judgment has been rendered is held not to be a competent witness for the other partners for the purpose of proving payment to the decedent.

Hallam & Myers for appellant.

J. F. & C. H. Fisk for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Prroy.

This case has been heretofore in this court and on the appeal of Miller's administrator and on the appeal of Worthington, and

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is now here for the third time. The action was instituted by the administrator on the following obligation: "Due John J. Miller two hundred and sixty-five dollars and forty cents.

"JAMES WHIPPS & CO."

The action being against the firm of James Whipps & Co., the petition alleging that James Whipps and Henry Worthington were members and that Wilcox, the other member, was dead, or had retired from the firm. Worthington denied by his answer the existence of any such firm, or that Whipps had any authority to sign his name to such a paper or to make him liable as a member of a firm to which he never belonged.

That Whipps was the mere agent to purchase tobacco for him (Worthington) and Wilcox, and without any power to sign their names in any way to paper evidencing an indebtedness. He further pleaded payment to the intestate for the tobaccco, for which this note was executed. Issues were made as to the existence of the partnership, and on the plea of payment.

When the case was here on the appeal of the administrator of Miller, it was held that Whipps being sued as a member of the firm was incompetent to testify as to the payment by him to the intestate, and a reversal on that account was had. When it went back there was a judgment against Worthington and James Whipps, that was brought here on Worthington's appeal, and reversed on account of an erroneous instruction. Whipps did not appeal, but the supersedeas was executed by Worthington, and the case sent back, the judgment being reversed, leaving, as Worthington contends, the judgment in full force as to Whipps, but reversed as to him (Worthington.) On the return of the case Worthington offered Whipps as a witness to prove payment, insisting that the latter was no longer a party to the action, and had no interest in the result. The court refused to permit the witness to testify, and this is the error complained of. Whipps was insolvent, and, therefore, was not particularly interested in the result. Whether solvent or insolvent, and waiving the question, that as the obligation sued on was a firm liability, and proceeded on as such, the judgment was a unit, it seems to us that the individual liability assumed by one partner in permitting judgment by default to go against him, can not render him a competent witness to testify for the other partners with reference to the same transaction as to what transpired between the witness and the dead man as to the payment of this note. If paid it relieves the partnership from any liability for the debt; and while the partnership assets might be amply sufficient to satisfy the judgment, a member of the firm is permitted to testify as against the intestate that he paid to the intestate in his life time the entire amount, thereby exonerating the firm from the payment of the firm debt. The firm is the party defendant to the action and no member of it can testify as to transactions with the decedent so as to absolve the firm from its obligation. There was no error, therefore, in refusing to permit the witness to testify.

Judgment affirmed.

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GRIGSBY, GD'N, &c. v. COCKE'S EX'R.

(Filed March 8, 1887.)

Executors—When bond should be required—The county courts are clothed with large discretionary power as to requiring executors to give bond for the faithful performance of their duties, although the will directs that no bond should be required of them, and upon appeal to the circuit court from an order of the county court requiring an executor to give bond, notwithstanding the will directs otherwise, the order should not be reversed unless it affirmatively appears that the county court, in requiring the execution of the bond, acted capriciously and without any cause.

Under the circumstances of this case, which are set out in the opinion, the order of the county court requiring bond was improperly reversed by the circuit court.

W. M. Beckner and J. T. Tucker for appellants.

Hunt & Darnell for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, as guardian of two infant legatees of appellee's testatrix, Amanda M. Cocke, moved the Clark County Court to require the appellee to execute bond, with secuirty, for the faithful performance of his duties as executor of the last will of Amanda M. Cocke, he, by the provisions of the will, having qualified as executor without executing bond for the faithful discharge of his duties.

The county court having required the appelle to execute bond, with security, for the faithful discharge of his duties as executor, and he having declined to do so, the county court removed him and appointed the appellant as adimnistrator of the estate, with the will annexed.

From these orders of the county court the appellee appealed to the ciruit court, which reversed the orders of the county court, and reinstated the appellee as executor without bond. From that judgment the appellant has appealed to this court.

Sec. 21 of the act of 1797 (1 Litt.'s Laws, 616), provided: "Where any testator shall leave visible estate more than sufficient to pay all of his debts, and by will shall direct that his executors shall not be obliged to give security, in that case no security shall be required unless the court shall see cause, from their own knowledge, or the suggestions of creditors or legatees, to suspect the executors of fraud, or that the testator's personal estate will not be sufficient to discharge all his debts."

By section 4, chapter 37 of the Revised Statutes, it was provided: "But when the will directs that an executor shall not give security, the court shall not require it unless on the motion of some one interested, or from its own knowledge, it shall appear proper to require it."

Article 1, section 4, chapter 39 of the General Statutes provides: "But surety shall not be required when the will so directs, unless on the motion of some one interested, or from the knowledge of the court, it may appear proper to require it; and when so required, which may be at any time, surety shall be given by the executor, else he shall not be permitted to qualify, or, having qualified, he shall be removed."

By the act of 1797 the county court, upon the application of the executor to qualify without giving bond, the will so directing, could not require the executor to give bond, unless it should "see

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cause, from its own knowledge, or the suggestions of creditors or legatees, to suspect fraud."

By the Revised Statutes the power of the county court was enlarged so as to give it power, upon the application of the executor to qualify without bond, the will so directing, to require bond if, from its own knowledge, or upon the motion of some one interested, it appeared proper to require bond.

The General Statutes further enlarge the power of the county court by expressly providing that it may require the executor to give bond, though the will directs otherwise, at any time after the qualification of the executor, if, from the knowledge of the court, or upon the motion of some one interested, "it may appear proper to require" the bond.

For the purpose of protecting the interest of creditors or legatees the county courts are clothed with large discretionary power as to require executors to give bond for the faithful performance of their duties, although the will directs that no bond shall be required of them. This discretionary power is not limited to cases of suspected fraud or bad faith on the part of the executors, but reaches out and embraces any fact or circumstance, either personally known by the court or developed by investigation, tending to show that it is proper to require bond. Of course the county courts can not require the execution of the bond capriciously and without any cause.

Upon an appeal to the circuit court from an order of the county court requiring an executor to execute bond, notwithstanding the will directs otherwise, the court should presume, in the absence of satisfactory evidence to the contrary, that the county court had, either from its own knowledge or from proof, cause to require the executor to execute bond, and unless it affirmatively appears that the county court, in requiring the execution of the bond, acted capriciously and without any cause, the order should not be reversed.

The proof, as developed in the record, is that the estate confided to the hands of the appellee as executor is a large one, consisting mostly of personal estate. That under the will he is the devisee of one-half of the estate, and the applelant's wards are the devisees of the other half; that the appellee has no near relations in this State; that his children live in other States; that he contemplates moving from the State as soon as he can wind up his business; that he has no estate of his own except that devised him by his testatrix; that by the terms of the will no estate is devised directly to appellant's wards, but the appellee is requested to pay them one-half of the net proceeds of the estate. It also appears that he contemplated bringing a suit to have the will construed. For what purpose? Evidently to test the question as to whether he is not entitled to the whole estate.

We think the county court did right in requiring the appellee to give bond, and in removing him as executor upon his failure to do so.

The decisions of this court relied on by appellee are not applicable to this case. In those cases the court was called upon to act without reference to the statute authorizing the county courts to require bond of the executor, notwithstanding the will provided otherwise. In such cases the court requires that bad faith, or what is equivalent to it, on the part of the executor, must be shown.

The judgment of the circuit court is reversed and the case is remanded with directions to certify to the county court to re-enter its order removing the appellee as executor, and the appointment of the appellant in his stead as administrator, with the will annexed.

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PETREY, &c. v. RANDOLPH, &c.

(Filed March 10, 1887.)

1. Landlord and tenant—A landlord, in order to preserve the superiority of his lien upon the tenant's property on the leased premises as against "a lien" of a third person, must assert his claim for rent within ninety days after it becomes due; and as against all other rights or equities of third persons he must assert his claim within 120 days.

2. Assignment for benefit of creditors—While an assignee for the benefit of creditors takes the assigned property subject to all valid liens and equities, he is not limited, as to defenses to distraint, attachment or execution against the property, to those only which the debtor could have made. Therefore, while a landlord might, as against the tenant, have distrained for rent at any time within six months after it became due, he can not, as against the tenant's assignee for the benefit of creditors, distrain after four months, the right of creditors having intervened by reason of the assignment.

L. A. Weakley for appellants.

L. C. Willis for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Holt.

A deed of assignment for the benefit of creditors divests the assignor of title. The qualification required by the statute. by the taking of an oath and the execution of a bond by the assignee, does not affect it, but is merely for the security of those interested.

The single question, therefore, presented by this appeal, is whether a landlord can acquire a superior lien for rent, which has been due less than six but more than four months, by the suing out and levy of a distress warrant upon the tenant's property upon the leased premises, but after the making of a deed of assignment by the tenant for the benefit of his creditors?

Chapter 66, article 2, of the General Statutes, provides:

Section 10. "A distress warrant may issue, although the lease be not ended, but only for rent then due, and not after the lapse of six months from the time it was due."

Section 12. "All valid liens upon the personal property of a lessee, assignee or under-tenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and on property upon which the landlord hath a superior lien for his rent, then to the extent of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference and be first satisfied, provided the same is sued out in ninety days from the time the rent was due."

Scetion 13. "A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or under-tenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days." * * *

Aside from the statute the landlord has no lien. At the common law he had no right to distrain after the lease or term had ended. By it he could only seize property for rent then accruing.

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(3 Blackstone, 11.) It is a summary proceeding, born of the statute, and should not be extended in scope by construction. The legislature has given the landlord a preference, but has not absolved him from vigilance. To guard against collusion between him and his tenant, and to prevent the latter from obtaining false credit, it has given him a lien and a summary mode of enforcing it, provided he does so within a certain period.

As between him and the tenant he may distrain within six months, but where the rights of third parties intervene, the statute has reduced the right to a more narrow limit, and the landlord must comply with it strictly or lose his right.

It is, perhaps, difficult, owing to their language, to arrive at the reason which led to the enactment of both the 12th and 13th sections, supra. It can be urged with some force, in the light of legislation upon the subject, that the first relates to property which the tenant carries with him to the leased premises, while the latter, in imitation of the feudal law, gives to the landlord a superior lien upon that which issues out of the land or is acquired by the tenant after he goes upon the premises.

There is, however, in our opinion, this distinction between the two sections: The first is, by its terms, applicable only to liens of third parties. All liens created upon the property of the lessee, prior to its removal to the rented premises, are declared by it to be superior to the landlords claim for rent; and if the lien be created after such removal, then the demand of the landlord is declared to be superior to the extent of a year's rent, provided the proper steps to enforce it are taken within ninety days after the rent becomes due.

It was accordingly held in the case of Gedge v. Shoenberger, 83 Ky., 91, which was a contest for priority of lien between the owner of a mortgage, given by a tenant upon property at the time upon the rented premises, upon the one hand and the landlord for rent, accruing subsequent to the execution of the mortgage, upon the other, that the latter must distrain within ninety days from the falling due of his rent or the superiority of his lien was lost.

This section must, in our opinion, as to the rights or claims of third parties, be held to refer to such as fall within the technical legal meaning of the word "lien."

The thirteenth section, however, is not so restricted. By it the landlord has a superior lien upon the property named in it for a year's rent, due or to become due, provided it has not been due more than one hundred and twenty days.

Under the one section he must, as against "a lien," assert his rent claim within the ninety days, and as against all other rights or equities of third parties he must, under the other section, do so within one hundred and twenty days. This construction is necessary to harmonize and give effect to both sections of the statute.

The 15th section of article 2 provides that if after the commencement of any tenancy a lien be created upon the property on the leased premses, the lien holder may remove the property by paying to the landlord the rent in arrear and securing him in that to become due, not exceeding in all, however, a year's rent; and section 16 says that if the property be taken under execution or attachment the officer shall, out of the proceeds of the property, pay to the landlord the money rent due and to become due for the year in which the levy is made, unless a bond of indemnity be executed; but these two sections must be understood as referring to cases where the landlord has not lost his right, as

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provided in sections 12 and 13, to enforce the collection of his rent without regard to the rights of third parties.

It is urged, however, that an assignee takes the property cum onere; that he merely steps into the shoes of the debtor; and that as the landlord can, as against the latter, distain within six months, that therefore he can do so as against the trustee.

It is true that an assignee for the benefit of creditors takes the assigned property subject to all valid liens and equities.

Here, however, the statute says that the landlord may, as between him and his tenant, distrain for the rent at any time within six months after it becomes due; but also provides, in substance, that whenever the rights of third parties intervene he can in no case delay longer than four months. This limitation upon his right was not contained in the act of January 31, 1811. It provided only that the property distrained should belong to the party against whom the warrant had issued or to a sub-tenant. Nor was the 90 day provision of the 12th section, supra, embraced in the Revised Statutes of 1852.

This right of the landlord is strictly a legal or statutory one, enforceable in a summary way. It can, therefore, find no support or favor in equity.

The period for which the rent is owing having determined, the lease-hold interest does not pass to the assignee under the deed of assignment. If so he would be the tenant. The legal title to the assignor's property, howerer, vests in him. He becomes the representative of the creditors. He is entitled to hold it until the debts are paid. Their rights have intervened, and if a landlord wishes to defeat them he must be vigilant and pursue his statutory remedy within the time fixed by law. This he did not do in this instance.

The trustee holds the property for the payment of the debts, and the interest of the creditors requires that he should not be limited as to defenses to distraint, attachment or execution against it to those only which the debtor could have made.

Judgment affirmed.

JETT'S EX'X v. COCKRIL'LS EX'X.

(Filed March 10, 1887.)

Executors and administrators—Interest—Unless a claim against a decedent's estate is verified as required by law and payment demanded of the personal representative within one year after his appointment, no interest accruing thereon after the death of the debtor can be allowed; and the personal representative by making a payment on the claim before it is verified does not waive his right to require, as a condition precedent to the recovery of interest accruing after the debtor's death, that the claim be verified and the payment of the balance due thereon demanded within a year from the time of his qualification.

C. F. & A. R. Burnam for appellant.

Riddell & Fluty for appellee.

Appeal from Estill Circuit Court.

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Opinion of the court by Judge Bennett.

Article 5, section 53 of the General Statutes provides that "no interest accruing after his death shall be allowed or paid on any claim against a decedent's estate, unless the claim be verified and authenticated, as required by law, and demanded of the executor, administrator, or curator within one year after his appointment."

E. L. Cockrill having died testate in Estill county, his will was admitted to probate by the county court of that county, and the appellee was qualified as executrix thereof on the 21st day of November, 1876.

Curtis Jett, who was alive at the time of the appellee's qualification as executor, and continued to live for several months thereafter, did not verify the note, which he held on the appellee's testator, as required by law; nor did his executrix, after her qualification, demand the payment of said note, accompanied with the verification required by law, until the 12th of March, 1878, more than one year from the time of appellee's qualification and appointment.

The statute, supra, is peremptory that no interest accruing after the death of a person, upon any claim against his estate, shall be allowed or paid, unless the claim shall be verified and authenticated, as required by law, and payment thereof demanded of his executor, administrator or curator, within one year after the appointment of the executor, administrator or curator. But notwithstanding this provision of the statute, if the executor, administrator or curator is the only person who will be affected by allowing the prohibited interest, he may waive his right to the protection of the statute by agreeing with the creditor of the estate to pay his debt in full in consideration of his postponing the collection of his demand, so as to enable him, the representative, to pay the debt without sacrificing the estate by a forced sale. (Croninger v. Marthen, MS. opinion, Feb. 27, 1886.)

There is no contention in this case that appellant and appellee ever made any such agreement.

Appellee, after she qualified as executrix and before the note was verified, as required by law, paid five hundred dollars on it. If she knew the debt was just and could be verified, as required by law, then she had the right to make the judgment on it. And she certainly waived no right to have the claim verified and the payment of the balance due thereon demanded within a year from the time of her qualification.

The distinction between this case and that of Croninger v. Marthen, is plain. In that case the creditor postponed taking any steps towards collecting his debt or perfecting his right to collect interest on it, by the request of his executor and his express promise that his debt should be paid in full. In view of these facts, together with the further fact that the executor was the only person to be affected by the payment of the interest, his court held that he waived his right to rely upon the statute. But in this case nothing of the kind occurred. The appellee simply in advance of the verification of the debt and demand of its payment, paid five hundred dollars thereon. This was certainly not a waiver of her right under the statute to refuse to pay interest, because the debt was not proved and payment thereof demanded within a year after her qualification.

The judgment of the lower court is affirmed.

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SCHILLINGER v. BOES, &c.

(Filed March 12, 1887.)

1. Benefit societies—Change of beneficiary—Where the charter of a mutual benefit society expressly empowers any member holding a benefit certificate to designate as the beneficiary another than the person originally designated therein, the right to make the change can not be questioned. The statute expressly authorizing the change, the question of public policy does not arise.

2. Same—Where it appears from the charter of such a society that the object of the society is to provide for the families of its deceased members, a member holding a benefit certificate, in which his wife is named as the beneficiary, may, with her consent, and the consent of the order, make the certificate payable to his children; and such a change is not fraudulent as to the creditors of the wife, she having no vested interest in the fund.

3. Same—Benefit fund exempt from execution—The charter of the Ancient Order of United Workingmen, a benevolent institution, requires the order to disburse the beneficiary fund for the relief of the families of deceased members, and provides that this fund so provided and set apart shall be exempt from execution, and shall, under no circumstances, be liable to be taken by any process to pay any debt of such deceased member. A benefit certificate was issued to B., payable to his wife, as he had the right to direct. B. having died, the wife's creditors seek to subject the fund due upon the certificate to the wife's debts. Held—That the fund, although payable to the wife, is for the benefit of the member's family, and is exempt not only from the deceased member's debts, but from the debts of any member of his family.

4. Liberal construction of charters—The charters of such benevolent institutions should be liberally construed in favor of the objects of their bounty, and so as to prevent the application of their funds to the benefit of those who are strangers to the organization.

Brown, Humphrey & Davie for appellant.

M. A. & D. A. Sachs for appellees.

Appeal from Louisville Law & Equity Court.

Opinion of the court by Chief Justice Pryor.

The plaintiff below, who is the appellant in this court, instituted this action against the appellee, Catherine Boes, to recover the amount of five notes alleged to have been paid off by him as her surety.

The indebtedness was created by the appellee while she was a feme covert, but while conducting a grocery store in her own name, she having been empowered to trade as a feme sole by the chancellor under the provisions of the statute enacted for such purposes.

She denies her liability for any of the debts, and attempts to show that the notes the appellant paid off were the mere renewals of the indebtedness of her husband, for which she was in no manner responsible, created before and after she was authorized to conduct business as an unmarried woman.

There is some conflict in the proof as well as circumstances conducing to show that some of the paper was the evidence of a former indebtedness by the husband, but after a review of the testimony we are disposed to concur with the chancellor that these notes were the obligations of the wife, and for which she was primarily liable.

The appellant, when he instituted the action, obtained an attachment and garnishee, by which he garnished certain funds in the hands of three benevolent or charitable institutions, of which

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the husband of the appellee was a member, and that, as was alleged, belonged to the wife as the only beneficiary.

The husband of the appellee insured his life in these companies, or rather was a member of these associations, with the certificate of insurance payable to his wife, Catherine Boes, the present appellee. The policy in the Knights of Honor was $2,000; National Mutual Benefit Association, $4,000; United Order of Workingmen, $2,000.

The husband of Catherine, during his last illness, and but a few days prior to his death, with the consent of his wife, changed the beneficiaries of his policy in the Knights of Honor to his wife, "in trust for hers and his children." In the United Order of Workingmen the benefit certificate for the wife was never changed. In the National Mutual Benefit Association the benefit certificate was transferred to Catherine Boes in trust for the children.

The benefit certificates in each association having been originally payable to the wife alone, it is maintained by counsel for the appellant that she became vested with a fixed and certain interest, payable at the death of the husband, and that any transfer made by her consent or jointly with her husband of these benefits to their children was a fraud on the rights of creditors. Secondly, that such transfers are against public policy and void.

It becomes necessary in determining these questions to look to the acts of incorporation creating these several associations, with a view of ascertaining the object to be accomplished, as well as the manner in which benefit certificates are issued, and the mode of transferring or changing the beneficiary by the member, or whether any such right exists by reason of the several charters.

These associations are on the mutual plan, with assessments made upon each member, that constitutes the fund out of which the insurance or benefits are paid. The charter and by-laws show that the prime object of each is to aid the members and their families or beneficiaries, and they can only be regarded as benevolent and charitable associations.

In March, 1881, a certificate was issued from the Knights of Honor to John Boes, the husabnd, who was a member, by which the Supreme Lodge agreed to pay out of the widows and orphans' fund, at his death, the sum of $2,000 to his wife, Catherine, under the laws controlling the order: "Provided, that this certificate shall not have been surrendered by said member or canceled at his request, and another have been issued in accordance with the laws of this order."

It is provided by section 4 of chapter 22 of the laws of this order, that "each applicant shall direct in his application to whom he desires his benefit paid, which shall be subject to such further disposal of the benefit as the member may thereafter direct in accordance with the laws of this order, and such directions shall be entered on the benefit certificate." By section 5 it is provided that a member may, at any time while in good standing, surrender his certificate, and the Supreme Lodge shall cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed.

The member as well as the beneficiary acquires his rights under the act of incorporation, and when the law of the association, as well as the certificate of benefit, empowers the member to change the beneficiary, there is no question of public policy involved, and the change being authorized by an express law or statute of the order, the right to make the change can not be questioned.

This rule is not in conflict with the case of Basye v. Adams, 81 Ky., 368. In that case the right to change the beneficiary was not expressly granted by the charter, and no consent obtained to

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the transfer, nor was it made to one who had an insurable interest in the life of the member. The National Mutual Benefit Association issued the policy in that case, and, if to the wife, unless expressly prohibited by the charter, we see no reason why a change, with the consent of the order and the beneficiary, might not have been made to the children. This order, the Knights of Honor, had a fund known as the widows and orphans' benefit fund, created for and payable to the family of deceased members (if not otherwise directed), and this fund has in part been created and sustained by the contriubtion of the deceased member, and should, therefore, be applied to the use and benefit of his children by the consent of the order and the original beneficiary. The wife, who was named as the beneficiary in the first certificate, paid no part of the dues or calls made by the order, but the husband (the member), both before and after the change was made, paid the regular dues, and was contributing his means for the purpose of providing for his children at his death. He doubtless saw or knew that his wife was involved, and, therefore, wished the fund to which she would have been entitled, in part at least, but for the change, paid to the children. No creditor of the wife was defrauded. He had the right to cancel the certificate or decline to pay the dues, and thereby forfeit his right to the insurance. If the wife had a vested interest, such as would pass the title, there is no reason why the benefits might not have been garnished prior to the husband's death. If this could be done it would virtually annul the entire object of the association, and defeat the benevolent intention of the member, by appropriating his means used in creating this fund to the payment of the debts of the beneficiary. The change here was from the wife to their children, and at a time when no creditor could have attached the fund, either for the debt of the husband, who was the member, or the wife, who was the beneficiary.

There is no rule of public policy that would preclude the husband or wife from making their children the beneficiaries of this fund, but on the contrary such is the principal or leading feature of all like organizations to enable the member to provide for his family. Here is no trade made or assignment of benefits to those who had no insurable interest in the life of the member, against or without the consent of the beneficiary, as was the case in Basye v. Adams, but a change affected by which the entire family of the insured member were made the recipients of the benefits resulting from these benevolent associations. The same principle should apply to each of these associations, and we see no reason for holding the transfer fraudulent as to any of the creditors of the wife. To hold otherwise would in effect greatly impair, if not entirely destroy, the benefits resulting to the public from these benevolent organizations.

It is argued that the certificate in the Order of United Workingmen never having been changed, that the fund belonged to the wife, and was liable for her debts, and the chancellor adopting that view, gave to the children an equal interest with the mother, and subjected her interest to the payment of appellant's claims.

The beneficiary fund in this order is created for the relief of members and their families, and by the organic law of the order, that necessarily enters into and becomes a part of the benefit certificate, the order is required to disburse this beneficiary fund for the relief of the families of the member as well as the member himself. It may be that the member may name a particular member of his family to whom he desires the money paid and the certificate issued, but when issued to the wife it follows that it is for the benefit of the member's family.

Section 5 of the act creating the order provides that this "fund

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so provided and set apart shall be exempt from execution, and shall, under no circumstances, be liable to be seized, taken or appropriated, by any legal or equitable process, to pay any debt of such deceased member." It is evident that this fund thus set apart for the benevolent purposes contemplated was to be exempt from execution, and as aganst the member, under no circumstances can the creditor reach it. Such was the intention of the order in its organization.

The fund was not only for the member, but for his family, and the fund itself is exempt, whether for a debt against one of the family or against the member. The members of the family become interested in the fund, and when created as it is by the members for that purpose, there is every reason for sustaining the exemption.

Under the general insurance law of the State the certificate being for the benefit of a married woman, the fund could not be reached for her debts. This law embraced all descriptions of policies; the ordinary life policy, where large sums are invested by way of premiums, and often a large surplus to be divided between its members as well as companies organized for purely benevolent purposes; but the legislature, in its session of 1876, enacted "that all Masonic Orders, Odd Fellows, Ancient Order of United Workmen, as well as all associations incorporated for purposes of mutual protection and relief of its members, and for the payment of stipulated sums of money to their families, etc., are hereby declared not to be life insurance companies, in the meaning of the general insurance laws of the State, and they are, and shall forever be, exempt from the provisions of said general insurance laws."

The law-making power was evidently intending to remove such burdens as were imposed on insurance companies whose object was private or corporate gain, and to place no obstacle in the way of the disinterested benevolence of such relief associations as those whose charters are before us, and may, in enacting the clause exempting such orders from the provisions of the general law, have gone too far, still the liberal construction that should be given all such charters by courts, to enable the order to accomplish its benevolent design, would suggest the necessity as well as the propriety of making the exempting clause of the act establishing this order apply to the members of the family as well as to the member.

In Geiger & Board v. McLin, 78 Ky., 232, it was held that the son of the member had no interest in the institution, and that the act creating the Kentucky Masonic Mutual Insurance Company that provided: "No part of the stock or interest which any member or his widow or children may have in said institution shall be subject to any debt against him, or any of them," was intended to apply only to the member, or the one having an interest in the institution, and while this was certainly not a liberal interpretation of the meaning of that act, in the case before us the fund itself is exempt, and it is the plain meaning of the charter that this fund shall be and is set apart for the member and his family, and can not be subjected to the payment of their debts. This construction harmonizes with the legislative action on the subject, as well as a rule of construction that, when applied to such organizations, requires a liberal construction of their charter in favor of the objects of their bounty, and to prevent the application of their funds to the benefit of those who are strangers to the organization.

The judgment is affirmed on the original and reversed on the cross-appeal, with directions to dismiss the proceedings in so far as they seek to subject the fund, or any part of it, to the payment of the debts of appellant.

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LOUISVILLE & NASHVILLE R. R. CO. v. RITTER'S ADM'R.

(Filed March 15, 1887.)

1. Railway passenger carriers bind themselves to exercise the utmost degree of human care, diligence and skill in order to carry their passengers safely; and this obligation makes it the duty of the company to remove timber and bushes along the track on the land of the company so as to keep the engineer's view unobstructed.

2. Presumptions—Where a passenger being carried on a train is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury were caused by the negligence of the carrier, and in order to overcome this presumption the carrier must show that the injury arose from an accident which the utmost care, diligence and skill could not prevent, or that the injury would not have occurred but for the passenger's own negligence. In this case the burden was on the plaintiff to show the accident and his intestate's injury by it, and then the burden shifted to the defendant. Therefore, an instruction placing the burden on the plaintiff all the way through should not have been given.

3. Contributory negligence—Where the death of a passenger is caused by the willful neglect of the carrier, and the action is for willful neglect, the defendant can not rely upon contributory negligence as a defense.

4. Impeaching evidence—J., a witness for defendant, was asked, on cross-examination, if he had not stated to M. that, if a witness could be found to state certain things, "money would be no object" to the defendant, and the witness said he had not made the statement. L. was introduced by plaintiff and asked if J. had not made such a statement, and was allowed to state that he had.

Held—That, as J. had not testified to the things referred to, his statement was not competent as impeaching evidence, but, if competent, should have been proven by M., J. not having been asked if he had made such a statement to L., and the error was prejudicial, as the testimony tended to cast a cloud upon the whole case of the defendant.

5. The bill of exceptions shows the objection to the competency of the testimony offered, and that the objection was overruled; then follows the testimony, followed by the statement: "To all of which the defendant excepted." Held—That it sufficiently appears that the ruling of the court was excepted to at the time it was made.

Wm. Lindsay and Porter & McQuown for appellant.

W. P. D. & F. F. Bush and Leslie & Botts for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Bennett.

In May, 1876, the appellant's passenger train, while en route to Louisville, came in collision with a cow, which was on the railroad track. The collision threw one of the passenger coaches from the track. The appellee's intestate was in this coach as a passenger, having paid his fare from Glasgow to Louisville, and was injured by reason of the collision and throwing of the coach from the track.

The trial of appellee's action against the appellant for the injuries received by his intestate in the collision resulted in a verdict and judgment for fifteen hundred dollars in damages. Appellant has appealed from that judgment.

Railway passenger carriers, in legal contemplation, do not insure the absolute safety of their passengers. But they do bind themselves to exercise the utmost degree of human care, diligence and skill in order to carry their passengers safely. It is meant by this rule, 1st, that the highest degree of practicable

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care and diligence should be exercised that is consistent with the mode of transportation adopted; 2d, that competent skill should be possessed, which should be exercised in the highest degree. Tested by this rule, the slightest neglect against which human prudence, diligence or skill can guard, and by which injuries accrue to passengers, the carriers will be liable in damages.

This high degree of care, diligence and skill extends not only to the running of passenger trains with a view to the safety of passengers, but to providing against defects in the road, cars or machinery, or any other thing that can and ought to be done in order to carry passengers safely. Among these duties is that of keeping the track clear of obstructions, and of removing timber and bushes along the track on the land of the company, so as to keep the engineer's view of the track in running the train unobstructed. A failure to do this or any of the duties above mentioned, is negligence.

Prima facie, where a passenger being carried on a train is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury was caused by the negligence of the carriers.

And the onus of disproving the presumption of negligence by showing that the injury arose from an accident which the utmost care, diligence and skill could not prevent is on them, or that in actions for ordinary neglect, although negligent themselves, the injury to the passenger would not have occurred but for his own negligence. Of course, where death ensues to a passenger by the willful neglect of carriers, they are not allowed to rely upon the contriubtory negligence of the passenger as a defense.

The foregoing views are sustained by the following authorities and leading cases: 2 Redfield on Railways, 229; Story on Bailments, sec. 601; Jamison v. S. J. & S. C. R. R. Co., 55 Cal., 597; T. C. & St. L. R. R. Co. v. Thompson, 55 Ill., 142; Pennsylvania Co. v. Roy, 102 U. S., 456; Railroad Co. v. Varnell, 98 U. S., 480; Railroad Co. v. Pollard, 98 U. S., 347; Meier v. The Pennsylvania Railroad Co., 64 Pa. St., 226; Ohio & Memphis Packett Co. v. McCool, 8 Amer. and Eng. R. R. Cases, 394; New Orleans & Great Northern Railroad Co. v. Albritton, 38 Miss., 274; Baltimore & O. R. R. Co. v. Worthington, 21 Md., 284.

The three instructions given by the lower court on behalf of the appellee, accord with the foregoing view of the law except in this: The burden of proof was on the appellee to establish the accident and his intestate's injury by it. This being done, then the burden of proof was shifted to the appellee to show that the accident and consequent injury was not the result of its negligence. These instructions, taken alone, mean this, but the fourth instruction, given at the instance of the appellant, which puts the burden of proof on the appellee all the way through, gives them a different meaning. This instruction should not have been given, except in the manner above indicated.

On the trial of the case the appellant introduced as a witness J. T. Mansfield, who testified that he saw Ritter soon after he was hurt, attending to business, riding to town and playing croquet.

On cross-examination the witness was asked, "Did you or not say to Melvine Lowery since the death of Ritter, that money would be no object to the railroad company if it could find some person to state that Ritter was fishing and wading in the creek in bad weather before his death?"

The answer was; "No sir, I never said that to Mr. Lowery,"

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Melvine Lowery was afterwards introduced by the appellee, but he made no reference whatever to Mansfield or to his evidence.

Lawrence Lowery was introduced by appellee, and was asked "if he had ever heard Mansfield say that if the railroad company or Porter, their attorney, could find a man who would say Ritter had dabbled in the water or gone fishing, that money would be no object with them." The witness was permitted to answer, notwithstanding the objection of the appellant. The answer was, that he "had heard Mansfield make that statement." Then follows: "To all of which the defendant excepted."

Mansfield had not testified in reference to Ritter having gone fishing or dabbling in the water. Therefore, his statement to Melvine Lowery could not be used as impeaching evidence, because it contradicted no fact that he had sworn to prejudicial to the appellee in reference to that matter.

Again, if his statement to Melvine Lowery was competent as impeaching evidence, it should have been proven by Melvine Lowery and not Lawrence Lowery, because he was not asked if he had made the statement to Lawrence Lowery.

The evidence was clearly incompetent and highly prejudicial to the appellant, because it tended to convict the appellant of a willingness at least, if not of the fact, of resorting to foul means to procure evidence; and to throw a cloud upon the integrity of the evidence that the appellant did introduce relative to Ritter's having gone fishing and exposing himself while fishing.

The bill of exceptions shows that the exception, "to all of which the defendant excepted" follows the testimony of Lawrence Lowery, instead of immediately following the overruling of the objection to the competency of Lawrence Lowery's evidence. The appellee did object to the competency of the evidence before it was delivered; the objection was overruled. And the expression, "to all of which the defendant excepted" follows the evidence, when technically speaking, it should have immediately followed the ruling of the court. But we think that it sufficiently appears, from the record, that the appellant did except to the ruling of the court at the time. The bill of exceptions, in this particular, being simply awkwardly arranged.

For this error the judgment is reversed and cause remanded, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

SAMS, &c. v. SAMS' ADM'R, &c.

(Filed March 19, 1887.)

1. Legitimacy—The statute which provides that "if a man, having had a child by a woman, shall afterward marry her, such child or its descendants, if recognized by him before or after marriage, shall be deemed legitimate," does not apply to where a married man has children by a woman other than his wife and afterward marries her, the first marriage tie having been severed.

2. Construction of statutes—The letter of a statute will not be followed where it leads to an absurd conclusion; the reason of its enactment must enter into its interpretation.

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C. F. & A. R. Burnam for appellants.

Riddell & Fluty for appellees.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Pryor.

Leroy Sams died in the county of Estill, in the year 1885, intestate, leaving surviving him his widow, Ann Sams, who was his second wife, and four children by his first marriage. He owned land of considerable value, and personal estate valued at twenty-five or thirty thousand dollars. His last wife, at the time of their marriage, was the mother of seven children. all of whom were born out of lawful wedlock, she never having married until her marriage with the intestate. Fannie and Nancy, two of these illegitimate children, asserted a claim to an equal interest in the estate, with the chidren by the first wife, upon the ground that they were the chidren of the intestate and were so recognized by him during his life time, and that the marriage consummated between him and their mother rendered them legitimate under the statute and entitled them to share in the distribuiton of his personalty and in the division of his land. The statute provides: "If a man, having had a child by a woman, should afterwards marry her, such a child or its descendants, if recognized by him before or after marriage, shall be deemed legitimate."

This aciton was instituted in the court below by the administrator of the estate and the children of the first wife against the widow and the two children, who are claiming to be heirs of the intestate, for the purpose of having distribution and determining the right of these children to an interest in the estate.

The widow seems to have made a contract with the administrator and heirs by which she agreed to take one-seventh of the personalty as her full interest in the distribution. That, upon a proper state of pleading, was set aside and the widow left to take such an interest in the personal and real estate as she was entitled to under the law of descent and distribution.

Her rights as widow, however, are not here involved. The chancellor adjudged that the two children, Fannie and Nancy, were not entitled to any part of the estate, and that question is the only one presented. It appears that these two children were born—the one about eight and the other some ten years prior to the death of intestate's first wife. They were recognized by the intestate as his children during the life of the first wife and always after her death. The name of Fannie Ann Green, one of the children, was changed by an order of the Estill County Court to Fannie Ann Sams, the record reciting that Leroy Sams, the father of the child, consents to the same. It is also shown that the intestate, on his death bed, expressed a wish that each of the two children should inherit from him as much of his estate as any one of his children by his first wife. Their mother states that the intestate was the father of the two girls, and the fact of the recognition by him of them as his children is clearly established. And their right to inherit from the intestate must depend upon the consruction given the statute by virtue of which it is maintained they are legitimate.

It is insisted by counsel for the appellants that the meaning and intention of the statute is so plain that but one interpretation can be given it, and although the children were begotten by the intestate when he was the lawful husband of another, his adulterous practices with an unchaste woman, and unfaithfulness

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to his own wife and children, can not be considered in determining the rights of those who were not participants in the wrong and whose rights the statute was enacted to protect.

If the case before us or that class of cases, where the husband has violated his marriage vows and become the father of children by an adulterous, sexual connection with another woman during the marital relation, had been the subject of legislative thought, it can scarcely be supposed that any law would have been enacted by which the children of the adulterous intercourse would be made legitimate, that they might inherit with the children of the lawful wife equal parts of the estate. Such a statute, if so construed, could only invite the husband to desert his wife and the woman of easy virtue to encourage the violation of his marriage vows that she might some day become his lawful wife and her children the rightful heirs of his estate. The motive to supplant the love of a true woman by the lewd practices of degraded women, would be found in such a statute, and the law, instead of securing to the innocent offspring an interest in the estate of the father and encouraging the latter to make reparation for the wrong committed by marriyng the mother, would invite the commission of great moral wrong and hold out an inducement to the guilty parties to remove those who stood in the way of legitimatizing their children by the consummation of the contract of marriage.

Where the offspirng is the result of an illicit intercourse between unmarried people, the legislature saw the necessity of enacting some statute by which the children in a certain state of case might be made legitimate, and, therefore, the law has said to the parties if you will marry your children shall not be bastardized, but will be, under the law, your legitimate offspring; and to say that this law applied to cases where married men were being guilty of adultery, and as an encouragement to them to do better and to relieve their offspring from the position in which they are placed by the law, would be an absurd construction of this statute. It is a well settled rule of construction that the letter of the statute will not be followed where it leads to an absurd conclusion, but on the contrary, the reason for the enactment must enter into its interpretation so as to determine what was intended to be accomplished by it. It is true the statute provides that if "a man, having had a child by a woman, afterwards marry her and recognize the child as his, it shall be held legitimate." The language might be applied to any man, whether single or married, but was such the legislative purpose.

The statute provides that "a man shall not marry his mother, grandmother, daughter or grandduaghter, nor shall a woman marry her father, brother," etc. This statute was not intended to apply to those who are married by saying to them you can not leave your lawful wife and marry your near kindred, because such a marriage to any woman would be unlawful and the party guilty of bigamy, but the language is addressed to those who are single and are not, at their second marriage, the lawful husband or wife of another. It was not to encourage those who had entered upon the marital relation to forsake their marriage vows and cohabit with others in anticipation of a future marriage with a view of making their offspring legitimate that this statute was enacted, but to make the illegitimate children begotten by one unmarried legitimate upon his marriyng the mother.

Where a marriage is contracted in good faith, under the belief of both parties that the former husband or wife was dead, then the children born of such marriage are made by our statute legitimate. The mistake is made to apply to both parties, but where a married man is living in open adultery with another than his

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wife with offspring in existence, the result of the unlawful association, no statute or rule of policy should be adopted by which such children should become legitimate and inherit with the children of the lawful wife the father's estate because he happens, after the death of his wife, to marry his concubine. No such construction should be given the statute before us.

The statute, if construed to apply to a man who is married at the time he begets the illegitimate children, its literal meaning would also apply to children begotten of a woman who was, at the time, the lawful wife of another as well as to an unmarried woman.

The statute provides "if a man, having had a child by a woman, shall afterwards marry her," etc., making no distinction between a sinlge woman and one married, and to follow the strict interpretation, or rather the language used, if the child was born of a married woman whose husband should thereafter die and she marry the reputed father, then his recognition of the child would make it the lawful heir of the last husband. This would be a novel construction, and lead to a conclusion directly opposite to that intended by the legislature.

The father, if he so regards himself, may provide for such children by a last will and testament, or a statute has been enacted and now the law by which one may render another capable of inheriting as his heir-at-law by adopting him as such by petition filed in the circuit court of the county of his residence. Under this statute, however, the party proposing to make another his heir, if married, can not do so unless his wife join in the petition, so that every opportunity is afforded parties who are bound to others, by natural ties, to provide for them either by last will or by adopting them as heirs-at-law. To construe the statute by its letter in this case would not only conflict with the legislative intent, but would encourage the faithless husband to pursue his immoral practices and invite his concubine to terminate by intrigue and perhaps crime, the existence of the marital relation.

The judgment below is affirmed.

BROWN v. CONNELL.

(Filed March 22, 1887.)

Fraudulent conveyances—A conveyance which is actually fraudulent as to the grantor's creditors is void as to subsequent purchasers for value, such purchasers not being affected by either actual or constructive notice of the conveyance; and a conveyance which is merely voluntary, and, therefore, only constructively fraudulent, is void as to such purchasers, unless they have actual notice of the conveyance, constructive notice not being sufficient to affect them. But the protection thus afforded to purchasers for value is only for a limited period, and whether the conveyance be actually or constructively fraudulent, the title of the grantee is perfect after the lapse of ten years, as any action to set aside such a conveyance is barred after that time.

Marc. Mundy, Trout & Peak and W. S. Morris for appellant.

Carroll & Barbour for appellee.

Appeal from Trimble Circuit Court.

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Opinion of the court by Judge Bennett.

On the 30th of December, 1864, J. J. Connell, by deed duly acknowledged and recorded in the proper office, conveyed to his wife and children the tract of land in controversy. The appellee is one of said children. He was, at the time of the conveyance, about one year old. On the first day of November, 1875, J. J. Connell, his wife and all his children, except the appellee, who was, at the time, an infant, conveyed to appellant said tract of land. The conveyance was by deed, duly acknowledged and recorded in the proper office. The consideration expressed in the deed was nine thousand and forty-one dollars. The appellee, upon his arrival at lawful age, instituted suit against the appellant for the purpose of recovering one-fifth of said land, which he claimed by virtue of his father's conveyance. The appellant resisted the appellee's right to recover upon two grounds: First. That the conveyance by appellant's father was made with the design of delaying, hindering and defrauding creditors and purchasers. Second. That the conveyance was voluntary, without any valuable consideration therefor.

Section 1 of article 1, chapter 44, of the General Statutes, provides, in substance, that every gift or conveyance of any real estate, made with the intent to delay, hinder or defraud creditors, purchasers or other persons, shall be void as against such creditors, purchasers or other persons. The second section of the same article provides, in substance, that every gift or conveyance by a debtor of any of his estate, without a valuable consideration therefor, shall be void as to all of his then existing creditors, but shall not, on that account alone, be void as to creditors whose debts are thereafter created, nor as to purchasers with notice of the voluntary alienation.

Under the first section of the statute, supra, the rule is that if the conveyance is actually fraudulent, the subsequent purchaser for value is not affected by either constructive or actual notice of the conveyance. Under the second section the rule is that a voluntary conveyance is prima facie fraudulent as to a subsequent purchaser, and, unless he has actual notice of the conveyance, his title is perfect, and he is not affected by the fact that the voluntary conveyance is of record. Actual and not constructive notice must be brought home to him. (Jones' adm'r v. Jenkins, &c., 7 Ky. Law Rep., 410.) But the protection afforded to purchasers for value by these sections of the statute is only for a limited period.

By section 6 of article 4, chapter 71, it is provided that "in actions for relief for fraud or mistake, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after making the contract or the perpetration of the fraud."

This section of the statute bars any right of action to set aside any gift or conveyance denounced by section 1, article 1, chapter 44, as actually fraudulent, or, by section 2 of the same article, as constructively fraudulent, after the lapse of ten years from the time of making such conveyance. Such gift or conveyance, when executed, is valid as against all persons except those whose rights are saved by said sections. The subsequent purchaser for value, under the first section, may disregard the fraudulent conveyance, in toto. Under the second section the subsequent purchaser is also protected, unless he has actual notice of the voluntary conveyance.) But the saving of the rights of the protected class does not last longer than ten years. If the fraudulent or voluntary conveyance is permitted to stand for ten years, without any action on the part of the protected class, then as against that class

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the donee or vndee under the voluntary or fraudulent conveyance acquires a perfect title. (Dorsey, &c., v. Phillips, &c., 8 Ky. Law Rep., 405.)

J. J. Connell having made the conveyance to his wife and children more than ten years before appellant's purchase, it is not necessary to decide whether the conveyance was actually fraudulent, nor is it necessary to decide, if the conveyance was only constructively fraudulent, whether appellant was a purchaser with actual notice. Because, in either case, the lapse of ten years, the statutory period of limitation, perfected the appellee's title as against J. J. Connell's creditors or purchasers for value from him after the period of ten years had elapsed. Upon the lapse of that period of time the appellee's title became as perfect and complete as if he held the title by purchase for value, or as if he had acquired the legal title by fifteen years adverse possession of the land. And the appellant, having purchased after the lapse of ten years from the conveyance, acquired no title by his purchase. He was as much bound to take notice of the conveyance, and the appellee's rights thereunder, as if the appellee had been an innocent purchaser for value by deed duly recorded.

The question of improvements was not passed upon by the lower court. Upon the return of the case that matter will be settled.

The judgment of the lower court is affirmed.

WALTON, &c. v. RILEY, &c.

(Filed March 24, 1887.)

1. Corporations created under chapter 56 of the General Statutes may commence business as soon as the articles are filed for record in the office of the county court clerk, and the franchise can not thereafter be declared null and forfeited except in a regular proceeding instituted for that purpose. It is not, therefore, essential to the validity of the acts of such a corporation that the newspaper publication required by the statute should have been made, or that the articles of incorporation should have been filed with the secretary of State. These defects can be taken advantage of only in a direct proceeding to annul the franchise.

In this case the collection of a tax levied in aid of a turnpike is resisted upon the ground that the turnpike company, the business of which was merely to construct the road, did not file a copy of the articles of incorporation with the secretary of State within three months after the filing in the clerk's office, as required by chapter 56 of General Statutes, under which the corporation was attempted to be organized. Held—That the collection of the tax can not be resisted upon this ground. The case of Heinig, &c. v. Adams & Westlake Manufacturing Co., 81 Ky., 300, is expressly overruled.

2. Taxation—When an act of legislature provides for the submission to the voters of a county or magisterial district of the question whether or not a tax shall be levied in aid of the construction of a turnpike, the question may be submitted at a special election. This being the construction placed upon the Constitution for years, it must control.

3. Same—It is no objection to the validity of a tax that some inequality of burden may arise from its imposition, as perfect equality of taxation is unattainable.

4. Same—The act authorizing the tax in this case provided that the county judge should "immediately" levy the tax upon the district after the elec-

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tion, provided the vote should be in favor of the tax. The election was held in March, 1883, and the tax was not levied until the December following. Held—That the delay was not unreasonable, and that the levy was valid.

5. Same—The act provided that the clerk of the county court should make out and deliver to the sheriff a list of the taxable property of said district as shown by the returns of the assessor of the county "for the last annual assessment." When the list in this instance was made the time had expired within which the assessor must return his assessment, and "the last annual assessment" then on file was that of 1883. Held—That it was proper to make the list from that assessment, and not from the assessment of 1882.

Browder & Edwards for appellants.

Ben. T. Perkins, jr., and W. L. Reeves for appellees.

Appeal from Todd Circuit Court.

Opnion of the court by Judge Holt.

The order of the judge of the Todd County Court submitting to the voters of magisterial district No. 6 of the county the question whether a tax of eight thousand dollars, and the cost of its collection, should be levied upon the property of the district to aid in the building of the Elkton turnpike by the Elkton Turnpike Company, was entered on February 12, 1883. It was authorized by legislative enactment, and the requisite preliminary steps had been taken. The election was held on March 10, 1883, resulting in a majority of sixty-nine votes for the proposition. The entire vote cast appears to have been a full one for the precinct, judging from its population.

The vote was properly ascertained and certified, but no further proceedings in the matter were had until December 10, 1883, when the county court judge entered an order levying the tax and appointing as collector the appellee, J. W. Riley. The appellants then brought this suit to enjoin its colletion. The grounds relied upon to sustain it are quite numerous, but we shall consider those only which are mainly urged in argument, because they appear to us to be the questions in the case.

Section 36, article 2, of our State Constitution, provides that no act of the legislature authorizing the creation of any debt on behalf of the Commonwealth shall become effective until it has been submitted to the people at a general election, and shall have received a majority of all the votes then cast; provided, however, that the General Assembly may borrow money to pay any part of the debt of the State without such submission. It is true that former distinguished judges of this court have differed as to whether this provision includes debts created by a county or other municipal division of the State, but to our minds the construction which for years has been placed upon it by both the legislative and executive branches of the government must control.

For a long period of time it has been the legislative practice to sanction the creation of such indebtedness, when approved by the local vote at special elections.

The Elkton Turnpike Company was organized as a corporation under the provisions of chapter 56 of the General Statutes.

It provides: "Sec. 3. Before commencing any business except that of their own organization, they (the corporators) must adopt articles of incorporation, which shall be signed and acknowledged by them, as deeds are required to be acknowledged, and recorded in a book kept for that purpose in the office of the clerk of the county court of the county where the principal place of business is to be.

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"Sec. 4. Corporations for the construction of any work of internal improvement shall, in addition, file a certified copy of such articles in the office of the Secretary of State, and have the same recorded by him in a book kept for that purpose. * * *

"Sec. 6. The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the Secretary of State, when such filing is necessary, within three months from such filing in the clerk's office." * * *

The appellants resist the collection of the tax upon the ground mainly that the turnpike company, the business of which is not to operate, but merely to construct the road, was never in esse as a corporation or legally organized; that it had no corporate existence; that it has not performed the conditions required of it under the statute, in order that the franchise may vest, and, therefore, the subscription is void.

The newspaper publication or notice required by the statute was properly given. This is not questioned. It is asserted, however, that the county clerk recorded the articles of incorporation in a deed book, and not in "a book kept for that purpose." This, however, does not appear from the record. They were acknowledged and filed for record on February 12, 1883, and the copy of them, which is made a part of this record, shows that the clerk certified that they were lodged for record and duly recorded.

The presumption must be indulged that they were recorded in the proper record book.

But conceding that they were recorded in a deed book, yet this was the act of the clerk. The corporators lodged them for record, and had the right to presume that the clerk would properly perform his duty, and record them as directed by the statute. The requirement as to recording is for the purpose of giving notice, and preserving the articles of incorporation. Moreover, the statute provides that "the corporation may commence business as soon as the articles are filed for record in the office of the county court clerk." This would often be necessary; and this provision of the statute is not in conflict with section 3, supra, because when the two are considered together they should not be construed as requiring that the articles shall be recorded before beginning business, but only that they shall be adopted, signed, acknowledged and filed for record.

The copy of the articles of incorporation were, however, not filed in the office of the Secretary of State within three months from the time when they were filed in the county clerk's office for record, and not until December 10, 1883.

As the order for the election was made on February 12, 1883, and it held on March 10th following; and as nearly ten months had elapsed from the time of the filing of the articles of incorporation in the clerk's office before the copy was filed in the office of the Secretary of State, it is urged that the imposition of the tax was illegal and void.

This argument is based upon the ground that the corporation was not in being; that its existence was a condition precedent to the exercise of any power looking to a subscription in aid of the road; that the corporators failed to complete the organization begun on February 12, 1883, by not filing the copy in the Secretary's office within three months from that day, and having so failed they could not do so thereafter.

This involves the construction of a statute somewhat doubtful in meaning, owing to an apparent conflict in some of its provisions.

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It is only corporations for the construction of any work of internal improvement that are required to so file a copy of their articles of incorporation; and the sixth section, supra, therefore, uses the words "when such filing is necessary." The Elkton Turnpike Company, however, is a corporation of the class to which this direction applies; and the question, therefore, arises whether its existence depended upon this being done.

In determining this question the seventeenth and eighteenth sections of the statute should be considered in connection with the sixth. They are:

"Sec. 17. Persons acting as a corporation under the provisions of this act shall be presumed to be legally organized until the contrary is shown; and no such franchise shall be declared actually null or forfeited except in a regular proceeding brought for that purpose.

"Sec. 18. No person acting as a corporation under the provisions of this act hall be permitted to set up or rely upon the want of a legal organization as a defense to action brought against them as a corporation; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defense."

The statute evidently contemplates the transaction of business by the organization as a corporation as soon as the articles of incorporation are filed in the clerk's office. Indeed the sixth section expressly gives this power. "The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk." * * *

By the 17th section the legality of its organization is to be presumed, and the franchise can not be declared null or forfeited except in a regular proceeding instituted for that purpose.

These provisions recognize indisputably the existence of the corporation from the time of the filing of the articles of incorporation in the clerk's office. It is said, however, that the 6th section, by implication, declares its acts void, if the four weeks' notice by newspaper publication required by statute is not given, and the copy of the articles of incorporation filed with the Secretary of State, in cases where such filing is necessary, within three months from the time of filing them in the clerk's office.

The 18th section, however, qualifies this, and provides that the persons so acting as a corporation shall not rely upon a want of legal organization as a defense to an action brought against them as a corporation, nor shall any one, who may be sued on a contract made with "such corporation," or for an injury done to its property, or for a wrong done to its interest, rely upon such a defense. The legislature apparently intended, even if they did not do so, to provide by this section for every state of case which could arise; and to give it effect we must restrict the operation of the sixth section, supra, so far as it, by implication, declares the acts of the corporation invalid, to cases where it is sought to annul the franchise, as authorized by the 17th section of the statute.

This construction is necessary to give effect to the entire law, and it appears to be in harmony with the legislative intent when the act is considered as a whole. Unless so construed its provisions are irreconcilable. We are aware that these views are in conflict with the case of Heinig, &c. v. The Adams & Westlake Manufacturing Co., 81 Ky., 300, where it was held that an organization under chapter 56 of the General Statutes could have no existence as a corporation unless it appeared that the notice

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by publication had been given, and a copy of the articles of incorporation filed in the office of the Secretary of State, when such filing is necessary, within three months from the time of filing in the county clerk's office, and that these matters were conditions precedent to the validity of any acts by it as a corporation. It was a case were it did not appear that the notice by publication had been given; and it was there said: "Such corporations have no right to commence business, or do any corporate act until the articles of incorporation are filed in the proper office for record, and the notice specified by section 5, supra, is published for the length of time, and within the time named in sections 5 and 6."

The latter part of this statement is directly in the face of the statute. Moreover, the court in determining the case does not appear to have considered sections 17 and 18, supra, and not being in accord with the views above expressed, it is overruled.

It results that the objection to the collection of the tax upon the ground that the corporation was not in being can not be sustained. Some inequality of burden may arise from its imposition, but perfect equality of taxation is unattainable. It can only be approximated.

The 3d section of the act of April 26, 1880, amendatory of "An act to provide for the building of turnpike roads in Todd county, Kentucky, and to authorize the different magisterial districts or election precincts to vote a tax for that purpose," provides that the county judge shall "immediately" levy the tax upon the district after the election, provided a majority of the votes cast are favorable thereto; and that "the clerk of said county court shall, as soon as practicable, make out and deliver to the sheriff of Todd county a list of the taxable property and tithes of said district, as shown by the returns of the assessor of the county for the last annual assessment." (Acts of 1879, volume 2, page 686.)

The tax was not levied until December 10, 1883, although the election was in March preceding; and it is, therefore, urged that the power of the county judge to make the levy had lapsed. The list was made from the assessor's returns of 1883, and it is also insisted that it should have been taken from those of 1882. In our opinion, however, an unreasonable time had not elapsed after the election before the levy was made, and the list is then to be made "as soon as practicable." The act does not provide that it shall be taken from the assessment of the proceeding year, but from the last annual assessment. This means the last one then on file. When the list in this instance was made, the time had expired within which the assessor must return his assessment. The last "annual assessment" then on file was that of 1883, and it was proper to make the list from it.

Judgment affirmed.

BARNES v. JACKSON, ADM'R.

(Filed March 24, 1887.)

1. Vendor and vendee—Pleading—In an action by a vendor to recover the purchase price of land which he has covenanted by title bond to convey, the plaintiff should allege in his petition the character of title he covenanted to convey, and that he has title to the land, but the defect in the petition in,

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this case in failing to allege these facts was cured by the defendant's answer, by which he admitted that the plaintiff had title, and consented to take the quantity embraced in the boundary sold, whatever it was, at the contract price per acre, the only issue being as to the number of acres.

2. A judgment ordering the sale of real estate directed the commissioner to sell on a credit of six months, and to take bond payable to himself, but gave no direction as to the time and place of sale except to direct the commissioner "to post notices of the time, place and terms of sale as sheriffs are required to do before selling land under execution." Held—That this was sufficient.

3. Judicial sales—Unless a judgment ordering the sale of real estate otherwise directs, the sale is to be made at the courthouse door of the county in which the property, or the greater part thereof, is situated.

W. O. Bradley for appellant.

J. M. Unthank for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Bennett.

Jarvis Jackson instituted suit in the Laurel Circuit Court against the appellant to recover judgment for the purchase price of a tract of land, which he had sold to the appellant, and to enforce a lien thereon for the satisfaction of the judgment.

Jackson alleged in his petition that he sold to Barnes, the appellant, by title bond, which Barnes held in his possession, a boundary of land supposed to contain one thousand acres at the price of fifty cents per acre. The boundary of the land is designated by other tracts of land which adjoin it. Jackson also alleged that he was able, willing and ready to convey by deed said boundary of land according to the terms of the bond, less four hundred and twenty acres thereof, which he had conveyed to John Hask, at the request of the appellant, and a little over one hundred acres in said boundary, held by R. Wilburn, which was to be excluded from appellant's purchase. As soon as the purchase money was paid for the remainder of the land, Jackson also asked that the appellant be compelled to produce the title bond in court, so that the land could be surveyed and the true quantity ascertained.

By an amended petition Jackson alleged that, since filing his original petition, he had caused the boundary of land to be surveyed, and, after deducting the Hask tract and the Hilburn tract, there remained six hundred and ninety-nine acres, the metes and bounds of which are set out in the amendment.

The appellant demurred to the petition and amended petition. The demurrer was overruled. Appellant then filed an answer to the petition and amended petition.

The answer was not pertinent to the allegations of the petition and amended petition, because the transaction set up in the answer related to the purchase of a different tract of land, which was in no way connected with the transaction sued on. The boundary of land sold to appellant, and the number of acres therein, and the price per acre that he agreed to pay, are sufficiently set out in the petition and amended petition.

Jackson also alleged in his petition that he was able, willing and ready to convey the boundary of land according to the terms of the title bond as soon as the purchase money was paid. But the character of title that Jackson, by his title bond, covenanted to convey was not alleged. Nor was it alleged that he had title

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to the land. These were necessary allegations. Therefore, the demurrer should have been sustained.

But the appellant, by his amended answer, cured the defect, and thereby waived his right to a reversal on account of the error in overruling the demurrer. For he admitted in his amended answer that Jackson owned said boundary of land, which he bought by title bond, but, differing from Jackson as to the quantity, thought that the boundary contained something near six hundred acres, which he acquired, and, after deducting the Hask purchase of four hundred and twenty acres, he was willing to take and pay for the remainder, whatever the quantity, at fifty cents per acre.

Therefore, the appellant, having admitted Jackson's ownership of the quantity of land contained in the boundary, not otherwise disposed of, and having consented to take the quantity, whatever it was, in discharge of the title bond, cured the defect in the petition and amended petition. And the surveyor's report of survey, and the proof in the cause having shown that there were six hundred and ninety-nine acres of land in the boundary, outside of the excluded portions, which belonged to Jackson, and which were conveyed by the title bond, the lower court did right in giving judgment against the appellant for three hundrd and forty-nine dollars and fifty cents, the price of the land at fifty cents per acre, with interest thereon, and for a sale of the land to satisfy the judgment.

The objection that the judgment fixed no time or place for making the sale is not well taken.

Section 696 of the Civil Code provides that "every sale made under an order of court must be public, upon reasonable credits to be fixed by the court; not less, however, than * * * six months for real property, and shall be made after such notice of time, place and terms of sale as the order may direct, and, unless the order direct otherwise, shall be made at the door of the courthouse of the county in which the property, or the greater part thereof, may be situated."

The judgment directed the comimssioner to sell so much of the land as was necessary to satisfy the debt, interest and costs, on a credit of six months, and to take bond from the purchaser for the price, with approved security, payable to himself. The judgment also directed the commissioner, before making the sale, "to post notices of the time, place and terms of sale, as sheriffs are required to do, before selling land under execution."

As the duty of sheriffs, in making sales of land under execution, is fixed by statue, the direction to the comimssioner was equivalent to directing him to sell the land at the courthouse door in Laurel county, on the first day of some county or circuit court for that county to be fixed by the commissioner, after having advertised the time, place and terms of sale, by written notice set up at the courthouse door, and three other public places in the vicinity of the land, for fifteen days next preceding the sale. Besides, the section of the Code, supra, provides that, unless otherwise directed in the judgment, the sale shall be made at the courthouse door of the county in which the property, or the greater part thereof, may be situated.

After the death of Jarvis, the case was revived in the name of his administrator by the consent of the appellant.

The judgment of the lower court is affirmed.

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TONEY v. HARRIS.

(Filed March 29, 1887.)

1. Constitutional law—Elections—Judicial offices created by statute must be filled in the mode prescribed by the Constitution for filling those of the same class named therein. Therefore, a vacancy in the office of judge of the Louisville Law and Equity Court must be filled in the same manner as vacancies in the office of circuit judge are directed by the Constitution to be filled.

An act of the legislature provided for the filling of a vacancy in the office of judge of the Louisville Law and Equity Court by appointment by the governor for the whole of the unexpired term. A vacancy occurring, the governor appointed appellee to fill it for the whole of the unexpired term, which was for more than one year. Held—That the act was unconstitutional, and that the governor had no power to make the appointment for a longer time than was required by law to be fixed by proclamation for filling the vacancy by election. The appointment by the governor was legal, however, and his appointee should be regarded as judge de jure, and his official acts valid until his successor is elected and qualified.

2. One who seeks by suit to recover an office must, as the plaintiff in every other case must do, show a legal title to that which he demands.

3. Certificate of election—The State board for examining returns of elections, and not the county board, must give the certificate of election to one who has been elected judge of the Louisville Law and Equity Court, that being a "district office," although within the gift of the voters of a single county.

4. Suit for recovery of office—Neither the refusal of the State board to give a certificate of election, nor the refusal of the governor to give a commission to one entitled thereto, will deprive such person of the right to sue for and recover the office to which he has been elected.

5. To make an election legal, there must be a time fixed for holding such election, either by law or by the officer empowered by law to do so. Therefore, as the first Monday in August is not prescribed either by the Constitution or by statute as the day in course for holding an election to fill a vacancy in the office of judge of the circuit court or other courts of the same class, such election can be legally held on that day only when appointed by a writ of election.

Wooley & Buckner, Hargis & Eastin, H. L. Stone and O'Neal, Jackson & Phelps for appellant.

Brown, Humphrey & Davie, Helm & Bruce and A. Barnett for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Lewis.

Appellant instituted this action to prevent an alleged usurpation by appellee of the office of Judge of the Louisville Law and Equity Court, and to recover of him the possession thereof, the petition and amended petition to which a general demurrer was sustained, containing substantially the following statement of facts:

That J. G. Simrall was, on the first Monday in August, 1884, elected to that office for the full term of six years, but, having resigned, appellee was, by the Governor, appointed January 1, 1886, to fill the vacancy thus created until the general election, on the first Monday in Auugst of that year, and thereupon entered upon the duties of the office, and still claims the right to hold it. That at the general election held at the last named date appellant was a candidate for election by the voters of Jefferson county, including the city of Louisville, to said office for the resi-

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due of the term, and his candidacy, as well as the fact there would be an election for that office then held, was fully advertised in the newspapers of the county, and by cards and posters. That the qualified voters of said county took notice of the law requiring such election to be held, and had actual notice it would be held and voted for appellant as a candidate for said office, their votes being regularly recorded in the several pollbooks used at said election. That in due time thereafter the county board, appointed by law to examine the pollbooks and ascertain the correctness of the summoning up of votes, made out certificates of the number of votes given in that county for appellant for that office, he being the only candidate, which show that he received 18,580, and that none were given to any other person. That one of said certificates was transmitted to the secretary of State at the seat of government. But the board for examining returns of elections for State and district offices, composed of the governor, attorney-general and auditor, refused to make out and deliver to appellant a certificate of his election to said office, upon the ground stated in a written communication filed with the petition, that the office in question is exclusively within the gift of the voters of Jefferson county, and, consequently, the county board of examiners is alone authorized to give a certificate of election in such case.

It is further stated that subsequently he received a certificate of election from the county board, and thereupon qualified and demanded of appellee the possession of the office which he refused to surrender, and yet wrongfully and illegally withholds from appellant.

In an amended petition it is stated that the governor, although actually informed more than six weeks prior to the first Monday in August, 1886, that a vacancy existed in said office, refused to issue a proclamation for an election on that day to fill such vacancy, and the sheriff of the county, by reason thereof, did not give official notice that an election for that purpose would be then held.

It is further stated that appellant requested the governor to issue to him a commission as judge of said court for the remainder of the regular term, but he refused to do so.

The special relief prayed for is judgment against appellee for the surrender to appellant of the office, together with the books, records, franchise and emoluments appertaining thereto. And the final judgment of the lower court was that the action be dismissed, and for the recovery by appellee of his costs.

The two sections of the Civil Code applicable to this case are as follows:

"Section 483. If a person usurp an office or franchise, the person entitled thereto or the Commonwealth may prevent the usurpation by an ordinary action.

"Section 487. A person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court, and the person adjudged entitled thereto shall be placed in possession thereof, but no one shall be entitled thereto unless the action be instituted by him," etc.

The attitude of appellant being that of plaintiff, to recover "he must, as the plaintiff in every other case must do, show a legal title to that which he demands." (Justices v. Clark, 1 Mon., 82.) And the question directly presented to us by this appeal is whether, assuming the facts stated by him to be true, he is entitled to the office. But to decide that question it becomes necessary to ascertain the true meaning of certain provisions of the statutes relating to the office, about which the parties differ, and, if construed as it is contended on behalf of appellee they

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should be, to also decide as to their validity. Hence, whether the case be determined one way or the other, we will have to indicate our view in regard to appellee's title to the office, and it is proper to state his counsel have requested that we do so.

The commission filed with the petition shows that appellee was appointed by the governor for the residue of the term of six years, and not, as alleged by appellant, until the August election in 1886.

Appellant admits that he has neither a certificate of election from the State board, which we think is alone empowered to give it, nor a commission from the governor, and whether the possession of either is indispensable to enable him to maintain this action we will now consider.

The first was refused under a misconception, as it seems to us, of the statute.

It is true section 2, article 5, chapter 33, General Statutes, provides that the county board for examining poll-books shall give a certificate of election of the person who has received at an election the highest number of votes for an office exclusively within the gift of the voters of the county. But manifestly that provision was intended to apply only to what are treated in the Constitution and statutes as county offices, and not to what is called a district office, that it generally requires the voters of two or more counties to fill. This is made clear by section 6 of the same article, which makes it the duty of the State board to give certificates of the election of judges of the circuit court, considered in connection with section 28, chapter 28, which requires "a circuit court" to be construed to mean any court of similar jurisdiction, either criminal, ordinary or equitable.

But we do not think the refusal of the State board to give the certificate should defeat appellant's recovery. For the essential fact that he received the highest number of votes given for the office has been duly ascertained by the board, whose duty it is to examine the poll-books and sum up the votes.

The commission was refused by the governor upon the ground stated by him in a communication, filed with the petition, that there was not a legal election for judge of the Louisville Law and Equity Court on the first Monday in August, 1886, because no vacancy existed in that office to be filled by election. And it is now contended that as appellant had no commission as judge of the court when he demanded possession of the office, he is not entitled to sue for and recover it.

The power and duty of the judiciary to decide upon the validity of an act of the governor, as well as of a law of the general assembly, when involved in the determination of a controversy properly before a court for adjudication, necessarily results from the division of the powers of the government into three distinct departments, and has frequently been exercised by this court in cases similar to this.

In the cases of Justices v. Clark, 1 Mon., 82; Bruce v. Fox, 1 Dana, 447, and Page v. Hardin, 8 B. M., 648, the decision of the governor that a vacancy in office existed, and his act in attempting to fill it, were directly before this court for revision, and in each one it was decided no vacancy existed, his act was invalid, and the person appointed by him was not entitled to the office.

In the last named case the relative powers and duties of the two departments are defined in the following language: "When, by the Constitution or the law, the governor has a discretionary power, or when, on any ground, his act is made conclusive as to all rights involved, it is of course not within the province of a court to inquire into the propriety or impropriety of his act. Such a power controls all rights which it may affect, and a prop-

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erly authenticated act done in pursuance of it can not be questioned, for the reason there can be no legal right coming in conflict with it. Rights dependent upon a discretionary power can not exist in opposition to it, but terminate at its will. The question, however, whether there is such a power in a given case, or whether any particular act or power is of the character referred to, is a judicial question whenever the right in litigation before a judical tribunal depends upon it, and requires its decision. If any office be held at the will of the governor, the appointee could not complain of the violation of any legal right by the revocation of his appointment, however sudden or groundless. But if the governor were to attempt to displace any officer at his mere will, he might undoubtedly make the question, in a legal contest with a proper party, whether the governor had such power, and whether his right to the office was terminated.

"The question of right on his part and of power on the part of the governor would be the same, and as he might unquestionably assert his right by appropriate legal remedy, the question of power would necessarily be brought within the cognizance of the court. And so any power claimed or exercised by the governor may be brought in question before a judicial tribunal, if it be relied on, and material either in opposition to any right asserted by legal remedy or in support of it.

"Such we understand to be the operation of the judicial power and the law in the protection of individual rights under a constitutional government. The judiciary pretends to no direct control over the action of the legislature or the supreme executive, but it may decide upon the validity of the acts of either affecting private rights. And by a writ of mandamus it may coerce a ministerial officer, though of the executive department, to the performance of legal duty for the effectuation of a legal right. It must decide all questions essential to a determination of the rights of the parties in a judicial proceeding coming properly before it."

The plaintiff in that case was the secretary of state, whom the governor had attempted to remove from office, and the defendant was the auditor. But the decisive question was one of right on the part of the plaintiff, and of power on the part of the governor. There his act, which this court decided invalid, was, as it is here, in opposition to a right "asserted by legal remedy."

But if the position of counsel be correct, it results that, although the decision of the governor upon the legality of an election is not, nor can be under our form of government, conclusive against the right of a person claiming an office in virtue of such election, still he may, by withholding the commission, not only deprive the claimant of it, but prevent any inquiry or determination by a judicial tribunal as to his title.

Section 15, chapter 81, General Statutes, provides that the officers named therein, including judges of the circuit, criminal and common pleas courts, chancellors and vice-chancellor, shall have commissions issued to them by the governor. But it was not intended thereby that the possession of a commission should be a condition of the right to maintain an action for any such office.

Sect'on 2, article 11, chapter 33, provides that each officer elective by the voters of a judicial district "shall enter upon the discharge of the duties of his office, after the commencement of his term, as soon as he receives his commission."

If the decision by this court should be in favor of appellant it would be regularly followed by a judgment placing him in possession of the office, and depriving appellee of it, which judgment the court would unquestionably have the power to enforce.

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But whether appellant could then, according to a fair construction of the last named section, enter upon the discharge of the duties of the office, without having received the commission, is a question it is improper to discuss, because we are not permitted to presume that the governor, whose duty it is to take care that the laws be faithfully executed, would, in such a case, leave the law creating the office in question suspended.

We will now proceed to the discussion of the validity of and construction to be given to the act of March 26, 1872, creating the vice-chancellor's court, the name of which was subsequently changed to that of the Lousviille Law and Equity Court, and the amendatory act of May 15, 1886.

The first and ninth sections of the act of 1872, the only two necessary to quote, are as follows:

"Section 1. There shall be elected, at the next general election of the qualified voters of Jefferson county, and every six years thereafter, a vice-chancellor of the Louisville Chancery Court, who shall hold his office for the term of six years, and shall receive the same compensation and have the same qualifications as the chancellor of said court, etc.

"Section 9. This act shall take effect and be in force from and after its passage, and until the next general election the vacancy existing as well as all vacancies hereafter occurring shall be filled by appointment by the governor."

The act of May 15, 1886, is as follows:

"An act providing for filling vacancies that have or may hereafter occur in the office of judge of the Louisville Law and Equity Court.

"Section 1. That vacancies in the officce of judge of the Louisville Law and Equity Court shall be filled at the same time, and for the same period of vacancies, and in like manner and on like occasions, as vacancies in the office of judge of the Jefferson Circuit Court.

"Section 2. But this act shall not apply to, or in any manner affect, the term of the present incumbent of said office of judge of the Louisville Law and Equity Court.

"Section 3. This act shall take effect from and after its passage."

It is argued for appellant it was intended by section 9 of the act of 1872, that in case of a vacancy in the office occurring at any time after the first Monday in August of that year, when the first election under the act was held, it should be filled for the residue of the regular term unexpired by an election at the general election in August next thereafter, and that the governor has no power to fill a vacancy for a period extending beyond a general election, and that the object and effect of section 2 of the act of May 15, 1886, was to leave the act of 1872 thus construed in force until the first Monday in August, 1886, at which time an election to fill the vacancy for the residue of the term was duly held, and appellant was legally elected.

On the other hand it is contended for appellee that by section 9 of the act of 1872 the governor was empowered to appoint and commission appellee to fill the vacancy caused by the resignation of Judge Simrall for the whole of the unexpired term of six years, which he did do January 1, 1886, and that the meaning and object of the proviso contained in section 2 of the act of May 15, 1886, was to leave the right of appellee to the office thus defined unaffected.

The latter clause of section 9 is somewhat awkwardly drawn, but in our opinion the construction of appellee is the correct one.

The words "until the next general election" connected by the conjunction "and" with the preceding clause, declaring when the act should take effect, we think relate to a particular period of time, beginning at the passage of the act and ending at the

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next or nearest general election thereto, during which it was the intention "the vacancy existing" by operation of the act itself should be filled by appointment. To make them apply to vacancies occurring after the termination of that period, requires not only a transposition of the words of the sentence, but the substitution of "each" or "any vacancy" for "all vacancies."

It, therefore, follows that the length of time for which the governor is empowered by that section to fill the vacancies occurring after the first election under the act is the whole of the term unexpired when an appointment is made. Such is the natural import of the language in reference to such vacancies, unaccompanied, as we think it is, by any qualifying words, and as the section manifestly was not intended to be construed in connection with, nor made subservient to, the provisions of the Constitution and existing statutes relating to the circuit and Louisville Chancery Court, such must be regarded as its meaning.

The act was thus construed by the predecessor of the present governor, who made an appointment to fill a vacancy in the office for two years, the legality of which the legislature, by an act passed in 1884 confining the appointee in office to the end of the regular term, seems to have recognized. And section 1 of the act of May 15, 1886, we think shows the same legislative construction.

It is, however, argued by counsel of appellant that such a construction renders so much of the act as relates to filling vacancies unconstitutional, and the court should, therefore, if possible, so construe section 9 as to make it harmonize with the Constitution.

If a statute be fairly susceptible of two constructions, that one in harmony, rather than the one in conflict, with the Constitution, should be adopted. And if there be a reasonable doubt on the subject of the validity of a statute, it is the duty of the court to hold it to be constitutional. But a court is never justified in perverting the true meaning of a statute to avoid deciding upon its constitutionality, nor for any other purpose.

It seems to us, however, that the application of the rule would not benefit appellant more than appellee, because if section 9 be construed either way contended for, it is liable to the same objection.

Section 1, article 4, of the Constitution is as follows: "The judicial power of this Commonwealth, both as to matters of law and equity, shall be vested in one Supreme Court, to be styled the Court of Appeals, the courts established by this Constitution, and such courts inferior to the Supreme Court as the general assembly may from time to time erect and establish."

There being no express provision in the Constitution in regard to either the manner of selecting or the qualifications of judges of the courts authorized by that section to be erected and established, nor as to the mode of filling vacancies in such offices, the question arises whether, as to any or either of these matters, there are implied limitations and conditions of the exercise of the power by the general assembly. For if so, they are as obligatory as if they had been expressed.

For the sure and true interpretation of the organic as well as a statute law, it is useful to look to the occasion and necessity of the law, the mischief felt, and the remedy had in view; "and then the office of all judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and pro privato commodo, and to add force and life to the cure and remedy according to the true intent of the makers pro bono publico."

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It seems to us that it is only necessary to look at the radical and complete change made by the present Constitution in the tenure and mode of filling offices from the former system to be convinced that it was the intention of its framers, who but obeyed the sovereign will, that all judicial offices, from the highest to the lowest grade, whether expressly named therein, or thereafter to be erected and established by the general assembly, should be filled by election by the people, and in no other way.

In Speed, &c. v. Crawford, 3 Met., 207, decided in 1860, is the following language:

"To curtail the power of appointment to office by the executive, and to extend the elective principle, was one of the leading objects of the authors of the Constitution. This purpose was not more distinctly manifested in the expression of public sentiment, which led to the call of the convention, that it has been in the provisions of the instrument itself. * * * The great object in the change of the system was to refer to the people the choice of their officers of all grades and classes, whether State, district, county, city or town officers. That choice was to be made through the instrumentality of an election."

To except from the application of the elective principle judicial offices, which the general assembly is authorized to erect and establish, would destroy the consistency and harmony of the Constitution, and to that extent defeat what was manifestly a controlling object of its adoption, and we are, therefore, bound to conclude if so intended it would have been plainly indicated.

The only exception or even modification to be found, and inferentially the only one intended, is in section 10, article 6, which does not relate at all to judicial offices. That section is as follows: "The general assembly may provide for the election or appointment for a term not exceeding four years of such other county or district, ministerial and executive offices as shall from time to time be necessary and proper."

But it is useless to argue further to prove what is so plain and has been so universally accepted as true since the formation of the Constitution.

If, then, judicial offices created by statute must be filled in the mode prescribed by the Constitution for filling those named therein, it would seem to follow that by it, and not by statute law, are the qualifications of the officers to be determined. Otherwise there might exist different qualifications for judges of courts having the same general jurisdiction, or the anomoly be presented of higher qualifications being prescribed for a judge of the circuit court, than for the judge of a statutory court of superior jurisdiction For the courts which the general assembly may, by section 1, article 4, establish are not required to be of less or even the same jurisdiction as the circuit court, but inferior only to the Court of Appeals and the legislature, under that section, established the Superior Court, and invested it with jurisdiction of appeals from judgments of the circuit court.

By what rule then are the qualifications of judges of statutory courts to be determined?

In Rudd v. Woolfolk, 4 Bush, 355, the principle question involved was as to the construction of section 28, article 4, of the Constitution, which is as follows: "The general assembly shall provide by law for holding circuit courts when, from any cause, the judge shall fail to attend or if in attendance can not preside." And this court said: "The circuit courts being of general common law, equity and criminal jurisdiction, all the statutory courts having general jurisdiction of either of these branches may be said to be carved out of it, and, therefore, substantially, and for every legal and constitutional purpose, circuit courts,

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whatever may be their designation by name or cognomen. * * * Looking at the evils to be remedied and the objects in view, we can hardly suppose the convention attached more importance to the name than the jurisdiction of the court. Therefore, we construe the meaning of this clause of the Constitution as conferring power to provide by law for the election of special judges for any court carved out of the jurisdiction of the circuit court, because, pro tanto, it is a circuit court, although called by another name."

A person to be eligible under the Constitution as judge of the circuit and Louisville chancery court, must be a resident of the district in which he is elected two years next preceding his election, at least thirty years of age, and have been a practicing lawyer eight years. But he may be eligible to the office of judge of the county, city or police court, or as justice of the peace, without any previous practice or experience as a lawyer, if he is over twenty-one years of age, and shall have been a resident one year in the county or district in which he is chosen one year next preceding his election.

It is, therefore, clear it was not intended to give to the general assembly the power to prescribe the qualifications of the judge of a statutory court having the same general jurisdiction as the circuit court, but they should be regulated by the provision of the Constitution applicable to the latter, and such has been the uniform legislative construction since the establishment of the first statutory court in 1865.

If, then, in harmony with the obvious design and general structure of the Constitution, judges of such courts must be elected, and belonging to the same class, erected for the same purpose, and invested with the same dignity and power, must have the same qualifications as a judge of the circuit court, the logical conclusion is that vacancies being equally within the reason of the Constitution, must be regarded as likewise within the Constitution itself, and, therefore, intended to be filled in the same manner as vacancies in the office of circuit judge are directed to be filled.

Section 26, article 4, is as follows: "If a vacancy shall occur in the office of judge of the circuit court, the governor shall issue a writ of election to fill such vacancy for the residue of the term: Provided, that if the unexpired term be less than one year, the governor shall appoint a judge to fill such vacancy."

The same provision is made as to a vacancy in the office of judge of the Court of Appeals. And at the first session of the general assembly after the adoption of the Constitution, it was enacted that the day appointed for filling a vacancy in the Court of Appeals or in a circuit court shall be within six weeks after the governor receives notice of a vacancy, except that when a vacancy occurs, there is not time to give the requisite notice before the proper first Monday in August, a special election shall be ordered to take place on a day within six weeks after such Monday, and such is now the law.

But in case of every other judicial office named in the Constitution, except the Louisville chancery court, the power to provide by a statute the mode of filling vacancies is given to the general assembly.

It seems to us unreasonable that the framers of the Constitution ever intended the legislature to have, or contemplated it would attempt to exercise, any more discretion as to the mode of selecting or qualifications of judges of such courts, or as to filling vacancies, than is given in respect to the circuit court.

To contend they did is to assume that while explicitly providing that judges of the circuit court should be elected by the people, they intended to give to the legislature discretionary

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power as to the mode of selecting judges of statutory courts of equal dignity and importance, while it was regarded essential to prescribe as qualifications a certain age, knowledge and experience in the practice of law for a circuit judge, power was purposely given to the legislature to dispense with such qualifications as to judges of statutory courts upon whom might be imposed precisely the same duties, and while it was deemed necessary to provide for promptly and speedily filling vacancies in the office of circuit judge by election, such vacancies in the office of judges of other courts of the same class were left to be filled by appointment for the residue of the term unexpired, without regard to the length of time.

In our opinion the power attempted to be conferred on the governor by section 9 of the act of 1872 is a plain evasion of the true intent and meaning of the Constitution, and can not be sanctioned as a precedent without marring the design, defeating the purpose and violating the fundamental principles of the Constitution. For if it may in this instance be violated upon the ground of the inconvenience of popular elections, other and repeated encroachments may be expected to follow.

If we are correct in these views, it results that section 2 of the act of 1886 is likewise invalid. And as the first section of that statute is but a mere re-enactment of the provisions of the General Statutes on the subject of filling vacancies in the office of circuit judge, alike applicable to the office of judge of the Louisville law and equity court, it follows that neither before nor after the passage of that act could the vacancy we are considering be filled at any other time than that fixed in the proclamation or writ of election issued by the governor, and that an election for that purpose can not be legally held at all without such proclamation.

To make the election of an officer of government legal, there must be a time fixed for holding such election, either by law or by the officer empowered by law to do so. If it was not so there could be neither a fair, orderly nor free expression of the popular choice.

If one candidate for an office and his friends may, without authority of law, prescribe the time for holding an election to fill a vacancy, his opponent may as well fix another and different time. For neither by the Constitution nor statute is the first Monday in August prescribed as the day in course for holding an election to fill a vacancy in the office of judge of the circuit or other courts of the same class, and such election, therefore, can be legally held on that day only when appointed by a writ of election.

To sanction an election held without lawful authority is to countenance confusion, tumult and unfairness. A proposition so plain needs no citation of authority to support it.

We are, therefore, of the opinion that the facts stated by him in his petition do not show in appellant a legal title to the office.

Having incidentally, yet necessarily, expressed our views as to the title of appellee to the office, it is proper to add that, in our opinion, his appointment by the governor was, under section 9, article 3, of the Constitution, legal. And though the governor had no power to make the appointment for the whole of the unexpired term, nor under that section longer than the time required by law to be fixed by proclamation for filling the vacancy by election, appellee should be held and regarded as judge de jure, and his official acts valid until his successor is elected and qualified.

Judgment affirmed.

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HEAD v. MARTIN.

(Filed March 31, 1887.)

1. Arrest—An officer in making an arrest for a felony, or in retaking a felon who has escaped, may use such force as is necessary to capture the felon, even to killing him when in flight. In the case of an arrest for a misdemeanor, however, the rule is different. It is the officer's duty to make the arrest; he may summon a posse, and may defend himself, if resisted, even to the taking of life; but when the offender is not resisting, but fleeing, the officer has no right to kill or shoot and wound.

2. Same—A bastardy proceeding is, under our law, a civil one, yet it proceeds in the name of the Commonwealth, and under the statute the offender is subject to arrest. Therefore, so far as regards the rights of an officer in making an arrest under a bastardy warrant, the offense is to be regarded as a misdemeanor.

The defendant in a bastardy warrant, who had been arrested under the warrant by a deputy sheriff, was shot and wounded by the deputy when fleeing from his custody. In this action for the tort, Held—That the deputy is liable.

Ben. S. Robbins and Carroll & Barbour for appellant.

Ira Julian for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Holt.

The single question presented is whether a peace officer may, in order to arrest one upon a warrant for bastardy, or to prevent his escape after arrest, kill him when fleeing. If he has the right under such circumstances to shoot and wound him, as was done in this instance, then it necessarily follows that he can not be held responsible if it results in death.

It is attempted to draw a distinction between a case where one is attempting to avoid arrest and where one is endeavoring to escape after arrest.

If, however, the offender is in flight, and is not at the time resisting the officer, then the law is the same, whether he be fleeing to avoid arrest or to escape from custody. (2 Bishop on Criminal Law, section 664; Wharton on Homicide, sections 212-214.) The averments of the answer, admitted by the demurrer, show that the appellee, Martin, had in fact been arrested by the appellant, Head, as deputy sheriff, and was shot by the latter when fleeing from his custody, but the fact that an arrest had been made does not alter the law of the case.

A bastard proceeding is, under our law, a civil one. Yet it proceeds in the name of the Commonweath, and under the statute the offender is subject to arrest. As to the question now before us, it is, therefore, to be regarded in the same light as a misdemeanor.

Our statute is silent, unless it may be regarded as speaking by implication, as to the force an officer may use in effecting an arrest, or in recapturing a prisoner. It merely provides that "no unnecessary force or violence shall be used in making the arrest."

We, therefore, turn to the common law for guidance. By it an officer in a case of felony may use such force as is necessary to capture the felon, even to killing him when in flight.

In the case of a misdemeanor, however, the rule is different. It is his duty to make the arrest. He may summon a posse, and may defend himself, if resisted, even to the taking of life, but when the offender is not resisting, but fleeing, he has no right to kill.

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Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity; they represent its majesty, and must be properly protected, but to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse and take the offender.

The reason for this distinction is obvious. The security of person and property is not endangered by a petty offender being at large, as in the case of a felon. The very being of society and government requires the speedy arrest and punishment of the latter.

Bishop says: "The justification of homicide happening in the arrest of persons charged with misdemeanors or breaches of the peace is subject to a different rule from that which we have been laying down in respect to cases of felony; for generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he can not otherwise be overtaken, and though there be a warrant to apprehend him; but under circumstances it may amount only to manslaughter, if it appear that death was not intended. * * *

"But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified." (2 Bishop on Criminal Law, sections 662-3.)

The same rule may be found in the works of the other common law writers. Hale says:

"And here is the difference between civil actions and felonies. If a man be in danger of arrest by a capias in debt or trespass, and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he can not be otherwise taken, if he be killed it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods." (1 Hale's Pleas of the Crown, page 481.)

So great, however, is the law's regard for human life, that if even a felon can be taken without the taking of life, and he be slain, it is at least manslaughter. Eevn as to him it can be done only of necessity.

An officer, in arresting or preventing an escape for a misdemeanor, may oppose force to force, and sufficient to overcome it, even to the taking of life. If the offender puts the life of the officer in jeopardy, the latter may, se defendendo, slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection.

It is often said that an officer may use such force as is necessary to make an arrest. Generally speaking, this is true. It was so said in the cases of Fleetwood v. Commonwealth, 80 Ky., 1; (3 Ky. Law Rep., 497), and Mokcabee v. Commonwealth, 78 Ky., 380. But in those cases a deadly affray between parties was in progress or about to occur, endangering the lives of not only the participants, but innocent persons, and it was the duty of the officer, when resisted, to quell it, even at the sacrifice of human life. In these cases he was justified in killing, not only se defendendo, but to prevent the impending commission of a felony.

In case, however, of a mere riot upon one day, and an attempted arrest upon the next, surely the officer would not be justified in killing the offender when fleeing from custody or to escape arrest. A person commits a misdemeanor by the use of profane language; he flees from the officer attempting to arrest him or from custody. The dictates of humanity, as well as the legal rule, forbid the taking of his life under such circumstances. The officer must, in such a case, summon his posse and take

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him. He has no more right to kill him than he would if the offender were to lie down and refuse to go with him.

It is said, however, that the appellee was in the wrong; that there was a sort of contributory neglect upon his part which produced the injury. It was not, however, such neglect or conduct as, under ordinary circumstanes, would produce the injury. It could not be expected that in consequence of it the officer would go beyond the limit of the law, and employ force when, and of a character forbidden by, it. It is not a question whether unnecessary force was used, but the answer of the appellant shows that he used it when and in a degree forbidden by the law.

The demurrer was, therefore, properly sustained, and the judgment must be affirmed.

KENTUCKY SUPERIOR COURT.

BRIANT, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 18, 1887.)

1. While common carriers can not, by contract or otherwise, obtain exoneration from loss, which is the result of the negligence of themselves or their agents, they may, by special contract, restrict their liability as insurers against accidents or mistakes.

2. As a general rule, railroad companies are not bound to deliver to the consignee at his place of business goods which they have undertaken to ship, nor are they bound to give him notice of the arrival of the goods at the depot of delivery. but this general rule may be controlled by contract or well established custom.

3. The responsibility of the carrier as such should contiune after the goods arrive at their destination, and until the owner or consignee. by the use of diligence, can remove them. What such reasonable time should be depends, in the absence of express contract, on the character of the freight, the distance to which it is to be carried, and the capacity and business of the road, with such other circumstances as would serve to notify the consignee of the probable time when the goods would reach their destination.

It was the uniform custom of appellee to notify consignees of the arrival of freight at its depot in Louisville by posting such arrival on a placard in the depot. Appellee failed to post the arrival of tobacco consigned to appellants, and by reason of this failure it was not hauled away. Four days after the tobacco arrived the depot was burned and the tobacco damaged. Held—That the company is liable.

S. B. Toney for appellants.

H. W. Bruce for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Barbour.

This action was instituted upon a bill of lading, wherein appellee agreed to carry for the appellants three hogsheads of tobacco

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from Franklin Ky., to Lousville. After the tobacco reached Louisville it was damaged by the burning of the depot in which it was stored.

The bill of lading provides that the appellee shall not be liable for loss or damage of property by fire or other casualty while in transit, or while in depots of transhipment, or at depots of delivery.

In L. & N. R. R. Co. v. Brownlee, 14 Bush, 590, it was held that this provision in the bill of lading, where there was no negligence shown upon the part of the company or its employes, exonerated the company from liability for the loss of property which it had undertaken to carry, and which was destroyed by fire, the court saying that common carriers may restrict their liability as insurers against accidents and mistakes by special contracts with their customers, but can not, by contract or otherwise, obtain exoneration from loss which is the result of the negligence of themselves or their agents.

In this case the petition charges negligence upon the part of the company, its agents and employes as the cause of the loss. We think it sets out a good cause of action against the appellee.

Whether the appellee is to be held to answer under its responsibility as common carrier, modified by the contract as embraced in the bill of lading, or as warehouseman, it seems to us is immaterial, for in either case it is liable if the loss was occasioned by its negligence, and in neither case is it liable unless it was so occasioned. We will, however, consider the question as to the sufficiency of the reply, which is the chief matter discussed by counsel. Appellee, in its answer, denies the negligence charged; denies that it was its duty to deliver the tobacco to the consignees at their place of business in Louisville, and alleges that it was delivered at its depot in Louisville, the place where it had undertaken to deliver it, and that after it was stored there it was injured by fire. In their reply the appellants make the following allegations, which, upon demurrer, must be taken as the facts of this case: The tobacco was received by appellee at Franklin, on the 3d of November, and arrived at the Louisville depot on the 6th. During that time, and for many years prior thereto, it was the uniform custom and established usage of the appellee in its dealings with its customers, shippers and consignees in Louisville, to notify them of the arrival of freight at its depot in Louisville by posting such arrival on a placard in the depot on the first day of the arrival, so that the same could be hauled away. Under this custom and usage, customers, shippers and consignees were induced to and did believe that the appellee would give them such notice. Such had been the dealings, custom and usage observed and exercised by the appellee with all the tobacco warehousemen in Louisville, who received freight over its road, including Wm. P. Johnson & Co., who were appellants' agents and consignees. The appellee failed altogether to post the arrival of the appellants' tobacco. On the 6th, 7th, 8th and 9th of November, Wm. P. Johnson & Co. sent their dray men and teamsters to the depot where the tobacco was stored, and they, in acordance with the custom, each day examined the placard, and found posted the arrival of other and different tobacco consigned to Wm. P. Johnson & Co., which had arrived on each of said days, which they hauled away. By the failure of the company to post the arrival of appellants' tobacco, their agents were induced to and did believe that it had not arrived, and, therefore, did not haul it away.

The depot was burned on the 9th of November, and the appellants' tobacco was damaged. Upon these facts the appellants charge that the failure to post the notice was gross negligence

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upon the part of the appellee, which was the cause of the damage.

Neither did the bill of lading or the law require the appellee to deliver the tobacco to the consignees at their place of business in Louisville. Nor, in the absence of a contract, or well established custom requiring it, was it the duty of the appellee to give notice to the consignees of the arrival of the tobacco at its depot in Louisville. In the Jeffersonville R. R. Co. v. Cleveland, 2 Bush, 471, the court says: Whether the responsibility of the company, after the arrival and storage of the goods in Detroit (the place of destination), was that devolved by law on carriers or only that of depositaries, it was not necessary that it should either give notice of the arrival of the goods or make actual delivery of them, as is now done by express companies, in order that their liability as carriers should cease after reasonable time had elapsed for the owner to attend and remove the goods. The transportation by railroads is necessarily such that their depots are the places of delivey. It is true the general rule upon the subject may be controlled by contract or well established custom. The responsibility of the carrier as such should continue after the goods arrive at their destination, and until the owner or consignee, by the use of diligence, can remove them. "What such reasonable time should be must, in the nature of the case, when not provided for by express contract, depend on the character of the freight, the distance to which it is to be carried, and the capacity and business of the road, with such other circumstances as would serve to notify the consignee of the probable time when the goods would reach their destination, so that, with proper watchfulness, he might receive them, and thus terminate the carrier's responsibility as soon as practicable."

We are of opinion in this case, in view of the custom and usage of the company, that it was as much its duty to post the notice of the arrival of the goods as it would have been had it, in its contract for carrying, agreed to so do, or as it would have been had the law required it to give notice upon the arrival of goods at the place of destination. It, therefore, follows that there was not, in legal contemplation, a delivery, and its liability as common carrier, modified, however, by the contract for carrying, continued until such notice was given, or the consignee had otherwise acquired actual notice of the arrival of the goods.

In the Cleveland case the goods did not arrive at their destination until the 25th of April, while in the usual course of transportation they should have arrived on the 20th. The consignee inquired for the goods at the depot on the 20th, 21st, 22d, 23d and 24th, but could not learn why they did not arrive. He was out of the city on the 25th and 26th. On the night of the 26th the depot and the goods were destroyed by fire. The court held that he could not be required, the goods arriving out of time, to attend day after day looking for his goods, and that under the circumstances he did not have a reasonable time to remove them.

This case seems to be as strong as that. The appellee had provided a mode of giving notice of the arrival of goods; the consignees had the right to expect this notice; it not having been given, they did not have the reasonable opportunity of removing the goods.

It is insisted that the negligence complained of in the reply consists in the failure of the appellee to give the consignee notice of the arrival of the tobacco, and that such failure to give notice was not the proximate cause of the loss or damage to the tobacco; that the proximate cause was the fire. As we have shown, the tobacco was not delivered to the consignees. Under its custom it was the duty of the appellee to notify the consignees

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of the arrival of the tobacco; this they failed to do, and in consequence of such failure the consignees were misled into believing that the tobacco had not arrived. The case stands upon the same grounds as if the consignees had, on each of the days, made inquiry for the tobacco, and had been informed by the company's agents that it had not arrived. The latter is only a stronger case. The failure to remove it was attributable to the want of the notice. Had it been given the tobacco, in all probability, would have been removed before the fire. It seems to us that as the negligene of the agents of the company prevented the plaintiffs' consignees from getting the tobacco into their possession, either on the 6th, 7th, 8th or 9th of November, by reason whereof it remained in the depot and was burned, the loss was so directly the consequence of this default on the part of the company as to render it liable for the damage sustained. (Stevens v. Boston & Maine Railway, 1 Gray, 281; Davis v. Garrett, 6 Bing., 716.) In the latter case Tindall, C. J., says: "No wrongdoer can be allowed to apportion or qualify his own wrong. If a loss has actually happened whilst his wrongful act was in operation and force, it is fairly attributable to his wrongful act. He can not set up as a defense that there was another or more important cause of the loss acting upon the subject matter at the same time, or the bare possibility of a loss if his wrongful act had neve been done."

The judgment is reversed and cause remanded, with instructions to overrule the demurrer to the reply, and for further proceedings.

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SUPERIOR COURT ABSTRACTS.

CALVERT v. CALVERT.

Filed March 23, 1887. Appeal from Trimble Circuit Court. Opinion of the court by Judge Ward, affirming.

Divorce—Certificate to depositions—In a suit for divorce the facts as to residence of the parties must be proved by some person who is certified by the officer taking the depositions to be personally known to him as worthy of credit: and upon appeal from a judgment dismissing a petition for divorce, the certificate made by the officer who took the depositions not appearing in the transcript, it must be presumed that the law has not been complied with, as all the presumptions are to be indulged in favor of the judgment.

Bartlett & McCain and J. A. Trout for appellant; R. F. Peak for appellee.

WALTON v. JONES.

Filed March 23, 1887. Appeal from Madison Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Surety—Limitation—A surety having satisfied the note upon which he was bound by the execution of his individual note and a mortgage to secure it, his cause of action against the principal then arose and is barred after the lapse of five years.

John G. Cole, W. Lindsay and Willoughby Rodman for appellant.

TRUSTEES OF TOWN OF IRVINE v. WAGERS.

Filed March 23, 1887. Appeal from Estill Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Towns and cities—Failure to repair streets—The legislature may extend the limits of a town and impose the duty of keeping in repair a road thus included in the town boundary without the consent of the trustees of the town.

As the statute in this case expressly made it the duty of the town to keep the road in repair, the further provision that if the town failed to perform this duty the county court should appoint a surveyor and assign him hands resident in the town to work the road, does not relieve the town from the duty imposed.

2. Same—When the duty to keep streets in repair is devolved on a municipal corporation, and the power is conferred on it to raise money for that purpose, it is liable in a civil action for special injuries resulting from neglect to perform this duty.

3. Same—Negligence as to bridge—The mere fact that a bridge is not level does not show negligence. To constitute negligence the inclination must be such as to import danger, and then, in order to recover, the plaintiff must show in some way that he was hurt by reason of the dangerous inclination.

The plaintiff having been injured by the falling of his horse upon a bridge, the mere fact that the floor of the bridge was not level does not authorize a recovery against the town upon which was imposed the duty of keeping the bridge in repair, there being nothing to show that the accident was caused by the inclination in the floor of the bridge, or that there was a sufficient inclination to make travel over the bridge dangerous.

Robert Riddell and H. C. Lilly & Son for appellants; J. B. White and John Bennett for appellee.

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ALBERT, &c. v. BOARD OF COUNCILMEN OF UNIONTOWN.

Filed March 23, 1887. Appeal from Union Circuit Court. Opinion of the court by Judge Barbour, affirming on original and reversing on cross appeal.

1. Liability of town marshal on bond—A petition by a town upon the bond of the town marshal to recover the amount shown to be due the town upon a settlement of the marshal with commissioners appointed by the town council, should have alleged specifically what money it was that the marshal had collected and when it was collected, since the sureties must be parties to such a settlement, or at least have notice of it in order to be bound by it, there being no provision in the charter for a settlement with the marshal. Still, as there was no demurrer to the petition in this case and the exhibits filed with it showed when and for what the marshal collected the money, it is too late, after an answer presenting all the matters of defense insisted upon here, and after judgment, to urge the objection in this court for the first time.

2. Same—The marshal, being ex officio tax collector, may be required to collect taxes for years preceding the year for which he is appointed, the charter being silent as to the collection of back taxes; and his sureties being bound for the performance of all duties which may, under the charter of the town, be required of him, are liable for back taxes which he has collected and failed to pay over.

3. Same—The marshal had no right, by agreement with the council, to restrict his duties or liabilities, as a condition of his acceptance of the office. Such agreements are against public policy.

4. Same—An ordinance providing that certain persons shall, before doing business, pay into the town treasury each a certain sum as a license does not repeal a provision of the charter that the marshal collecting money due from licenses shall pay the same to the treasury. While the license fee should be paid directly into the treasury, yet, if the licensee is allowed to proceed with his business upon paying it to the marshal, the latter is liable on his bond.

5. Same—The expression "assessments and other dues" used in the marshal's bond includes licenses.

6. Same—If the sureties are not liabel for the back taxes and license fees collected by the marshal, the payments made by him and not applied will be first applied to extinguish these claims.

7. Same—The marshal held under his appointment to fill a vacancy only until the next regular election, and not until his successor was elected and qualified, the charter providing that the board of councilmen shall appoint a person "until the next regular election."

8. Same—As the marshal's term of office did not expire until August, 1880, and the tax books for 1880 were placed in his hands before his term expired, his sureties are liable for the taxes of that year.

As the charter provides that any person aggrieved by an assessment shall have until July 10 to apply for its correction, the presumption is that the books are then ready for the marshal, whose duty it is to collect the tax, and it is not required that the books shall be turned over to him by an order of the council; a delivery to him by the clerk is sufficient, and a subsequent order of the council in this case directing the clerk to demand the return of the books was a mere nullity.

W. F. Berry, J. L. Taylor and J. W. Marshall for appellants; W. Lindsay and C. L. Long for appellees.

McCLAIN v. McCLAIN.

Filed March 30, 1887. Appeal from Spencer Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Settlement of accounts—Surety—R., an assignee for benefit of creditors, and W., his brother, were the principal creditors of the assigned estate, being sureties on most of the debts. By an agreement between the parties in interest certain encumbrances upon the property were removed and R., the assignee, proceeded to sell the property and pay debts. The accounts of R. and W. having become somewhat confused, R. brought this suit for the

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settlement of his accounts as assignee, and also for the settlement of the accounts between himself and W. In this settlement R. was credited by $1,000 paid the wife of the assignor. This amount had been borrowed by R. and W. from C. and the debt had never been paid. The court required W. to pay one-half of the debt. Held—That this was error. W. should be regarded merely as R.'s surety, and R. should be required to pay the whole debt.

Thomas J. Barker for appellant; G. G. Gilbert for appellee.

ELY & CO. v. JESSUP, &c.

Filed March 30, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

A sale of personal property is valid as between the vendor and vendee and against all the world, except purchasers and creditors, though possession remains with the vendee, and it is competent for the vendee to show that one who is attacking the sale, claiming to be a creditor, is not in fact a creditor.

In this action on a claimant's bond executed to suspend the sale of property levied on under execution, the execution creditor attacks the claimants' title upon the ground that the sale to him by the debtor was fraudulent because the possession was retained by the debtor. Held—That the claimant had the right to show that the debtor, as surety, had been released by reason of indulgence granted to the principal after the judgment was rendered, and that, therefore, the plaintiff in the execution was not in fact a creditor.

Petree & Downer for appellant; E. P. Campbell for appellees.

VOWELL v. CONWAY, &c.

Filed March 30. 1887. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Capias pro fine—Right to control—A capias was issued against appellant upon a judgment for a fine, and while in the hands of the jailer, there being no sheriff or coroner, the Commonwealth's attorney ordered the jailer to stay the capias so far as his commissions were concerned. The jailer thereupon permitted appellant to replevy the balance of the judgment. The replevin bond was quashed by the court without notice to appellant, and a new capias ordered to be issued, which was done. Appellant, by this action, seeks to enjoin the execution of the new capias. Held—That the replevin bond was void, and that the Commonwealth had the right to disregard it. So long as the State had any interest in the judgment, no one but the trustee of the jury found had the right to control it, and the order of the Commonwealth's attorney to the jailer to stay the capias so far as his commissions were concerned was a nullity. The writ could not be executed in piecemeal. Nor is it material that the petition alleges that the Commonwealth's attorney had been paid his part of the fine, as he had no right to receive it.

2. Premature hearing—That the case was prematurely heard can not affect appellant's rights, as upon his own showing, he was in no event entitled to the relief sought.

Haycraft & Slack for appellant; Weir, Weir & Walker for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH

Filed March 30, 1887. Appeal from Boyle Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Taxation—Listing by county court—When the taxpayer has failed to list his property, and there is an order of the county court to list, the defendant may appeal to the circuit court, whether the proceeding is under section 20 or section 25 of article 5, chapter 92 of General Statutes. That the triple tax is not imposed does not affect the right to appeal.

2. Same—Appellant was bound to list its property for taxation for county purposes for the years 1876 and 1877, and, in this proceeding to require it to do so, its response admitting its failure to list, the county court's order directing the clerk to take the list was proper: and, as this was the only subject of inquiry upon appeal to the circuit court, that court should have en-

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tered a judgment affirming the judgment of the county court; but, as the dismissal of the appeal has the same legal effect, appellant has no cause of complaint.

3. Same—If the clerk's assessment was too large, appellant's remedy was by application to the county court to have it corrected, and from the action of the county court it would have had a right of appeal.

Wm. Lindsay for appellant; Robert Harding for appellee.

SCHNEIDER'S ADM'R v. GABLER, &c.

Filed March 30, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, reversing.

Executions—Landlord's lien—If an execution creditor wishes to dispute a claim for rent asserted by the debtor's landlord, he may give a bond of indemnity and have the property sold for his own benefit, taking the proceeds from the officer as in a common case not involving any interest except that of the parties to the execution; and if the landlord persists in his claim, he must assert it in an action on the security thus substituted for his lien, if he had one.

D. M. Rodman and Eugene P. Moore for appellant; Kohn & Barker for appellee.

STERRETT, &c. v. ADAIR, &c.

Filed March 30, 1887. Appeal from Hancock Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Assignment—Pleading—When in an action upon an assigned note the plaintiff alleges that by his contract with the assignor he is to pay nothing if he receives nothing, and that he is to pay exactly the amount he receives, he should not be regarded as equitably entitled to the note unless his averments exclude the fact that the contract is only a mode by which the assignor seeks to collect his debt.

In this case the averment of the assignee that by his contract with the assignor he was to pay "as much money" as he received, is to be taken as meaning that he was to pay to the assignor what he collected. It may mean that, and the pleading is to be taken against the pleader.

2. Husband and wife—Wife's equity—A. and wife having a judgment against H., a creditor of A., seeks to subject the proceeds of the judgment to the payment of his debt. The wife seeks to have the fund settled on her. It is conceded that the administrator of the wife's father turned over the note on H., upon which the judgment was obtained, as part of the wife's share as distributee. She says the note was delivered to her, and that she had had possession of it all the while, and that her husband had set up no claim to it as his own. There is no evidence tending to show that the husband had ever asserted his marital right to the note, or had ever tried to do so. Held—That the wife is entitled to a settlement. The fact that the husband receipted to the administrator for the wife's share of the estate does not even tend to disprove her averment that the note was delivered to her, and that she retained possession of it. Nor does the fact that the administrator wrote on the note an assignment to the husband affect the right which she acquired by a delivery of it, as hers, into her hands, even if the endorsement, under which she does not claim, could be read as evidence against her.

3. Same—When it is conceded that a fund which the wife seeks to have settled upon her is part of her patrimony, and it is denied that the husband has reduced it to possession, the creditor must show such reduction in order to preclude the wife.

4. Same—An act sufficient to bar the wife's legal right as survivor may not affect her equity. A judgment in favor of the husband alone will not do it; here the judgment was in favor of both upon their petition expressly recognizing the wife's claim to the note as her separate estate.

W. P. D. Bush for appellants; John Allen Murray for appellees.

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WAHL v. SMALL, &c.

Filed March 30, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

Affidavits are not competent as evidence on the trial of a case on the merits on the issue joined by the parties.

In this action by a married woman seeking to be empowered to trade as a feme sole, certain creditors of the husband were made defendants, and by their answer denied the allegations of the petition. Upon the trial of the issues thus made, the only evidence was an ex parte affidavit filed before the creditors were made parties. Held—That the petition was properly dismissed, as there was no competent evidence to support its allegations.

W. Carrico for appellant; Weir, Weir & Walker for appellees.

ANDERSON v. HALE.

Filed March 30, 1887. Appeal from Graves Circuit Court. New opinion of the court by Judge Ward, reversing.

1. Principal and surety—Credits—In a suit upon a note the plaintiff admitted in his petition that defendants were entitled to a credit indorsed on the note. The defendants, principal and surety, filed separate answers, the principal alleging that the credit should have been placed on another debt which he owed plaintiff. The plaintiff did not reply. The surety made no reference to the credit in his answer. Held—That while the plaintiff was entitled to recover against the principal the amount of this credit, in addition to the amount he had claimed in his petition, he was not entitled to recover the additional amount against the surety.

2. Amount of recovery fixed by court—The only issue joined being as to whether there had been any such an alteration of the note sued on as to release the obligors, it was for the court and not the jury to fix the amount of recovery: and the jury having found "for the plaintiff the amount of his note and interest," and undertaken to fix the amount, the court should have disregarded the amount fixed by them, and rendered judgment for the amount the plaintiff was entitled to. Therefore, for the error of the court in rendering judgment on the verdict for two large an amount, the judgment is reversed, with directions to render judgment for the proper amount, and not for a new trial.

3. Alteration of note—A note made payable at the "First National Bank of Mayfield" was altered by drawing a mark over the words quoted. A surety claims that he is released by reason of the alteration. Held—That as the note was not commercial paper as defined by our statute, the alteration in no way changed or affected the contract right of the parties, not being such an alteration as to affect the identity of the paper.

4. Evidence—Letters—It was not error to reject the testimony of a witness as to the contents of a supposed letter received from the plaintiff, as there was no evidence that the plaintiff wrote the letter. It was not incumbent on the plaintiff to state, when recalled in his own behalf, that he had not written such a letter, unless he was interrogated on that subject by the defendant.

5. Date of credit—The petition admits a credit on the note sued on of date November 8, 1877; the credit appears upon the note as copied into the trancript as of November 8, 1876. Held—That if the discrepancy really exists, the date on the exhibit being most favorable to defendant must control.

Robertson, Smith & Robbins, L. Anderson and E. W. Hines for appellant; W. Lindsay for appellee.

SMITH, HENRY & CO. v. FOGG, SHAW, THAYER & CO.

Filed March 30, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Ward, reversing.

Pleading—Findings by court—This is an action to recover the value of certain goods consigned by plaintiffs to defendants for sale on commission. For defense defendants allege that plaintiffs ordered them to deliver the goods to H. & Co., defendants' successors in business, which they did, and

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alleged further that plaintiffs ratified this delivery. The plaintiffs, by their reply, denied that they had ordered defendants to deliver the goods to H. & Co., or that there had been such a delivery upon plaintiffs' order, and also denied the alleged ratification. The law and facts were submitted to the court, and the court found that the evidence failed to show any order to deliver to H. & Co., or any delivery of any kind, actual or constructive. The court having thus found, did not, as it could not, find as to the alleged ratification. Held—That there was no denial in the pleadings that there was a delivery to H. & Co., and, therefore, the court erred in requiring defendants to prove what was not controverted.

Elliott & Hemingray and Wm. Lindsay for appellants; C. B. Seymour for appellees.

WHITE v. NEVILLE.

Filed March 30, 1887. Appeal from Hickman Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

The competency of evidence can not be considered in the absence of exceptions taken to it in the court below.

George W. Griffey for appellant; George L. Husbands for appellee.

BOYD, &c. v. CHAMBERS.

Filed April 6, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, reversing.

Injunctions—Damages—Counsel fees paid in cases in which a temporary injunction was sued out can not be recovered as damages on the injunction bond unless it is alleged, and, if denied, proved that the employment and labor of the attorney and the services paid for related solely to the dissolution of the temporary injunction.

The cases of May v. Deposit Bank, 5 Ky. Law Rep., 691, and New National Turnpike Co. v. Dulaney, &c., 8 Ky. Law Rep., 530, recognize this principle, and were decided in conformity to it.

Haycraft & Slack for appellants; W. N. Sweeney & Son for appellee.

BRIGHT, &c. v. BLAKEMORE.

Filed April 6, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Attachments—When each of several attachments has been sued out upon the ground that the defendant did not have enough property in the State subject to execution to satisfy the plaintiff's claim, and the defendant has not controverted the ground of any of the attachments, but the attached property has sold for more than any one of the claims amounted to, no one of the attaching creditors is entitled to priority over the others by reason of his priority in time, the record showing no right to an attachment in any of the attaching creditors. The fund in such a case must, therefore, be distributed ratably.

2. Same—Attached personal property having been placed in the hands of a receiver, it was "a fund in court" from the time it came to his hands, and an attachment executed by delivering to the receiver a copy thereof created no lien on the property. To create a lien on such a "fund" the attachment should be executed by delivering to the clerk a copy of the order, with a notice specifying the fund. But even if the property in the hands of the receiver could not be regarded as a fund in court, the attachment created no lien, because no notice specifying the property was delivered to the receiver. The mere fact that a notice is copied into the transcript following the order of attachment, does not authorize the presumption that such a notice was delivered to the receiver.

James W. Head for appellants; Bullock & Beckham for appellee.

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BINKLEY v. BERRY, &c.

Filed April 6, 1887. Appeal from Butler Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Reversible error—As there is no complaint in the grounds for a new trial that the court erred in excluding evidence, this court is precluded from inquiring into the matter.

2. Instructions—Whether the instructions asked by the appellant would have been relevant, and should have been given if the court had not excluded the evidence to which they relate, it is not proper to consider. The excluded evidence stands upon the same ground as if it had not been offered.

William Wand for appellant; John L. Scott for appellees.

HASTINGS v. GIRTY.

Filed April 6, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Dedication is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner.

2. Dedication by parol—A dedication of land to public use may be made by parol and established by parol evidence.

3. Towns and cities—Acceptance of alley—In this action to enforce a lien for the cost of improving an alley, the answer presents the single defense that there has never been a dedication to the city of the ground used for an alley, nor an acceptance of it as such by the city. It appears that the alley has been open, and used by the public as a public way for twenty or twenty-five-years, and has been recognized and claimed by the community as such, and has been placed on the city map as a public alley for about the same length of time. It also appears that the owners of the lot from which the alley was taken have acquiesced in its improvment by paying, or agreeing to pay, the cost of its improvement, in so far as they are chargeable therewith.

Held—That the length of time the ground has been used as an alley, and the placing of the alley upon the city map, are sufficient evidence of a dedication to, and acceptance by, the city. But, independent of these facts, the acquiescence of the owners of the ground in its improvement is sufficient evidence of a dedication to the city, and the fact of the improvement being made in pursuance of the ordinance of the city, is sufficient evidence of acceptance by the city.

4. Pleading—Defects cured—If the plaintiff's petition is insufficient in that he fails to allege that there was a dedication, or that there was an acceptance by the city, that defect is cured by the answer, which denies the existence of these facts in express terms.

A. T. Root for appellant; Richards & Hines for appellee.

CITY OF OWENSBORO v. SUTTON, &c.

Filed April 6, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Street improvements—Repeal of statutes—The new charter of a city provided for the assessment of a different amount for street improvements from that provided in the old charter—that is, one-half instead of the whole cost. When the ordinance directing an improvement was passed, and when the improvement was made, the old charter of the city was in force, and when the ordinance making the assessments against the several lot owners was adopted, the new charter was in force. Held—That the old charter applies both as to the amount to be assessed and as to the method of making and enforcing the assessment, as the statute provides that "no new law shall be construed to repeal a former law as to any * * * act done, or any right accrued, or any claim arising under the former law."

2. Same—As the new charter provides only for the regrading of streets or alleys which have been graded, it does not purport to contain all the law on the subject of street improvements, and, therefore, does not repeal a section of the old charter which provides for the original grading and improvement of streets, and the assessment and collection of the cost.

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3. Same—As the city is vested with the right to recover the cost of street improvements from the lot owners, it is not confined to an action for the purpose of enforcing this right.

Haycraft & Slack for appellant; Geo. W. Williams & Son for appellees.

PULLMAN PALACE CAR CO. v. GAYLORD.

Filed April 13, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, reversing.

1. Sleeping car companies—Negligence—A sleeping car company has no contract relations with a passenger in regard to his property, except as to such reasonable sums of money as may be proper for current expenses, personal attire, watches, and such belongings as go with the person, and such as a guest at an inn might properly take with him to his room at the innkeeper's risk. But even for these articles the company is not obliged to provide a safe depository, and its failure to do so is not negligence.

2. Same—A sleeping car company is not a common carrier or an innkeeper, nor is it under a like liability.

3. Same—A passenger who takes a berth in a sleeping car, with a full knowledge of the conditions, and suffers a loss of his property, can not recover of the company upon the ground that it could have made the car more secure, or could have provided a safe depository, and failed to do so.

4. Same—A sleeping car company is not obliged to have more than one competent and faithful watcher at a time for the protection of the property of the passengers in a car, and it is, therefore, not negligence, to have only one.

In this case the jury having found that the "servants in charge of the car" were "competent and faithful," and that they kept a reasonable watch over the plaintiff and his property, and that the property was not lost by reason of their negligence, no value whatever is to be given to the conclusion of the jury that the company was negligent "in not providing force to guard the car."

5. Special verdicts must not be subjected to the utmost rigor of criticism; it is enough if it appears with reasonable certainty what the jury means.

In this case the jury found that "the president and directors of the company were negligent in not providing a proper receptacle for passengers' property, or in not providing force to guard the car." Held—That this finding is to be construed as meaning that the company was negligent both in not providing a proper receptacle, and in not providing force to guard the car.

6. It seems that under a general allegation of negligence "of defendant, its servants and employes in charge of the car," no inquiry can be made as to whether or not the construction of the car was adequate for the protection of the property of passengers.

S. B. Toney for appellant; Temple Bodley for appellee.

CROWDUS' ADM'R v. HARRISON.

Filed April 13, 1887. Appeal from Boyle Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Cross petition—Revivor—As "a cross petition is the commencement of an action by a defendant against a codefendant," and an action is not commenced until a summons is issued, a cross petition, upon which no summons had been issued when the plaintiff died, could not be revived in the name of the plaintiff's administrator.

2. Proof of allegations of value—As allegations concerning value, accompanied by an allegation of facts showing an implied promise to pay such value, need not be proved unless traversed, and there is an implied promise to pay for services what they are reasonably worth, the failure to deny an allegation that the services of an attorney were worth more than a certain amount was an admission of the alleged value.

Hill & Rives for appellant; W. B. Harrison for appellee.

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HILL, &c. v. MUDD.

Filed April 13, 1887. Appeal from Grayson Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Indemnifying bonds—Prior to any statutory provision upon the subject, an officer who levied an execution upon personal property belonging to one not a defendant in the writ was liable to the owner for the damages sustained in consequence of the seizure or sale; and the Code provisions with reference to the execution of bonds of indemnity in no way affect the right of the person whose property has been seized and sold except to require him to sue on the bond given by or for the plaintiff instead of suing the officer. Therefore, when two or more executions are levied, and separate bonds are given, each obligor becomes liable for the entire damages, and he can not apportion the loss thus inflicted on the owner in the ratio of the execution debts. An action can be maintained against all of the obligors in all of the bonds, they having made themselves substitutes for the officer.

2. Same—Under the statute, as before, the title of the person whose property has been seized and sold is not affected by the sale, but if he elects to sue on the bond, the obligors can not mitigate by showing that he might have recovered the thing itself, and so would have been damaged only to the extent of a disturbed possession, and casual injury to the thing. If, however, he has elected to assert his title, and has gotten the property again, he can not include the value of that which he has so regained in the damages he seeks to recover.

In this case the fact that the purchaser at the execution sale had the property in his possession as the servant or partner of the claimant, does not affect the right of the latter to recover on the indemnifying bond the value of the property, there being nothing to show that the purchaser in fact acted for his master or partner in purchasing the property.

3. Sale of personal property—M. and S. entered into a contract whereby M. furnished a machine which S. agreed to operate, the machine to remain the property of M. It was agreed that M. should have a part of the profits, and that when his part of the profits should amount to a sum agreed on as the price of the machine, the title to the machine should vest in S., but if M.'s part of the profits should not amount to that sum, he should retain the machine, and there should be an adjustment on the basis of profits merely. Held—That this was not a conditional sale, but merely an executory contract to sell, and the machine continued to belong to M., even as against creditors, without regard to whether or not they had notice.

G. W. Stone for appellants; J. S. Wortham and J. C. Graham for appellee.

SIMON v. LANIUS & MUSTER.

Filed April 13, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Building contracts—A building contract, after designating the depths of excavations for the foundations, provided that "if above-named depths do not give a firm and solid base, the excavations must be continued until such is obtained." Held—That the contractors were to go to the designated depths in any event; if solid ground was reached at such depths, they were to go no further; but if it was not, they were to go on until it was reached. This they agreed to do in consideration of the sum bid by them, and they are not entitled to compensation for excavations below the designated depths.

2. Same—Liquidated damages—The building contract provided that the work should be "pushed to completion as rapidly as possible, consistent with its own durability and safety," and that it should be finished complete on or before a certain day, in default of which a certain sum per day was agreed on as "liquidated damages." Held—That the only delay against which the contractors provided was such as might arise out of the work itself, and not such as might result from their mere personal inability to do the work themselves, or to employ a sufficient force to do it, and in an action against the contractors for damages resulting from delay in the completion

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of the work, they can not defend upon the ground that they were unable to employ sufficient force to complete the work within the time specified.

3. Same—Whatever may be the law in a case where a building contract contemplates the actual removal of the family to the premises, and there is a stipulation for possession at a given date and a certain amount stated as "liquidated damages" in case of failure to deliver, only actual damages can be recovered for the breach of a bare contract to have a house done by a given date, without regard to the use for which it is intended.

In this case the contractors are liable only for what the rental of the house would have been if completed, it not appearing that they had any knowledge of the fact that the plaintiff intended to use it as a residence for his family.

Young & Trabue for appellant; Dodd & Grubbs for appellees.

BALDWIN & CO. v. CROW, &c.

Filed April 13, 1887. Appeal from Jessamine Circuit Court. Opinion of the court by Judge Ward, reversing; Presiding Judge Bowden, delivering separate opinion, and Judge Barbour, dissenting.

1. An unrecorded mortgage can not be enforced as against an execution creditor whose lien had attached before he received notice of the mortgage.

In this case the execution creditor received notice of the unrecorded lien at the time the execution was levied. Held—That the lien of the execution creditor is superior, his lien having attached when the execution was placed in the officer's hands.

2. Conditional sale—Where there is a sale of personal property upon condition that the title is not to pass until all the purchase money is paid, the position of the vendor as against creditors of the vendee is that of the holder of an unrecorded mortgage.

Simrall & Bodley and B. F. Campbell for appellants; Bronaugh & Bronaugh for appellees.

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KENTUCKY COURT OF APPEALS.

NEEDHAM v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 26, 1887.)

1. Degree of negligence a question for jury—Whether one has been guilty of neglect is a question not only of law, but of fact, and it is peculiarly the province of the jury to find the degree of negligence.

In this action under the statute for willful neglect, resulting in the death of the plaintiff's husband, an employe of defendant, a special finding by the jury that the death was caused by the willful neglect of the defendant was sufficient to authorize a verdict for defendant, even though the other findings were not sufficient to enable the court to determine whether there was willful neglect. Therefore, the plaintiff's motion to set aside the verdict and award a new trial upon the ground that there was not a complete verdict was properly overruled.

2. Master and servant—As a general rule, if a servant knows that the machinery or premises provided for his use are unsafe, and without objection continues to use them, and injury results to him, he can not hold the master responsible.

It was the habit of switchmen in taking trains into a depot to run along a path at the side of the track. In this path was a dry well partially covered with a car door. A switchman was killed by stepping into this hole and being thereby thrown between the moving cars. In this action by his widow against the railroad company for willful neglect the jury found that the plaintiff's husband knew the condition of the premises, and had so known it for years. Held—That the plaintiff is not entitled to recover.

3. Ordinary care—The court properly instructed the jury that "ordinary care is that degree which is exercised by ordinarily prudent persons under similar circumstances."

R. C. Davis and Matt. O'Doherty for appellant.

Wm. Lindsay, H. W. Bruce and Lyttleton Cooke for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Holt.

John Needham, while in the employ of the appellee, the Louisville & Nashville R. R. Co. as a switchman, and when engaged in in the nighttime in running one of its trains into its freight de-

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pot, at Louisville, Ky., was thrown between and killed by being run over by the cars. It was the habit of the switchmen, in taking the trains into the depot, to either ride on the cars or run along a path at the side of the track. In this path was a hole or dry well, partially filled with debris, and covered overwith a car door. The well had been in this condition for a long time, and its size and depth is variously stated by the witnesses. Its existence and condition, as well as that of the premises, was well known to the deceased, he having been in the employ of the company for several years. There is evidence tending to show that the hole was entirely covered by the door, and also testimony to the effect that enough of it was open at one side to admit a man's foot, and that there was also a hole in the door sufficient for this purpose.

Near the entrance to the depot, and near the track, was a brick column. It is claimed upon the one side that the deceased lost his life when running along in the pathway at the side of the train by stepping into the hole, and being thereby thrown under the train, while upon the other it is said that as he was riding upon a lader on the side of the car he so carelessly swung his body out that he came in contact with the pillar, and was thereby knocked under the car.

But one witness professes to have seen the killing, and he testifies that it occurred as last stated. All of the jury, however, did not believe his version of the transaction, as they did not find that his death was caused in one way or the other.

His widow brought this action under section 3, chapter 57 of the General Statutes to recover damages for the death of her husband through the willful neglect of the company or its servants.

The petition avers that this neglect not only consisted in leaving the well in the pathway, but in failing to light the entrance to the depot.

The jury were directed to find a special verdict. It is as follows:

Q. 1. Was there or not a pathway at or near the place where John Needham was killed, designed by defendant for the use of its employes, switchmen and others, and used by them while in defendant's service?

A. We say there was.

Q. 2. Was there a hole in said pathway?

A. We say there was.

Q. 3. Was said hole, at and before the time of said Needham's death, covered over with a car door?

A. We say yes, except a small hole on the east side.

Q. 4. Was there any hole in said car door or covering, or alongside the same, in the said pathway sufficient in size to admit a man's foot, or cause him, when passing along said pathway, to stumble and fall, or be thrown to the ground?

A. We say yes.

Q. 5. If, in answer to No. 4, they say that, at and before the time named herein, there were any holes in said car door, or alongside the same, in said pathway, of the size and description mentioned, then they will say whether or not the existence of such holes were, before the day the said Needham was killed, known to the defendant's employes in charge of its tracks and pathway in the depot where he was at work, or, by the use of proper diligence on their part, could have been so known to them?

A. We say yes.

Q. 6. Was the pathway referred to in question No. 1 (if there was such a one), at and before the death of Needham, in a reason-

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ably safe and good condition, and reasonably fit for use by said Needham and others in like service?

A. We say we of the jury are unable to agree on an answer to this question.

Q. 7. Was the condition of said pathway before the death of Needham known to defendant's employes in charge of the depot and the tracks or pathways therein, or could they, by use of proper diligence, have known its condition?

A. We say yes.

Q. 8. Did defendant or its employes, before and at the time of Needham's death, keep a light at the entrance of said freight depot?

A. In answer to question 8 we of the jury say no.

Q. 8½. Was the keeping of such lights at such entrance necessary for the safety of Needham and other switchmen engaged at night on work about said depot?

A. We say no.

Q. 9. Did defendant or its employes in charge of said depot before the death of Needham know that such light was so necessary, or could they, by the use of ordinary diligence, have known it?

A. We say they did not know that it was necessary; could have known it if it was necessary.

Q. 10. Did said John Needham, at and before the time when killed, know the condition of the defendant's depot and premises at and near the place where he received his injuries which resulted in his death; and if so, how long had he known their condition?

A. He did know it, and must have known it for several years.

Q. 11. At the time when said Nedham fell between or under the cars, and received the injuries which caused his death, was he standing or walking on the ground or pathway near the track; or was he riding on the side of a freight car?

A. We of the jury are unable to agree in the answer to this questuon.

Q. 12. Did said Needham loose his life because of a fall occasioned by the hole named in question 2, and occurring as he, said Needham, was walking or passing on the ground along the pathway near the track? Or did he lose his life by falling or being knocked off the side of a freight car, in consequence of striking against or coming in contact with a brick wall or column at the south end of defendant's freight depot?

A. We say we of the jury are unable to agree in the answer to this question.

Q. 13. Was the car door over said hole, if there was such door over it, sufficiently heavy to keep it in place, without being otherwise fastened to the ground?

A. We say yes it was.

Q. 14. Was Needham, on the evening before his death, furnished with a lantern to enable him to see how to discharge his duties?

A. We say we answer he was.

Q. 15. Was the said freight depot lighted with gas when the said Needham was killed? If so, how many gas lights were then burning therein?

A. We say we answer thirty-two lights were burning.

Q. 16. Was the death of said Needham caused by the willful negligence of defendant's employes, or any of said employes?

A. We say we answer no.

Q. 17. If they answer question No. 16 in the affirmative, then they will say in what acts or act or omission or commission did such negligence consist?

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A. We say.

Q. 17½. Could the said John Needham have avoided the injuries which caused his death by the exercise of ordinary care and diligence on his part?

A. We say we of the jury are unable to agree in an answer to this question.

Q. 18. If they say, in answer to question 16, that the death of Needham was caused by the willful negligence of the employes of defendant, then they will, in answer to this, say what sum in damages plaintiff should recover of defendant because of said death?

A. We say.

The company moved for a judgment upon it in its favor, while the appellant, holding that it was not a complete verdict or sufficient to authorize a judgment, moved the court to set it aside and grant her a new trial. She now complains of the action of the court in rendering a judgment for the appellee.

It is true that the jury were unable to agree as to whether Needham, when he lost his life, was walking along the path or riding upon the cars; or whether he lost his life by falling into the hole, or by being knocked off the side of the car; but they did find that it was not necessary to have any more light at the depot entrance than the company had provided; that the deceased had a lantern to enable him to see how to perform his duties; that he knew, and had known for several years, the condition of the premises at the place where he was killed, and that his death was not caused by the willful neglect of the company.

It is urged that the last finding is but the inference or conclusion of the jury. The issue, however, was as to the existence of willful neglect. Whether one has been guilty of neglect is not only a question of law, but of fact; and it is peculiarly the province of the jury to find the degree of it.

In the case of the Louisville & Nashville R. R. Co. v. Collins, 2 Duvall, 115, it is said:

"After full and careful consideration we are satisfied that the engineer was guilty of some negligence. The degree of it was a question of fact, which, on such apparently conflicting testimony, the jury had a right to decide."

Again, in L., C. & L. R. R. Co. v. Mahoney's adm'r, 7 Bush, 237:

"Whether these and other facts developed on the trial sustained the charge of willful neglect it was the peculiar province of the jury to determine."

And in Claxton's adm'r v. L. & B. S. R. R. Co., 13 Bush, 642, the court said: "Under such a state of proof it was for the jury, and not for the court, to determine whether the company's negligence was willful."

Suppose the jury had found that Needham lost his life by stepping into the hole, and being thereby thrown under the car; yet it would have been the province of the jury to have said whether the company should be charged with willful neglect.

This was the issue. If there had been no special verdict, but a general one, the jury would have found for the company, although they may have believed that the death occurred as the appellant claims, inasmuch as they found the nonexistence of willful neglect upon the part of the company.

If, however, the degree of negligence was a question of law merely, yet not only the jury has said that there was no willful neglect, but the court has passed upon the question by affirming the finding of the jury by its judgment.

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Again, it is the duty of the master to use ordinary care in providing for the use of the servant safe machinery and premises in safe condition.

He is not, however, an insurer; and if the servant knows that they are unsafe, and, without objection, continues to use them, and injury results to him, he can not hold the master responsible. There may be cases where he has the right to rely upon the superior knowledge or means of knowledge of the master, but the above is the general rule. In this case the jury found that Needham knew the condition of the premises, and had so known them for years; and if the question of liability had been submitted to the court alone, or had properly belonged to it alone, a like judgment would probably have resulted.

We perceive no error in the instructions which were given to the jury. They were told: "Ordinary care is that degree which is exercised by ordinarily prudent persons under similar circumstances."

This instruction expresses the law in plain and concise terms, and is not, in our opinion, open to objection.

Judgment affirmed.

To a petition for rehearing Judge Holt delivered the following response of the court:

Counsel for the appellant understand that the opinion in this case takes the broad ground that when, in an action for the death of the servant through the willful neglect of the master, under section 3, chater 57 of the General Statutes, such neglect has been shown, its effect may be avoided by evidence of contributory neglect upon the part of the deceased.

It must not, however, be so understood. It was not intended to, nor do we think it admits, of such an interpretation. The language employed in that portion of it which speaks of the duty of the master to the servant in providing for his use machinery and premises reasonably safe, and the legal effect of the use of them by him, with knowledge of and without complaint of their unfitness, was used in discussing the question of the existence or nonexistence of willful neglect.

Upon a re-consideration of the case, and a careful reading of the able petition for a rehearing, we feel constrained to adhere to our former conclusion.

The petition for a rehearing is overruled.

HAYS v. GRIFFITH.

(Filed March 17, 1887.)

1. Judicial sales—Reversal of judgment—Where real estate has been sold and the title passed to the purchaser under a judgment subsequently reversed, in an action by the defendant to recover damages of those who procured the erroneous judgment the measure of recovery is the value of the property at the time of the sale, with interest, or, where the property was improperly placed in the hands of a receiver prior to the sale, with reasonable rents up to the time the purchaser obtained possession, and then with interest from that time, together with the ordinary costs of the litigation.

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2. Same—Creditors, in an action instituted by them for that purpose, obtained a judgment determining that a mortgage executed by their debtor operated as an assignment for the benefit of creditors, and ordering a sale of the property to pay debts. After the property had been sold, and a part of the proceeds distributed to creditors, the judgment under which the sale was made was reversed. In this action by the debtor to recover damages. Held—That the plaintiffs in the original action who sought and obtained the judgment are alone liable. Therefore, creditors who did nothing more than file their claims after the judgment was entered determining that the estate of the debtor inured to the benefit of creditors, are not liable for the damages sustained: nor should they be required to restore what they may have received in satisfaction of claims justly due them.

Wadsworth & Son and Cochran & Son for appellants.

A. E. Richards and John B. Baskin for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, Mary Griffith, owned the one-half of a tract of land in the county of Mason and some personal estate, and while the owner of this property she executed a mortgage on her interest in the land in conjunction with her brother, who owned the remaining half, to one Riley, to secure him in the payment of two notes for borrowed money, upon which she was bound either jointly with or as surety for her brother.

The present appellants, or some of them, who were the creditors of the brother, and also of the appellee, filed a suit in equity against the two (brother and sister), alleging that the mortgage executed by them to Riley was in contemplation of insolvency, and wit the design to prefer him as a creditor, and, therefore, their entire estate passed under the statute for the benefit of creditors. The court below so decided, and on appeal to this court it was held as to the appellee, Mary Griffith, she was not insolvent, nor was the mortgage executed in contemplation of insolvency, with a view to prefer the particular creditor. The judgment from which she appealed was not superseded, and when the mandate of reversal was returned to the lower court her land and personal estate had been sold, and the proceeds distributed, or a portion at least, to creditors. The sale of her estate under the judgment passed the title to the purchaser, although a reversal was had, as has been often decided by this court, and her remedy was to take the purchase money and interest that had already been paid to creditors for the injury she had sustained by reason of the erroneous judgment below, or she might proceed to recover damages of those who had procured the erroneous judgment, and those damages would be confined to the value of the property, real and personal, at the time it was sold, with interest on the proceeds, and the costs expended by her in the action, that is, the ordinary costs of such a litigation, not including attorney's fees or the extraordinary costs incurred by her in the defense of the original action. This is not an action for a malicious prosecution, or a proceeding to recover damages by reason of the wanton or reckless conduct of the appellants, but a claim for restitution and damages against parties who, by obtaining an erroneous judgment, sold the appellee's property when they had no right to have it sold.

When money has been collected under an erroneous judgment that has been reversed the party obtaining it may be required to pay back the money by a rule to do so, or a restitution of the

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property, if not sold, may be required in the same manner, but the proper remedy, where the land or personalty of the party has been sold and a recovery of its value is denied, is to bring an action for damages alleging such facts as will show that the plaintiff is entitled, by reason of the reversal, to what he has been deprived of by the erroneous judgment. As this court intimated, when this case was here on a former appeal, that the appellee might proceed, by rule or by a supplemental pleading, to recover what she was entitled to, we will treat the proceedings below as an action to recover damages for the wrong, as all the parties are before the court, and seem to have made no question as to the mode of proceeding.

The question of more difficulty than any other in this case is as to the time at which the appellee's land should have been valued in estimating the damages, whether at the date of the reversal or when the order of reference was made to the commissioner to take proof of value, or at the time of the sale of the land by the commissioner under the erroneous judgment.

It is insisted by counsel for the appellants that the only criterion of recovery is the amount for which the land sold, with the interest, as the error committed was that of the court below, and not the plaintiffs who brought the action.

It is plain that one of the two parties must suffer, and the party who asks for and obtains the erroneous judgment under which the property of another is seized and sold when it was not subject to be sold, should make compensation for the loss. It is true he has received only what the land sold for, but at the same time he has been the means of depriving the owner of its real value.

We have been referred to cases where the amount of recovery has been confined to the price the property brought under the judgment, with the interest, but those are cases, or the majority of them, in which the officer has sold property under an erroneous judgment that had been reversed when he had not parted with the proceeds. In such cases the officer would only be liable for the amount realized, and in the other cases cited there was no question made as to the right of the injured party to recover more than the purchase money and interest, or, in other words, that where the property has been sold restitution may be had in money. That the owner of land thus improperly sold may be restored the money for which it was sold is evident, but can he delcine that and claim its value, and, if so, when is that valuation to be made?

In the case of Thompson v. Thompson, 1 Coxe's Reports (New Jersey), 160, it is said that the words used in the judgment are that the defendant "shall be restored to all he has lost by occasion of the judgment," and this is and ought to be the measure of damages. Freeman on Judgments, section 482, says: 1st. But the plaintiff on the reversal is liable to an action to recover the damages occasioned by a sale of defendant's property made under the judgment prior to its reversal.

In South Fork Canal Co. v. Gordon, 2 Abb., U. S., 479, Mr. Justice Field states the rule to be "that the defendant or unsuccessful party in the court below is to be restored by reversal to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree, and in such case he is to have a right of action for a money equivalent."

In Sutherland on Damages, volume 1, page 831, the rule is stated to be: "But where the action is against the person who occasioned the injury recovery may be had for the whole damage the injured party sustained by reason of the erroneous judgments

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and executions. He may recover the full value of the property sold." (13 Ill., 486; Reynolds v. Hosmer, 45 Cal., 616; 6 Peters, 18.)

In this State the purchaser of property under a judgment, whether the plaintiff or a stranger, is vested with the title, and the responsibility of those procuring the judgment should be for the value of the property sold, and the fact that the plaintiff may hold what he buys makes it the more necessary for recognizing such a rule. When, then, is the property to be valued?

Some general rule must be adopted applicable to this class of cases, and it seems to us that the time at which the sale took place should ordinarily be the period at which, where a reversal is had, the valuation should be made. It is then that the owner becomes divested of title, by taking his property from him by virtue of an erroneous judgment, and passing the title to another. Like an action of trover and conversion, the value of the property at the date of the conversion is the true criterion—not what the land or propety sold for, but its value on that day, for then the plaintiff ceased to be the owner, and the absolute title vested in another.

In the case before us the appellants are required to account for the difference between the value of the land at the time the present judgment was rendered and the price it sold for to Howard, the purchaser. Having increased in value from Howard's purchase up to the time this judgment was rendered, the difference is given to the appellee in damages, and also the rents. This is erroneous. The value of the land at the date of the sale is the criterion, with the reasonable rents up to the day of sale, or to the time the purchaser obtained possession, it having been placed in the hands of a receiver, and then with interest from that time, subject to a credit by any debts that may have been paid out of the sale money to creditors who had filed their claims, and upon which the appellee was liable. Whether liable or not on any of the claims this court can not now determine. As to the personalty, all that portion of it to which appellee was entitled (one-half), and that was sold under the erroneous judgment, the appellee will recover its value.

When giving to the appellee the value of one-half of the land at the date of sale, with rents and interest as indicated, and one-half of the personalty sold, or its value, with interest, and crediting her claim by the assets paid out for debts she was liable to pay, she then has restitution by way of damages for all that she is entitled to recover, save the costs she has incurred. She is not responsible for attorneys' fees paid by the appellants, nor are they liable for fees paid to attorneys by the appellee.

There is another question to be determined as to the liability of these appellants, or some of them. The plaintiffs in the original action who sought and obtained the judgment are alone liable in damages. After the judgment was entered determining that the estate of the debtor enured to the benefit of her creditors many of these appellants did nothing more than file their claims with the comimssioner, in order that they might obtain their distributable share of the fund arising from the sale of her property, and in this way only became parties to the action. They have been made jointly liable for the damages sustained when they were in nowise instrumental in procuring the judgment. They may be liable to refund any money improperly paid them, with interest, but to no greater extent, and if the money received was in satisfaction of a claim jointly due them by the appellee, we perceive no reason for requiring restitution from them.

This case should go back to the comimissoner to audit and settle the claim of the appellee and the creditors. Her account,

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when made up, to be credited as of the date of payment, which stops interest to that extent, of the claims paid out to creditors where her liability existed, and then giving to her the ordinary costs of the litigation incurred, will make a fair and legal adjustment of the controversy.

The judgment below is reversed and cause remanded for proceedings consistent with this opinion.

To a petition for rehearing in the foregoing case Chief Justice Pryor delivered the following response:

There is a manifest distinction between the case under consideration and the cases of Morgan v. Hart, 9 B. M., 79, and Smith v. Bohon, 12 Bush, 448, and the decision here presents no conflict in the several opinions. The court below in this case had complete jurisdiction of the subject-matter and the parties. The claims allowed creditors were reduced in effect to a judgment. Their validity was not assailed, and the grounds for the reversal applied only as to the remedy adopted for obtaining judgment. The property sought to be subjected was held not to be liable to the payment of the debts, although valid, because the transfer by the debtor was not within the provisions of the act of 1856, under which it is claimed the title passed to creditors.

The creditors, or those instrumental in procuring the judgment, have been compelled to account for the value of the property sold, and with a judgment in effect for their debts, growing out and forming a part of the proceedings in the court below, it is maintained that they should pay back the money obtained on valid claims, and also account for the value of the property sold under the erroneous judgment—a judgment not erroneous as to the claims, but erroneous as to the remedy sought for enforcing them.

Where a judgment in equity is reversed it does not follow, as was held in Morgan v. Hart, that an order for restitution should go as a matter of course. Where the claim is held to be invalid, or no equity exists on the part of the party recovering, or the court has no jurisdiction of the parties or the subject of the action, the rule contended for might apply, but here the claims of creditors, valid and just, were allowed, and the present appellant a party to the litigation. They are not independent claims attempted to be pleaded as a set-off, but constituted the basis of the litigation under which it was erroneously held that the title to the property of appellant had passed to creditors. The equities of the parties require that these claims allowed be retained out of the value of the property for which the appellees were made liable, or at least that the creditor whose claim has been properly allowed and paid should not be compelled to refund the money to the appellant.

Petition overruled.

AVERY & SONS v. MEIKLE & CO.

(Filed March 26, 1887.)

1. Trade mark—Where a manufacturer so closely imitates the goods of another as to destroy the efficacy of the latter's trade-mark and deceive the

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public there is as much a violation of the rights of property in the trade-mark as if the trade-mark itself had been used.

2. Same—Damages—Where one's trade-mark has been appropriated by another, or his goods have been so closely imitated as to destroy the efficacy of his trade-mark, he may elect whether he will claim damages against the wrongdoer or require him to account for profits; and if, in an action in equity to restrain the wrongdoer, he elects to take the profits, the chancellor will not require him to show affirmatively that he has been damaged, but will assume as a matter of law that those purchasing the simulated goods would have been the customers of the plaintiff but for the simulation. And even though the plaintiff may, in such an action, have claimed "damages," this will not preclude him from electing to take the profits, which is in fact the true criterion of damages in equity, no other special injury being alleged or claimed.

This court, upon a former appeal in this case, held that the defendants had, without using the trade-mark proper of the plaintiffs, so simulated the plaintiffs' plows by using the same letters and numerals and the same coloring and staining as to deceive the public, and enable them to sell their plows as those of plaintiffs, and that the plaintiffs were, therefore, entitled to an injunction restraining the defendants from selling their plows as the plows of plaintiffs, and the case was remanded for further proceedings. Upon the return of the case to the lower court the plaintiffs asked for a reference to a commissioner, with directions to hear proof and take an account of profits, which the court refused.

Held—That the case should go to the commissioner, with directions to ascertain the number of simulated plows sold by the defendants after the simulation became complete, and the amount realized for them, the net profits to be ascertained by deducting from this sum the actual cost of making the plows, including the cost of material, value of use of machinery, hire of employes and value of the labor and superintendence of the work by the defendants themselves, and deducting also the expenses of advertising and selling.

3. Same—This imitation by the defendants was begun first in November, 1878, but not completed until in 1879. About five or six months after it was made complete, and fourteen months after it was begun, the plaintiffs instituted this action.

Held—That there was no such laches by plaintiffs as to deprive them of the right to an accounting of profits, and would have been none had the simulation been complete in November, 1878.

Muir & Heyman, John Mason Brown, Hargis & Eastin and W. O. & J. L. Dodd for appellants.

Jas. S. Pirtle, Wm. Lindsay and Geo. M. Davie for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

The original action was instituted in the court below by the present appellants, and an injunction obtained restraining the appellees from the use of appellants' trade-mark upon certain plows, and to prevent them (the appellees) from selling their plows as the plows of the appellants.

The chancellor below having denied the relief, his judgment was reversed, this court upon the hearing holding that while the appellees had not used the trade-mark proper of the appellants, they had so arranged or placed the letters and numerals used by the appellants on their plows, the plows of the appelles, and with the same coloring and staining had so simulated their manufacture as to cause their plows to be taken and sold as those made by the appellants, and that an intentional violation of the

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latter's right of property was in this way made to decieve the pulbic, and to enable the appellees to sell their manufactures as that of Avery, the appellants.

This court said: "By skillful combination of legal particles taken one at a time, and in the aggregate, leaving the mere trade-mark untouched, they have so confused its force and effect as to destroy its office and real efficacy to distinguish appellants' plows from all others." (81 Ky., 113.)

The right of the appellants to an injunction was finally determined, and the case remanded for further proceedings. On the return of the case to the lower court the appellants asked for a reference to the commissioner, with directions to hear proof and state an account of damages between the parties by reason of the wrongful acts of the appellees; that the appellees be compelled to state the number of plows that had been thus simulated by them that were sold, and the profits made on the sales, and that they be compelled to produce their books, etc. The court declined to make such an order, and the case having been transferred to the law and equity court, that court refused to instruct the commissioner to report what profits the defendants (appellees) had made, but held that as the infringment of the property right had been committed by other means than the appropriation of the trade-mark itself, it was essential in equity, as well as at law, to show the fraudulent intent, and, therefore, the profits made by the appellees should not be the measure of damages, but the actual injury sustained by the appellants. Under this view of the law, as held by the chancellor and followed by the commissioner, the appellants were only entitled to recover, when the proof showed that the plows of Meikle & Co. had been actually sold as the plows of the Averys, and there being a failure in this respect, the damages were merely nominal, and no recovery except for nominal damages was allowed.

The appellants maintain, as this court had determined that the simulation was intentional, the wrongful appropriation of this property right of the appellants was consummated when these plows were sold by the appellees or their agents, and the profits realized constituted the criterion of damages in equity when no special damage was alleged or claimed by the appellants; while, on the other hand, the appellees insist that it was a mere tort, and the injury is limited to cases where the appellees have, in selling their plows, represented them in fact to be the plows of Avery. This is the real and only issue involved on the appeal.

We do not understand that in order to constitute a violation of the right of property in a trade-mark that it is necessary the trade-mark itself should be imitated, but where the simulation in every other respect is so made as to destroy the efficacy of the trade-mark, and to deceive and induce others to believe that the manufactured article is that of the real owner of the trade-mark, it then becomes as much a violation of the right of property as if the trade-mark itself had been appropriated. Such was the decision in this case on the former appeal, and the intention on the part of the appellees in violating this right of the appellants was then finally determined. The fraudulent intent with which the simulation was made having been already adjudged, it was not necessary, on the return of the case to the lower court, for the commissioner, under an order of reference, to hear, or the appellants to offer proof on that subject, but a simple reference to the commissioner to state an account of profits upon proof adduced, which, when correctly ascertained, would give to the appellants all the relief to which they were entitled. In compliance with this order the commissioner could call on the appellees

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to disclose the number of plows sold and the profits made, or appellants could establish the profits, if any, in some other mode. To require the appellants to show an actual fraudulent representation made by the appellees to those who purchased their plows would be impracticable, and result in permitting the wrongdoer to appropriate the property of another to his own use, without rendering an account, as he would scarcely say to the purchaser: "These plows I am selling were made by the Averys."

The law makes this representation for him when he has imitated the manufactured article that he is selling so as to destroy the trade-mark, and enable him to sell it as the product of another. While the profits made by the wrongdoer are not, in a technical legal sense, to be termed damages, still many of the text-books, as well as some of the reported cases, in fixing the measure of damages in a court of equity in a case like this, say that the plaintiff is entitled to the profits, but not so at law; he may then recover more or he may recover less than the profits realized. The fraud does not prevent a recovery of the profits in equity, as the plaintiff may not ask for more or be satisfied with less. Mr. Upton, in his work on Trade-marks, in discussing the rights of the plaintiff in a case like this, says: "It is a violation of the right of property in a trade mark, while upon the principles established as the basis of the protection which the law extends to such property will be suppressed by the extraordinary power of a court of equity, and its fruits intercepted and restored." (Page 14.) An example is given in this work of a case analogous in almost every feature to the one before us, where, to use the language of the author, "an elaborate simulation had been made, not to communicate the truth, but to escape the penalty of a falsehood."

In appropriating this trade-mark, by such a close imitation as to render it difficult for an ordinary observer to distinguish the one plow from the other, and then disposing of the plows to the public, the appellees, by a well-settled rule of equity, have applied the profits to their own use that justly belonged to the appellants, and it is not necessary to inquire, nor will the chancellor stop to inquire, whether or not the appellants could have sold their plows to the same parties. The trade-mark is his property; the manufacture the result of his skill, and when one undertakes, by coloring, painting and so arranging his manufacture as enables him to virtually destroy the trade-mark of another, and to sell his own, as the product of the skill of the real inventor, it is as much a violation of the right of property in the trade-mark as if the trade-mark itself had been used. The appellants' trade-mark is a maltese cross, with the name of letters A V E R Y distributed in its arms and center. It is not pretended that this trade-mark appeared on the plows made and sold by the appellees, but the imitation in every other respect is complete, and, as was heretofore decided, made with the intent to invade the right of property in the trade-mark of the appellants. If so, the appellants are entitled to an account of profits. It has in effect destroyed the trade-mark, and enables one to sell his plows as the manufacture of another.

This is not an action for damages by the Averys against Meikle & Co. by reason of the latter selling their plows as the product of the Averys. If so, the ordinary rule in regard to the measure of damages resulting from the tort would apply. It is an action in equity to restrain the appellees from the use of appellants' trade-mark, and from making and selling plows which, by certain devices and colorable imitations, have been made to represent the plows of Averys', and thereby destroyed their tradmark or the right of property in it. It is a matter of doubt

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whether the averments contained in this equitable action are sufficient to make it a good petition at law, as an action on the case, the prime object being the injunction to prevent the wrong, and, when having the jurisdiction, the chancellor will order an account of profits. The rule as to the measure of damages, or the relief to which the plaintiff is ordinarily entitled in such a case as this when in a court of equity, is "to give as damages the amount of profits the defendant made by reason of his wrong." The rule generally recognized as the true one is to give as damages the amount of profits the defendant should have made by the infringement. (Brown on Trade-marks, page 308.) In this case it has been adjudged that the imitation was made with the design on the part of the appellees to make profit by the deception, and we perceive no reason why the appellants should not have the profits, if they claim nothing more. This court can not now, if so disposed, reconsider the question heretofore determined by requiring the plaintiffs to establish a deception that has already been adjudged to exist. In equity the wrongdoer is considered as a trustee in respect to the property, and is considered as holding the profits for the rightful owner. This rule applies as to patents, and the elementary authors on the subject say: "In trade-mark cases the rule is much the same, but in the latter considerations are involved which do not enter into ordinary patent improvements, as, for example, loss of reputation; so that courts allow greater scope in ascertaining damages." (Brown on Trade-marks.) In equity, says Mr. Sutherland in his work on Damages, "where there is ground for invoking its jurisdiction, and an infringement has been found and decreed, and there has been no unavoidable delay in commencing suit, an account of profits will be decreed, which means the net profits the infringer has actually realized." Mr. Upon on Trade-marks says: "The order usually made by courts of chancery, that the defendant keep an account of the sales made by him, to the end that he pay over to the plaintiff the profits resulting from such sales, would seem to indicate a rule." While this assertion questions the wisdom of the rule, he substitutes no other for the guidance of the chancellor, and certainly where the intention to violate appears, and the party charged is acting mala fides, he should not be heard to object to an account of profits.

The Supreme Court, in the case of Root v. Railway Co., 105 U. S., 189, said: "When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid a multiplicity of suits, and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but by requiring an account of profits, on the ground that if any had been made it was equitable to require the wrongdoer to refund them, as it would be inequitable that he should make a profit out of his own wrong." In the same case citations are made from the opinions of Vice-chancellor Wigram, in Colburn v. Simms, 2 Hare, 543, and of Sir J. Leach, in Bailey v. Taylor, 1 Russ. & M., 329.

In Colburn v. Simms it is said: "The court does not accurately measure the damage, but as the nearest approximation it can make to justice it takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged."

In Bailey v. Taylor the ground for belief is laid down by the master of the rolls as follows: "The court (alluding to a court of equity) has no jurisdiction to give to the plaintiff a remedy for an alleged piracy unless he can make out that he is entitled to the equitable interposition of this court by injunction, and in

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such case the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then this remedy, as in case of any other injury to his property, must be that law. Unless that primary right to an injunction exists this court has no jurisdiction with reference to a mere question of damages."

In the case of Graham v. Plate, 40 California, 593, the question as to the measure of damages was carefully considered, and hence has become a leading case. It was there argued that the entire profit should not be held to have originated from the wrongful use of the trade-mark, but that the intrinsic value of the article sold should enter into the question of value, and thereby lessen the profits. The court, in response, said: "Every consideration of reason, justice and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from liability for the profit he has made by the use of the trade-mark on the plea that it is impossible to determine how much of the profit is due to the trade-mark, and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit renders it just that he should lose the whole."

The case of the Leather Co. v. Hirshfield, Law Reports, 1 Equity, 298, claimed by counsel for the appellees to be analogous to this case, was where the plaintiff sued in equity as here, but elected not to take an account of the profits to which, by the decision in that case, he was entitled, but elected to claim damages by reason of the invasion of his right, and having done so it was held that the burden was on him to show the extent of his injury, and the court would not assume as a matter of law that those purchasing of the defendant the simulated goods would have been the customers of the plaintiff.

The appellants in this case did elect to have an account of profits, and asked for a reference that such an account might be taken. The fact that they claimed damages did not preclude them from electing to take the profits. This was in fact the true criterion of damages in equity, when no other special injury was alleged or claimed. In fact the case of Nelson v. Betts, 5 English and Irish Appeal Cases, 319, and De Vetre v. Betts, 6 English and Irish Appeals, —, referred to by counsel, established the rule that there can not be an inquiry as to damages, and also an account of profits; the plaintiff is not entitled, as said in those cases, "to an account of profits and also an inquiry as to damages. That principle applies generally, and without any distinction at all. It applies to every case of infringement, and, therefore, it must be taken to have settled conclusively that point, that the patentee must, in all these cases where he has a decree, elect whether he will have an account of profits or an inquiry as to damages. He can not have both." In this case the chancellor refused to permit the plaintiffs to elect, but compelled an inquiry as to the entire damage the plaintiffs had sustained, when they were not asking for it. It is true the appellants asked for damages in their equitable action, but this did not confine them to such damages as a jury could give in an ordinary action for fraud. The chancellor should have said: All I can give you in the way of compensation is an account of profits. You may elect to claim such damages as you have sustained, or take an account of profits. The plaintiffs asked for an account of profits; they claimed nothing more. We have found no case, and been cited to no authority, where there has been a notation of the trade-mark, and an injunction granted where the party wronged has been refused an account of profits unless he had first elected to claim the actual damages he had sustained, or delayed the assertion of

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his claim. In the case of Bigelow v. Dobson, 114 U. S., 489, a case, however, unlike this, the plaintiff declined to take an account of profits. In an action at law the measure of damages would be as insisted on by counsel for the appellees, and the authorities adduced in support of their views all conduce to sustain the jurisdiction of a court of equity, and the right of the appellants to an account of profits.

The plaintiff here had obtained his judgment or decree restraining the defendant from a further invasion of his right. It was adjudged that he had violated the rights of the plaintiff by appropriating his right of property to his own use, and the only question left for future consideration was the damages sustained. The plaintiff says my damages, in the form I have selected to grant the relief sought, is the net profits the appellees have realized by reason of their wrong. To these profits he is entitled. This is the doctrine of the text-books, and approved by the reported cases referred to by counsel on either side. "The net profits may be recovered in equity as profits made by the use of the plaintiff's property, and the defendant, as a constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiff's loss, and not the defendant's gain." (Sutherland on Damages, volum 13, page 631.)

The rule laid down by Sutherland, and clearly stated, is the correct doctrine as to the criterion of damages, and while that general rule may be applied to every case, where there is an intentional appropriation by the one of the other's property, by the use of the latter's trade-mark, in so assimilating the manufacture of one as to resemble the other, so as to destroy the property in the trade-mark, we perceive no reason for denying an account of profits. The aid of a court of equity has been invoked to prevent the further appropriation of the plaintiffs' right of property to the use of the defendants. That relief has been granted, and the chancellor, at the instance of the plaintiffs, will require the trustee to settle his accounts and account for the profits. The defendants occupy in fact the relation of trustee to the plaintiffs. The latter are the beneficiaries. It is upon this principle, long recognized by courts of equity, that enables the chancellor to adjust the accounts between the parties, and give to the complainant that character of relief which he coud not obtain in a common law court.

It is also urged by counsel for the appellees that the appellants have been guilty of such laches in the prosecution of their claim for profits as precludes the chancellor from giving any such relief. The imitation in this case began first in the month of November, 1878, but was not made complete until sometime in 1879, then the precise similitude appeared, and in some five or six months thereafter this action was instituted. So there was no laches on the part of the appellants, and would have been none if the similitude had been complete in the month of November, 1878, for then only fourteen months would have elapsed between the commission of the wrong, in the first place, and the bringing of the action.

Whether a lapse time of less than five years would constitute a bar to the recovery of profits in equity is not necessary to be decided. There might be such an acquiescence on the part of the plaintiff as would amount to consent, or work an equitable estoppel, but we find no such case presented by this record.

This case should, therefore, go to the commissioner, with directions to ascertain the number of simulated plows, from the time the simulation became complete, which was in the beginning of the fall of 1879, sold by the appellees, and the amount

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realized for them. The actual cost of the material used in the manufacture; the cost, which includes the hire of the epmloyes in making the plows, allowing the use of the value of the tools, machinery, power and other facilities necessary for the manufacture; expenses of selling and advertising; the value of the labor and superintendence of the work by the appellees themselves. These items deducted from the amount realized from the sales will leave the net profit, if any. If no profits, the damages are nominal only, as an election to take the profits has been made.

In some instances interest has been allowed on the profits to the plaintiffs, but there are facts and circumstances existing in this case that authorize the chancellor to withhold interest, if such is to be regarded as the general rule.

For the reasons indicated the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

WILLS v. WILLS, &c.

RAMSEY, &c. v. WILLS, &c.

(Filed April 1, 1887.)

1. Construction of devise—In the case of an immediate devise a devise over in the event of the death of the first devisee refers to that event occurring in the lifetime of the testator where there is no other period to which the words can be referred.

2. Case adjudged—A testator, after directing that his estate be equally divided between his four living children (excluding the child of a deceased daughter), "under the restrictions and exceptions hereinafter made," proceeded to place certain restrictions upon the portions of his two married daughters, and appointed his two sons as his executors, and, finally, by the last clause of his will, provided: "In case of the death of either of my children I will that their said interest shall go to their children, in case they have any, if not, it is to go equally to my four living children, or the heirs of their body, or such as may be living." Held—That the children of the testator took an absolute estate, and not merely a life estate or a defeasible fee, the testator intending by the last clause to provide how the estate should pass under the will in the event of the death of either of his children during his lifetime.

Wm. Lindsay and W. M. Beckner for appellants.

B. F. Buckner and T. S. Tucker for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Pryor.

These two actions, in the nature of ejectments, were instituted in the court below for the recovery of the land in controversy by the children and devisees of John P. Wills, who are the appellees, against the devisees of John G. Wills, the present appellants.

The right of recovery depends on the construction given the last will of John P. Wills, deceased.

The testator had four children living at the time of his death and a grandchild. He disinherited his grandchild, giving his entire estate to his four children. Their names were Martha Flynn (wife of

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Dudley Flynn), John G. Wills, Benjamin Wills and Mary E. Wills.

The son, John G. Wills, took possession of his part of the realty in the year 1870, and died after the testator, his father, without children, leaving a last will and testament by which he devised his part of the realty to the present appellants.

It is maintained by the appellee that the son, John G. Wills, had no power to dispose of his realty, by will or otherwise, and that, having died without children, his part of the estate passed under his father's will to his surviving brothers and sisters, or their descendants, who are the appellees, while the appellants insist that at the death of John P. Wills (the father) his son John G. Wills, surviving him, took an absolute estate in the land, and, therefore, the title passed from him under his last will to them.

After the death of the first testator his son, John G. Wills, claiming to be the devisee in fee of that part of the estate devised to him, sold a small strip or parcel of his land to one William S. Franklin, and the latter refusing to pay the purchase money, and questioning the title, an action was instituted for a specific performance, that upon the hearing was dismissed by the court below, and on an appeal to this court the judgment below was reversed and an opinion delivered determining that John G. Wills, under the will of his father, was invested with the fee simple title. That opinion was delivered in the year 1873, but as that action was between John G. Wills and Franklin only, the present appellees not being parties to the record, they should not be held to that judgment if the construction given the will of John P. Wills was erroneous.

The chancellor below only considered that opinion as an argument on the one side, and, perhaps, not entitled to that consideration that would have been given it if the question presented had been more elaborately discussed, held that John G. Wills, having died without children, had only a life estate or a defeasible fee in the land devised to him, and rendered a judgment for the appellees. As no argument, by brief or otherwise, was presented to this court in the case of Wills v. Franklin favoring the construction given the will by the court below in the present case, we will treat the question involved as if it had arison de novo, and, with the careful and able presentation of the views of counsel on each side, will have but little difficulty in placing a proper construction on the provisions of that will that must determine the right of property between these parties.

The language of the will is as follows:

"Clause 2. I will to my beloved wife, Nancy, what she is entitled to by law, and in addition to that whatever she may elect to take in the way of stock and servants, leaving it to her to take whatever she may want in kind, quality and quantity, she having already some money that I have never given her, which is not to be taken into consideration.

"3. It is my will that after the special devise above, that all my property be equally divided among my four living children: Martha Ann Flynn, John G. Wills, Benj. E. Wills and Mary Elizabeth Wills, under the restrictions and exceptions hereafter made.

"4. I give to my granddaughter, Martha Locknane, formerly Martha Flynn, one dollar.

"5. It is my will that whatever portion of my estate should go to my daughter, Mary Elizabeth, shall go to her exclusive benefit and control, to the total exclusion of her husband, both as to principal and profits, and proceeds; and this provision is also to apply to my daughter, Martha Ann Flynn, I herein making the

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same provisions with regard to her interest, not, however, through any lack of confidence in her present husband.

"6. I will my sons, John G. and Benjamin E. Wills, my executors herein, and request them to carry out faithfully the provisions of this will.

"7. In case of the death of either of my children, I will that their said interest shall go to their children, in case they have any; if not it is to go equally to my four living children, or the fruit of their body, or such as may be living."

The will of the common ancestor, John P. Wills, was probated in the year 1869, and his estate divided between his four children, the devisees, in the year 1870, and the nature, extent and character of the interest devised to each must be determined under the recognized rules of construction by which courts are aided in arriving at the intention of the testator.

Did the testator in this case intend to give to his four children the fee, subject to be divided at their death, without leaving children, or, in other words, did the language used create a defeasible fee? If not, did the testator intend to give to each of his children only an estate for life in the estate devised, or was it his intention to give to them the absolute fee in the event they were living to take the estate at his, the testator's, death?

When this case was heretofore in this court the case of Hughes v. Hughes, 12 B. M., 115, was referred to as recognizing the following rule of construction, that should be applied to the language of the present will, and that is: "In the case of an immediate devise it is generally true that a devise over, in the event of the death of the preceding devisee, refers to that event occurring in the lifetime of the testator, and this construction prevails where there is no other period to which the words can be referred." The application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intention, to be gathered from the entire will.

A defeasible fee is where the devisee becomes invested with the fee simple title, subject to be divested upon the happening of some contingency provided by the will, as where an estate is devised to A, and if A should die without children then to B, in such a case the devise over takes effect in the event A dies without children, and B becomes the owner in fee of the estate. If A should have children living at his death, then B takes no interest in the estate, nor will the children left by A take any interest whatever under the will, but will inherit the estate from A. The contingency upon which A is to be divested of title never happening, he was invested with the fee, and the estate passed by descent from A to his children, and no right was acquired by them under the will. They inherit it from the father, because he was the absolute owner of the estate. Therefore, in the case before us, there was no defeasible fee, because, by the express language of the will, the testator has provided that "in case of the death of either of my children (John G. Wills being one of them) their said interest shall go to their children, in case they have any; if not, to my four living children or the heirs of their body," etc. The children of the four devisees, if any, were, by the provisions of the will, to be vested with an interest upon the happening of a contingency, and the question presented in the case is, what is that contingency, and when was it to happen, by which the children, if any, were to take, and if no children, the surviving brothers and sisters of the immediate devisee? We have seen that it was not a defeasible fee, and there being a

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devise over to the children, if any; and if none, to the survivors of the first takers, the four children of the testator took either a life estate in the property devised, and at their death it passed under the will to their children, and if none, to the survivors of the immediate devisees, or they were to take in the event the immediate or first devisee died before the testator. Did the testator intend to give to his four children a life estate only? This is the real question involved. That the children of these devisees were to take under the will in a certain event is manifest, and the survivor, if there was no children; and if so, was the event upon which the survivors were to take the death at any time of the first devisees without children, or was the testator providing for the contingency of his children, or some of them, dying before the will took effect, that is, before his death? Was he providing for some one to take in the event one or more of his children died before he died? The will of the testator was written and signed when he owned land, slaves, stock and other personal estate, including moneys, choses in action, etc., and from its contents he must have been possessed of considerable estate, real and personal. He made ample provision for his wife; disinherited his grandchild, the child of a deceased daughter; then gave his entire estate to his four children, naming them, subject to the restrictions and exceptions thereinafter set forth. He then provided that, as to his two daughters, their husbands were to have no interest in the estate devised to them, either in the principal or profits, and then makes his two sons his executors, with directions to them to execute faithfully the provisions of his will. It was so far a complete instrument, except the signing and attestation, as required by the statute. He had made an absolute devise of his estate, after providing for his wife, to his four living children, with the restrictions and exceptions as to the interest devised to his two daughters, by which their husbands were excluded, and appointed his executors. The will seems to have been written by one of more than ordinary intelligence, is plain and undoubted in its meaning, until we reach the 7th, and last, clause of that instrument, that seems to be an addenda to an otherwise complete will, in which the testator attempts to provide the manner in which his estate is to go on the happening of a certain contingency, and that is: "In case of the death of either of my children, I will that their said interest shall go to their children, in case they have any; if not it is to go equally to my four living children, or the heirs of their body, or such as may be living."

It is evident that the draftsman of the instrument must have known how to create a life estate, and equally so, we think, that the testator had no intention of limiting the devise of his moneys, choses in action, slaves and land, to a life estate in his four children. Instead of saying, I give this estate to each of my children for life, and then to their children, and if no children, then to my surviving children. If such was the purpose of the testator the draftsman was evidently attempting to provide for the contingency of one or more of the principal devisees dying before the testator, and there being no one to take, then he says: "In case of the death of either of my children, I will that their said interest shall go to their children, if any; if not it is to be equally divided between my four living children or their bodily heirs." The testator wanted his four living children to have the estate and not his grandchild, and the thought suggesting itself that some of his children might die before he did, without children, he could make a provision by which he could secure the estate to the surivvors. There was no devise to either of the fourchildren, and when they should die to their children, for this

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would be but a life estate. There was no devise to John G. Wills, and if he had no children, or died without children, then to the survivors, for this would be a defeasible fee. It was simply a devise over, in the event the child given the absolute estate was not living at the testator's death to take it. In that event his said interest was to go to his children, if any, etc.

If the restrictions and exceptions mentioned in the third clause of the testator's will, by which the absolute estate is devised to the testator's four children, are to be applied to the seventh, and last, clause of the will it can make no difference in the construction to be given that instrument. "In case of the death of either of my children, I will that their said interest shall go to their children, in case they have any." The death of the testator's four children was an event that must certainly happen, and the period of time at which the children of the testator's children were to take is the important inquiry.

This was not a devise over, in the event the immediate devisees died without children, but here was a devise first to the children of the immediate devisee, and if none to the surviving brothers and sisters. The event then upon which the devisee was to be deprived of his fee was not his dying without children, because the devise was first to the children, and if none then to the surviving devisees, showing plainly the purpose of the testator to substitute a devisee who would take in the event either one or all of his children should die before he did, that is, the child or children of the devisees are to take, and if none, to the survivors. In case of the death of either of my children, I will that their interest shall go to their children, leaving out the second devise over, and it is a devise first to the child of the testator, and in case of his death the said interest "shall go to his children."

Now if this creates a life estate in the immediate devisee then the appellees are entitled to recover. The devise over to the survivor after the direct devise to the children of the immediate devisees can not affect the construction of this provision of the will. It is equivalent to a devise to A, and if he is not living to B, and if B is dead to C. If A is living at the death of the testator, neither B nor C can take, because A survives the testator, and is ready to take the estate. A devises to B, and f he should die without children, to C. the event upon which C takes is the death of B without children, and is a defeasible fee, but such is not the provision of the will before us. Illustrations or examples of the various rules of construction in cases of wills are to be found in the case of Edwards v. Edwards, 15 Beavan, 357, and relied on by counsel for the appellee in this case. The first of the four classes of cases is "that of a simple gift to A, and if he should die then to B." The second is "that of a gift to A, and if he should die without children, then to B." Third, "A gift to one for life, and after his death to A, and if A should die then to B." Fourth, "A gift to one for life, and after his death to A, and if A should die without leaving a child, to B."

If the appellees are entitled to recover this case must be brought within either the second or third class of cases. It can not be brought under the second clause, because in that class the first devisee takes the fee, if at his death he has a child or children, and his children when he dies take from him and not under the will. Here the children of the immediate devisees are to take under the will upon the happening of a contingency, and that contingency is the death of the immediate devisee before the

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death of the testator. This case can not come under the third class, because, for the reason already given, there was no intention on the part of the testator to create a life estate.

In the case of Edwards v. Edwards a life estate was first carved out by the testator and given to B absolutely, but if he should die without children, then to B's brother. B survived the life-tenant, and it was held that he took an absolute estate. This is really an authority against the construction given the will below, although the cases are not analogous, for it is to be assumed that these devisees had only a life estate it ends the controversy, and the judgment below should be affirmed.

In the case of O'Mahoney v. Burnett, English and Irish Appeals, 388, the bequest was to A, and if he should die unmarried or without children, to B, and it was held to be an absolute gift to A defeasible by the gift, and in the event of his dying at any time unmarried or without children. The devise in Edwards v. Edwards was questioned to some extent by all the judges in the case of O'Mahoney v. Burnett, but we see no reason for controverting the rules laid down in that case. In O'Mahoney v. Burnett there was no devise to the children of the first devisee, but a fee to the first taker, to be defeated if he died unmarried or without children.

This case comes under the first class of cases mentioned in Edwards v. Edwards. The devise first to A, if he should die, then to B, and if B should be dead, to C. First, to the immediate devisees of the testator, in case they should die; then to their children, in case they have any; if not, it is to go to the surviving devisees. If the devise to the children had been omitted and the deivse had read "in case of the death of either of my children, then to the survivors," the intention of the testator as to the time would necessarily refer to his own death.

Cases may be found in the English reports controverting this rule, and at variance with the rule in this State as to the time at which an estate is to vest, or the devisee to be divested of his title, but it must be recollected that the effort of the courts in this country, when not inconsistent with the intention of the testator, is to prevent the title to real estate from remaining contingent, and unless there are plain indications of a contrary intent to hold the title vested in those claiming under the will or gift, and we can not, when looking to the provisions of this entire will, hold that the prime objects of the testator's bounty were to be confined to a life estate in all the property, real, personal and mixed, devised to them.

In the case of Ware v. Watson the testator had three sons and three daughters. He divided his estate into six shares, with the direction that each son's portion should be paid to them as soon as convenient after the testator's death, and provided "that if any son died without having issue living at his death, the share intended for the son should accrue to the survivors of the testator's children," etc. This provision was omitted from the devise to his daughters, and the court, looking to the entire will, held that the shares of the sons surviving vested absolutely at the death of the testator. (7 DeGex, M. & G., 247.)

This last case is much stronger, and goes further in support of the appellant's claim, although an English case, than any we have been able to find, and still we think, when looking to the whole will, such was the testator's intention.

Neither the case of Farthing v. Allen, 2 Maddock's Chancery, 503, or that of Child v. Giblett, 3 Myle & Keene, 281, sustain the right of recovery in the appellees. In the last-named

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case the testator devised his estate in equal portions to his two daughters, and in the case of the death of either, to the survivor, and in the event of their marrying and having children, then to the child or children of them or the survivor, if they attain the age of twenty-one years; but if not, then among the children of Paul Giblett. The question presented in that case was whether the two daughters surviving the testator took an absolute estate at his death or an estate for life, the general rule being that where the devise is to the survivor, in the case of the death of one of the devisees, it means the death of the testator. The court said it was qualified by the devise over to the children of Paul Giblett.

Where there is an absolute devise to several, under which the devisees or donees would be entitled to the possession at the death of the testator, with the proviso that if either should die, then to the survivors, it is a universal rule that the survivorship refers to the death of the testator, but where the gift is to take effect after the termination of a particular estate, the survivorship applies to those who survive the period of distribution, that is, the termination of the particular estate. (Wren v. Hyne's adm'r, 2 Met., 129.) In Birney v. Richardson, 5 Dana, 424, Richardson devised his estate to his widow during widowhood, and if she married, then to his several children; but if either should die without children, then his or her part to go to the surviving children. It was held that the children living at the marriage of the widow took the absolute estate, not defeasible at their death at any time without children. In discussing that case this court said: "Had the bequests been direct and immediate to the testator's children as tenants in common, then the only question as to dying without issue would have been whether it meant a death in the testator's lifetime, or at any time, however remote. And nothing else appearing to aid in the interpretation, the law would incline to construe 'dying without issue' as meaning the death of the legatee without issue in the testator's lifetime. But when the gift is not immediate, but in remainder, and there is a bequest over on the legatee's death alone, or death without issue, the inquiry will be enlarged, and in such a case the simple unexplained words, dying without issue, will be construed as meaning the death of the legatee after that of the testator, and before the time of distribution, or when the legacy may be reduced to possession."

In the present case there was no remainder interest in the four living children, but the absolute estate devised without any particular estate intervening, and a substitution of other devisees by the testator in the event his children, or any of them, died before he did. Can there be any doubt but that the testator intended his children to take the estate in the event they survived him? It is insisted by counsel that his purpose was to invest the four children, who were the objects of his bounty, with an estate for life only, with the fee in their children, if they had any, and if none, to the survivors of the tenants in common. Such is not a proper construction of the will of the testator. It might be argued, if required, in support of the conclusion reached that the language used in the latter part of the seventh, and last, clause of the will sustains the construction heretofore given that instrument. The testator had but four children when the devise was made, all of whom were living at his death, and in making provision for those whom he decreed should be the recipients of his bounty (having disinherited his grandchild) after saying "that in case of the death of either of my children, I will that their said interest shall go to their children, if they have any," he then proceeds to say: "If not, it is not to go equally

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to my four living children or the heirs of their body, or such as may be living." Living when? At the death of the testator. His four living children were to take, and he was providing for the contingency of their being, by reason of death, prevented from accepting his bounty. The seventh clause is awkwardly written, but the entire will, properly construed, gave to the four children who survived their father, the testator, the fee simple and absolute title to the moneys, choses in action, stock and lands devised to them by his last will.

The judgment below is, therefore, reversed and remanded, with directions to sustain the demurrer of appellants to the two petitions and for proceedings consistent with this opinion.

LUEN v. WILSON.

(Filed April 16, 1887.)

1. Champerty—Where one has conveyed property adversely held he can not, without first rescinding or abandoning the contract in good faith, be heard to say it was champertous and can not affect him.

In this action of ejectment the defendant offered in evidence a deed executed by the plaintiff conveying the property in controversy to another. The plaintiff objected upon the ground that the deed was champertous and the court rejected it upon that ground, thus deciding, in effect, that the defendant, who was, by his evidence, relying upon adverse possession to defeat a recovery, was in the adverse possession of the land when the deed was executed. Held—That this was a question for the jury, but that aside from this the deed should not have been rejected for the reason that the plaintiff could not be heard to say that his deed was champertous.

2. Ejectment—Where in an action of ejectment both parties are claiming under the same third party, it is sufficient for the plaintiff to show a derivation of title from him, and it is not necessary that he should trace his title back to the Commonwealth.

J. F. & C. H. Fisk for appellant.

H. P. Whittaker for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

This action of ejectment was instituted by the appellee, Rothwell Wilson, against the appellant, John Luen, on May 7, 1884, to recover a lot in the city of Covington. The evidence shows that one Hunter conveyed it to Joseph H. and E. Taylor in 1853; and that the Taylors deeded it to the appellee, Wilson, on February 10, 1860.

The appellant, Luen, held a claim against it for a street improvement, and in 1875 brought an action to enforce his lien, the Taylors alone being defendants to it and proceeded against as nonresidents. A judgment was obtained, the property sold and purchased by Luen, and on June 14, 1878, it was conveyed to him by a commissioner's deed.

The testimony does not manifest or place beyond all doubt the identity of the property in contest, but, in our opinion, when considered as a whole it shows that the lot conveyed by the Taylors

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to Wilson and described in the petition, is the same as that deeded by the commissioner to Luen, and now claimed by him.

It is urged that the appellee was not entitled to a recovery because he did not exhibit or trace his title back to the Commonwealth. Both parties are, however, claiming under the same third party, and in such a case it is sufficient to show a derivation of title from him. (2 Greenleaf on Evidence, section 307.)

It appears that Luen took possession of the property several years before he obtained his commissioner's deed, possibly so long before that he may have held it for fifteen years before this action was brought; and it is, therefore, claimed that he had a possessory title to it, and was under the statute of limitation entitled to hold it. This is not clearly shown by the testimony, however, but if it were, yet adverse possession is not pleaded; and it is evident, as the jury found in their special verdict, that he took possession merely because he had a lien on it, and with the intention of enforcing it when the owner should appear.

Moreover, the bringing of the suit for the enforcement of his lien dissipates this ground of defense even if it had been set up by pleading.

As the Taylors had parted with the title long before Luen brought his action to enforce his lien, it of course follows that he acquired none by his commissioner's deed.

There is but one other question necessary to be considered. It is fatal, however, to the judgment rendered below.

Upon the trial the appellant offered to introduce in evidence, and for the purpose of defeating a recovery by the appellee, a deed made by the latter on September 17, 1883, to one Patton to the property in contest, and which had been duly acknowledged and recorded. The court rejected it, and refused to let the appellant show by a witness that it covered the property in dispute. This ruling was doubtless based upon the ground that the deed was champertous, and, therefore, void. It is true that the appellant was by his evidence, but not by plea, relying upon adverse possession to defeat a recovery; and the testimony already offered tended to show such holding by him at the date of the deed to Patton. By its rejection, however, the court in effect decided that Luen was in the adverse possession of the land when it was executed. This was a question for the jury, but aside from this it should not have been rejected.

Prima facie it passed the title to Patton, and Wilson, when he brought the action, had no right to sue.

It is said, however, that under the statute it was absolutely void. It is true that section 2, chapter 2 of the General Statutes provides that all sales of conveyances of land at the time adversely held shall be void; but it must be considered in connection with section 4 of the same chapter, which provides who may prove this in bar of an action.

It says:

"The person in the adverse possession, according to the provisions of the second and third sections of this chapter, his personal representatives, heirs or assigns, or the person under whom such occupant claims or holds, his personal representatives, heirs or assigns, may give in evidence under the general issue, or may plead the sale or purchase of any pretended right or title in violation of the second section of this chapter, or any contract or agreement made in violation of the third section of this chapter, in bar of any suit or action against them to recover the possession or title to the land so held."

Here Patton is not suing for the property, but the grantor in

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the deed to him; and when the defendant offers it in evidence to defeat a recovery the grantor, and not the party in possession, says it is champertous, and, therefore, void and inadmissible as testimony. The party in the adverse possession does not offer it as showing a champertous sale; but when it appears from it that the plaintiff has no title, he says that it is champertous, and it can not, therefore, affect me.

It has been held by this court in more than one case that if one who has previously sold land to another seeks to recover, he can not maintain his action upon the ground that the sale was champertous. The champertous contract must be abandoned or rescinded in good faith before he brings his action. (Hobson v. Hendrick, MS opinion, Nov. 12, 1885; Harman, &c. v. Brewster, &c., 7 Bush, 355.)

In the case now before us there is nothing showing that this had been done. In fact it is not so contended.

Wilson can not prosecute the action for the benefit of Patton.

In such case the appellant can rely upon the still existing champertous contract. The law of champerty was intended as a shield to the possession, and not as a weapon of offense; as a defense to the remedy sought by a plaintiff; and a grantor, after he has conveyed property adversely held, can not, without first rescinding or abandoning the contract in good faith, be heard to say that it was champertous, and it can not, therefore, affect me. This is the right of the occupant; and his protection was clearly the aim of the statute.

It results that the lower court erred in rejecting as evidence, upon behalf of the appellant, the deed to Patton and the testimony showing that it covered the lot in contest; and the judgment is reversed, with directions to grant a new trial and for further proceedings consistent with this opinion.

ROBERTS v. HOSKINS' ADM'R.

(Filed April 23, 1887.)

A vendee, who, having paid part of the purchase money, was sued for the unpaid balance, made his answer a cross petition, sought a rescission of the contract and a sale of the land to repay the purchase money he had paid. He died pending the action and his cross petition was revived in the name of his administrator, and a judgment rendered canceling the contract. Held—That the cross petition should have been revived in the name of the heirs as well as of the administrator.

Carroll & Barbour for appellant.

John D. Carroll and Wm. M. Cravens for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Roberts, executed to Hoskins a bond for title to a certain tract of land, and for which the appellee's intestate gave his notes and paid part of the purchase money. The wife of Roberts owned the land in her own right and died leaving children, who took the land by descent from their mother. The

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death of the wife left Roberts tenant by the curtesy, and he, having signed the notes for the purchase money to Harford, the latter brought suit against Hoskins to enforce the contract. Hoskins died leaving children, but before his death had answered the suit of Harford, setting up the defect in the title and asking for a cancelation of the contract and a sale of Roberts' life estate in the land to repay the purchase money and its interest. At Hoskins' death, after answer, his answer being made a cross-petition, the cross-petition was revived in the name of his administrator, and a judgment rendered canceling the contract and subjecting the curtesy of Roberts to the payment of the money paid by Hoskins in his lifetime.

Roberts' complaint is that the cross-petition of Hoskins should have been revived in the name of his children as well as his administrator. The title, if any acquired, passed from Hoskins to his heirs at law, and in order to divest them of title and sell this realty, they were necessary parties. It is urged that Hoskins had no title, and acquired none by his bond. It is true that Roberts had no title at the time he sold, but the death of his wife made him a tenant for life, and Hoskins sought to subject that on the idea that, to the extent Roberts had acquired title, the land was subject to sale to repay him what he had advanced on the purchase. It was an equitable lien created by reason of the inability of Roberts to make his title perfect. That title the children might have occupied if beneficial to them in preference to a personal judgment. While the reasons for a rescision are palpable, the vendee or his heirs are necessary parties. The intestate, Hoskins, held through bond for title, and the rescission could not be made without the heirs of Hoskins were before the court. The judgment is in every respect a rescission of the contract for the sale of land between these parties.

The judgment is, therefore, reversed, with directions to make the children of Hoskins parties, plaintiffs or defendants, to the cross petition and for proceedings consistent with this opinion.

SEELEY v. MITCHELL'S ASS'EE, &c.

(Filed April 23, 1887.)

1. Partnership land—Mortgage—Land conveyed to members of a copartnership as tenants in common, but purchased with copartnership funds and used for copartnership purposes, is treated in equity as copartnership property, and the creditors of the copartnership are entitled to priority of payment out of it in preference to the creditors of the individual members of the firm. But if one member of the copartnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, the mortgagee having no notice of the character of the property in equity as copartnership property, he is entitled to hold it under his mortgage in preference to the partnership or its creditors.

2. Judicial sales - Lis pendens - C. executed a mortgage to M. after a judgment in favor of R., for the enforcement of a lien upon the same property, had been rendered R. assigned his judgment to S. In an action to which both M. and S. were parties S. set up the judgment lien which R. had assigned to him, and asked for its enforcement, and M. thereupon asserted his mortgage lien, and asked for its enforcement, subject to the judgment lien of S. Pending this action S. had the property sold under the judgment

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which was assigned to him, and became the purchaser, and in response to M.'s pleading, asserting a lien. he claims the property absolutely. Held—That the conduct of S. must be held to have been an abandonment of his right to enforce his judgment, save in this action, and he can not now be heard to say that M. acquired his lien pendente lite.

Wright & McElroy for appellant.

Rodes & Settle and Edward W. Hines for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Holt.

We can not review the accounts between the appellant, E. B. Seeley, and D. B. Campbell as partners, composing the firm of Campbell & Seeley, because Campbell is not a party to this appeal. They are, therefore, not now involved.

The deed of Campbell to Seeley to an undivided one-half of the mill property was dated and acknowledged in February, 1881, and recorded on March 8, 1881.

The mortgage given to Mrs. Whitehead by Campbell upon the remaining half was executed on March 24, 1881, and that to Albert Mitchell on the succeeding day.

The appellant, Seeley, now contends that for advancements made by him to the firm of Campbell & Seeley, and for its indebtedness to him and to its creditors, he has a lien superior to that of the mortgagees upon the half interest so mortgaged.

It is not contended that the partnership existed prior to the time of the conveyance by Campbell to Seeley. It is not shown that any firm indebtedness was created or any firm business transacted prior to the time when the mortgages were executed, unless in a single instance, and the debt which may then have been created was, sometime after its inception, embraced with other debts in a joint note, nearly all of which was subsequently paid off with firm means, and, in any event, it does not appear that the mortgagees when they became such, knew of the existence of the firm, if indeed it was then in being.

In Jones on Mortgages, volume 1, sections 119 and 120, it is said:

"Land conveyed to members of a co-partnership as tenants in common, but purchased with co-partnership funds and used for co-partnership purposes, is treated in equity as co-partnership property. The creditors of the co-partnership are in such case entitled to priority of payment out of it in preference to the creditors of individual members of the firm. But if one member of the co-partnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, as, for instance, for a loan of money, the mortgagee having no notice of the character of the property in equity as co-partnership property, he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record. * * * A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate, but of his interest in the portion mortgaged, after the payment of the firm debts, upon a settlement of the partnership accounts." Boone on the Law of Mortgages, section 26, is to the same effect.

If a mortgagee takes a mortgage with knowledge of facts, which make the property in equity assets of a firm, then he can not ask to stand in front of those who have a right to have it

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applied as partnership assets. He, however, holds as a purchaser. and if he had no notice that it was partnership real estate, then there is no prevailing equity in favor of the partnership or its creditors. It might properly be held, perhaps, that the continued use of the property by the partnership is notice of its equitable right in it; but in the case now presented it does not appear that the mortgagees knew, when their mortgages were executed, that the firm of Campbell & Seeley was using the property, or even that such a firm existed.

This is not all, however. It is not averred in the pleadings that it was then in existence even.

The appellant, Seeley (a defendant below), in his amended answer, says:

"After his purchase of an undivided half interest in the four acres of ground and appurtenances, known as the D. B. Campbell mill propety, this defendant and D. B. Campbell conducted and run said mill in partnership, under the firm name of Campbell & Seeley, and bought timber, sawed it up into lumber and conducted the general business of a sawmill."

This is the extent of his averment upon this point. He says that the partnership was formed after the purchase of the half interest in the property. But whether immediately or how soon after is not stated.

In view of the rule that the statement must be regarded most strongly against the pleader, we can not construe this as amounting to an averment that the partnership was formed prior to the execution of the mortgages, which were executed soon after the conveyance by Campbell to Seeley; and there is neither averment nor any evidence showing that the property had been devoted to partnership use prior to the execution of the mortgages, or that the mortgagees so knew, or were eveu aware, that such a firm as Campbell & Seeley existed.

Neither the deed from Campbell to Seeley nor the mortgage to Mrs. Whitehead gave such notice. The latter merely recited that the property was "owned by Campbell & Seeley."

The judgment giving the mortgagees priority as to the mill property is correct.

One other question remains to be considered.

The mortgage to Mitchell also embraced a tract of land known as "Kopley Knob." In his petition, however, he did not describe it or ask that his lien be enforced against it. The answer of Seeley, however, and which was a cross petition against Campbell, set up a mortgage lien of $1,500 on the "knob" in his favor elder to that of Mitchell. It subsequently appeared, however, that it was settled. It also averred that one Rodes had a mortgage lien upon the "knob," then in the form of a judgment. and that "said Rodes has assigned and transferred said lien, or will assign and transfer said lien judgment, to this defendant;" and claimed that it was superior to the mortgage liens of Mitchell and Mrs. Whitehead and asked its enforcement and the sale of the "knob" to pay it.

This pleading was filed on June 19, 1882. Subsequently the Mitchell lien was set up as to the "knob" and its enforcement asked, subject, however, to the lien of Seeley for the Rodes judgment. He, however, in response to it, claimed the property by reason of the following facts:

The Rodes judgment was rendered on February 12, 1878. A supplemental judgment, directing the execution of the first one, was entered on October 29, 1880. Seeley appears to have purchased it prior to the filing of his answer on June 19, 1882, in this suit,

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but it was not assigned to him until August 1, 1882. Neither Mitchell nor the party to whom he has assigned his debt were parties to it.

After Seeley had thus set up his lien for it in this suit and asked a sale of the property to pay it, and while it was pending, and on August 28, 1882, he had the "knob" land sold under the Rodes judgment; purchased it; had the sale confirmed, and a deed made to himself. He, therefore, now claims it absolutely, and resists a sale of it in this action.

It is true that the Mitchell mortgage was executed after the rendition of the Rodes judgment, and it is, therefore, said that there was a lis pendens when Mitchell obtained it. The Rodes judgment was, however, allowed to lie for nearly five years without any step being taken to enforce it, and when it was done the owner of it was asserting it in another suit with another lien creditor as the superior lien, and asking in that suit that the property be sold to pay it. This he had voluntarily done, because when he set up the lien the other lien creditor was not asserting his lien as against this property. The question of priority of lien had been raised by Seeley himself, and was pending before the sale of the property under the Rodes judgment. It is true that the assignee of Mitchell did not become the owner of the Mitchell debt until after the purchase of the land by the appellant, but he stepped into the shoes of his assignor.

The parties had a right to believe that the question of lien would be settled in this suit. The appellant, Seeley, had asked this very thing. To say now that he is entitled in equity to hold the property as the owner, by virtue of his purchase under the Rodes judgment, would allow him to profit by his own conduct, which was, at least, misleading to the other party. The latter had a right to believe, from the conduct of the appellant, that he had abandoned the enforcement of the Rodes judgment save in this action. The supplemental judgment in the Rodes case was entered prior to the assertion by Seeley of his lien in this suit, and the conduct of the latter in thus asserting it deprives him of the right to say that the other lien holder acquired his claim while there was a lis pendens, and must be held as to such other party to have been an abandonment of the right to enforce the Rodes judgment save in this action and by a further order of the court.

The lower court correctly held that the appellant, as to Mitchell's assignee, held a lien only upon "Kopley Knob," and properly ordered its sale to satisfy the liens, giving the appellant the priority.

Judgment affirmed.

PRICE v. SWAGER'S TRUSTEE.

(Filed April 23, 1887.)

A trustee appointed by will having refused to act, the chancellor appointed another in his stead, investing him with all the powers and duties that had been conferred by the testator on the trustee who was designated as such by his will. One of the powers conferred by the will upon the trustee named therein was to lay off a certain tract of land into lots and sell them, "or such parts of them on such terms as might be considered beneficial to his (the testator's) estate," and invest the proceeds in improving other property. Held—That this was not such a discretion or confidence placed in the trustee

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named by the testator as terminated with his refusal to act, and, therefore, the order of the chancellor investing the trustee named by him with the same power was effectual for that purpose.

E. F. Trabue for appellant.

Chas. H. Gibson for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

By the last will of Joseph Swager he appointed O'Leary his executor and trustee, with certain powers and directions as to the disposition of his estate, and among them he directed the trustee to lay off certain lots and streets in a tract of thirteen acres of land lying on the Dunkirk road, in the county of Jefferson, and to sell and convey such portions or parts, or the whole of said lots, on such terms as might be considered beneficial to his estate, and invest the proceeds in improving the lots unsold, or upon any other unimproved ground the testator owned in the city of Louisville. The will then proceeds to direct the trustee or executor as to the disposition to be made of the estate between his children and grandchildren.

O'Leary refused to accept the trust or to qualify as the executor, and the appellee, Sidney Hobbs, was, by an order of the Jefferson County Court, appointed administrator, with the will annexed, of the estate, and qualified as such. After his qualification he instituted an action in the Louisville Chancery Court against the children and devisees of the testator for a settlement of his accounts, and, at the instance of the children, the appellee, Sidney Hobbs, by an order of court in that case, was appointed trustee in place of O'Leary, who declined to accept the trust.

The appellee qualified as trustee, and, by an order of the chancellor, was invested with all the powers and duties that had been conferred by the testator on the trustees who were designated as such by his last will and testament. Under this power conferred by the chancellor the appellee, as trustee, proceeded to lay off the thirteen acres into streets, alleys and lots, and afterwards sold all the lots to the appellant, Vernon D. Price, for $12,500, a part of which was paid in cash and the balance in deferred payments.

The appellant refuses to pay the purchase money or accept a deed from the trustee, in accordance with the terms of sale, on the ground that the chancellor had no power to confer on the trustee appointed by him the right to sell this realty in the manner directed by the testator when appointing the trustee by his last will, and who refused to qualify.

The object of this proceeding is to enforce the contract by compelling the appellant, Price, to comply with the terms of sale, and accept the title offered by the trustee. The power to sell is expressly conferred by the will of the testator, and the refusal of the executor and trustee to qualify leaves no one to execute the trust unless the right to appoint a trustee is with the chancellor. The mere appointment of the appellee as trustee would vest him with no other right than to hold and possess the property for the beneficiaries of the trust, but in this case the chancellor has gone further and invested the trustee appointed by him with all the powers that had been given the trustees designated by the will, and the mere fact that the lots and streets were to be laid off, and a portion of all sold as might be deemed by the trustees named in the will

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beneficial to his estate, was not such a discretion or confidence placed in O'Leary by the testator as finally terminated with the refusal of O'Leary to qualify. A mere power to be exercised in the management of the estate or for its benefit is not of such a personal character as applies alone to the person named as the trustee, and directed to execute it. The direction to lay off the land into lots and sell them, or any portion of them, without adding the words as might be considered beneficial to the estate, would impose on the trustee the duty of so executing the trust as would, in his judgment, prove beneficial. The law imposed the duty on the part of the trustee of looking to the interest of the beneficiaries, and the desire of the testator that the lots should be sold is manifest from the provision of the will creating the trust. Without the aid of the chancellor the trust could not be executed, and it is a familiar rule of equity that a trust shall not fail for the want of a trustee.

The cases of Warfield v. Brand, 13 Bush, 77, and Harirs v. Rucker, 13 B. M., 564, settle the question presented. Besides, the trustee, clothed with all the powers conferred on the original trustees, is, in the same court of equity from which he derived his powers, alleging the manner of its existence, and asking the chancellor to enforce the contract of sale made by him as trustee to the appellant. The chancellor approves his action, and while he may control the investment of the fund by requiring the trustee to report his investment, still, as the appellant is in no manner responsible for the acts of the trustee after he, the appellant, performs his part of the contract, we see no reason why the judgment of the chancellor compelling him to accept the title should not be affirmed.

Judgment affirmed.

CARTER, &c. v. ADAMS, &c.

(Filed April 23, 1887.)

1. Secret trust—In this action to subject land, the title to which is in A, to the satisfaction of a judgment against B, upon the ground that it is held in secret trust for the benefit of B, it is held that the evidence does not show that B has any interest in or claim upon it whatever.

2. Exemptions—The defendant in this case is a widower, having two children, both of whom are married. He resides in the same house with one of his daughters, her husband and child, the evidence tending to show that he is the housekeeper, and that the other three board with him. There also resides with him an old lady who has raised his children, but who is not akin to him. Held—That, as he is under no natural or legal obligation to support any of the persons residing with him, he is not entitled to the exemptions allowed by the statute.

B. F. Procter and E. W. Hines for appellants.

Rodes, Settle & Rodes for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Lewis affirming.

The evidence does not show that the land which appellant seeks to subject to the satisfaction of his judgment against J. G. Adams is now held in secret trust, or otherwise, for his benefit,

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by either J. C. Adams or Taylor, or that he has any interest in a claim upon it whatever. On the contrary, under judgments in favor of other creditors. rendered before the commencement of this action, the validity of which it does not seem can be questioned, the whole of the land appears to have been regularly sold and conveyed to J. C. Adams, who paid the purchase price thereof. The effect of these sales was not only to divest J. G. Adams of whatever interest in the land he may have had, but to annul the deed he made to Taylor in 1878, which appellant alleges in is petition, and J. C. Adams admits, was fraudulent and void as to his creditors, for whose benefit it was afterwards subjected and sold.

But the personal property belonging to J. G. Adams, a list of which he gives in his answer, we think is subject to appellant's debt, and the lower court erred in dismissing the petition as to him.

To exempt personal property from sale under execution attachment, or for the satisfaction of a judgment, the defendant must be a bona fide housekeeper with a family. It is not sufficient that he be a housekeeper, but he must be one with a family, consisting of one or more persons dependent upon him, and whom he is under a natural or legal obligation to maintain.

The proof is that he is a widower, having two children, both of whom are married; that he resides in the same house with one of his daughters, her husband and a child. Admitting that he is the housekeeper, and that his son-in-law, wife and child are boarders, which the evidence tends to show, still none of them, nor the old lady who resides with him, but of no akin to him, can be considered members of his family in the meaning of the statute, for he is not under any natural or legal obligation to support either of them, his daughter and child being dependent on her husband, who is bond to support them, and the old lady having no natural or legal claims on him for a support.

Wherefore, the judgment is affirmed as to appellees, J. C. Adams, Taylor and McFadden, but reversed as to appellee J. G. Adams, and the case remanded for further proceedings consistent with to this opinion.

DUNCAN, TRUSTEE, &c. v. CENTRAL PASSENGER RAILWAY CO.

(Filed April 30, 1887.)

1. Deeds—Limitation as to uses—A condition or limitation in a deed restricting or limiting to particular uses the property conveyed is valid, but may be waived or abandoned by the subsequent conduct of the grantor, so that a court of equity will not interfere to prevent its violation.

J., owning unimproved city property, laid it out in lots, the "plan" being to sell the lots only for residences. He sold and conveyed several of the lots to A., the deed providing "that no business, manufacturing or other than dwelling houses, shall be built upon said property." J. afterward sold other lots to different persons without any restrictions whatever. Appellee, having purchased the lots conveyed to A., commenced the erection of a building on the property to be used as a station for its street railway, the erection of which J. seeks to enjoin. Held—That J., by selling the remainder of the property without any restrictions, has put it out of his power to carry out his plan of using the property for residences only, as a part of which plan

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the restriction in the deed of A. was inserted; and he can not, therefore, call upon a court of equity to prevent others from destroying the plan.

2. A contract, the fulfillment of which becomes unreasonable, will not be enforced at the instance of a party who, by his own conduct, has produced such a result.

Alex. P. Humphrey for appellants.

John Mason Brown and Geo. M. Davie for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

Wm. P. Johnson was the owner of twenty acres of land lying between Baxter and Barrett avenues, in the city of Louisville.

In 1870 he made a plat of it in which it was laid out in lots, with a wide avenue running through the middle of it, from Baxter avenue to Barrett avenue, known as "Highland avenue.'

The owner believed that the lots would sell best for residences, and the purpose was to confine them to this use. This was the plan.

In October, 1873, he sold and conveyed lots Nos. 60, 61 and 62, which lie at the corner of Baxter and Highland avenues, to one Allman.

He had previously declined to sell them to the appellee, the Central Passenger Railway Company. Allman conveyed them to it in December, 1873, for the price at which he had purchased. The deed from Johnston to Allman contained this restriction:

"It is hereby agreed between the first and second parties that no business, manufacturing or other than dwelling houses, shall be built upon said property, and no alley shall run through said property; and no building of any kind shall be put thereon fronting any other way than on Highland avenue or the said twenty-four foot alley."

The deed from Allman to the railroad company, however, embraced no such condition; but the one to him was of record, and the company, moreover, had actual notice of the restriction in the grant to him. It occupies no better attitude, therefore, than it would if it had been embraced in its own deed.

Such negative easements or predial servitudes, as they were called in the Roman law, are valid. They qualify the estate granted. The limitation on the use enters into the consideration for the contract, and should, therefore, by common justice, be upheld, if not unlawful. It is not void as in restraint of trade, because it is not a contract in general restraint of it, but merely prevents the use of a particular piece of property in a certain way. No undue but a limited restriction upon the use merely is imposed. Conditions forbidding alienation to particular persons or for a limited time or to particular uses are not in violation of laws. (Stines v. Dorman, 25 Ohio St., 580; Trustees v. Lynch, 70 N. Y., 440; Cowell v. Springs Co., 100 U. S., 55; Tulk v. Moxhay, 11 Beavan, 571.)

The appellee, in 1881, began the erection of a brick building upon its lots, thus acquired, to be used as a station for its street railway, which extends along Baxter avenue, and also to shelter its cars, and as a stable for its stock.

The appellant, Johnston, relying upon the restriction in the deed to Allman, enjoined the appellee from building it. There is no question of laches upon his part, because he acted in limine as to the work, and enjoined it as soon as it was begun, but the inquiry is presented whether there has been such a change in the condition of

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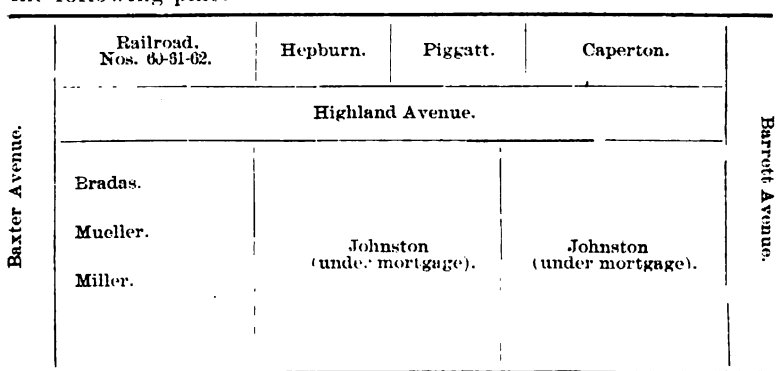
the property, or such conduct upon his part as prevents him from asking the aid of a court of equity.

There are as yet no buildings upon any of the lots. In fact "Highland avenue" has never been improved or in fact made a street.

It must be recollected that the sale to Allman was in October, 1873. Prior to that time Johnston had sold a lot to one Miller; also one to a man by the name of Mueller, and had mortgaged a portion of the land. He sold a lot to one Bradas in 1874; another to Susan Hepburn in 1876; another to one Piggatt in 1880; and in 1881 he sold a large portion of the land to John M. Caperton and mortgaged all the balance of it, which he still owned, and which was not already encumbered by mortgage.

The location and different sales will be best understood from the following plat:



None of the deeds or mortgages made by the appellant, Johnston, contained any restrictions whatever as to use save that to Allman.

The Hepburn lot has changed ownership several times since its sale by Johnston, and now belongs to the appellee. The parties nowcomplaining own no land adjoining the lots of the railroad company, or any upon that side of Highland avenue. They have no interest in any save that yet belonging to Johnston, and which is under mortgage. Indeed he is the only complainant in interest because the other appellants are his wife and his trustee.

The owners of the lots adjacent to those owned by the company are not complaining, and have the right to erect any thing they please on their lots short of a nuisance. Indeed the company have a right to build a stable or any other structure upon the Hepburn lot, as it now belongs to it, and is not subject to any restriction.

It is urged that the conduct of Johnston in thus selling the other lots without any restriction should be held to be an abandonment or waiver of the restriction in the Allman deed, and that by so doing he has produced such a state of circumstances or condition as to the property that no such injury can accrue to him as authorizes its prevention by injunction.

This writ is an extraordinary remedy. Its aid can not be invoked save in a clear case of impending injury.

There must be an urgent necessity, and this must be clearly shown. A mere possibility of injury does not authorize it. (Dumesnil v. DuPont, 18 B. M., 804.)

The mere fact that there is a contract bewteen parties does not authorize it because there is a remedy for a breach of it by an

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action at common law for damages, and if every contract could be enforced in equity the chancellor would be over burdened.

Our Code of Practice authorizes its issual where great or irreparable injury is about to accrue. This, however, is not to be confined to cases of heavy pecuniary loss. If so the person who has but little would often be comparatively remediless.

If the cause of action be continuous, and the nature of the impending damages such as not to be susceptible of proper assessment by a jury, but a matter of conjecture merely, then an injunction will lie. Otherwise the remedy would often be inadequate, and it is in such cases that equity aids the poverty of the law, and rather regards the right of the party than the amount of damage which may accrue. (Stines v. Dorman, supra.) Cases in support of this rule might be cited without number.

Indeed there is high authority holding that no damage whatever need be shown, but that the right existing by virtue of the contract may be enforced without regard to the question of resulting damage. (Dickinson v. Canal Co., 15 Beavan, 290; Commonwealth v. Railroad Co., 24 Pa. St., 160; Trustees v. Lynch, 70 N. Y., 440.) We need not, however, determine the extent of the rule, because there is another question which is fatal to the appellant's claim.

It is evident that the restriction in the Allman deed was inserted to enable the appellant, Johnston, to carry out his plan of selling the property for residences. The then design was to have no buildings erected there save for residential purposes. This was a general plan, and to prevent its symmetry from being marred the covenant in the Allman deed was inserted.

The evidence is conclusive that this plan was abandoned. Johnston subsequently sold the most of the property without any restrictions whatever.

The grantees have the right to erect any character of building, and use it for any purpose, save a nuisance, which the law, and not the conveyance to them, inhibits.

They may build stables, tan yards, soap factories or structures of any other character save those within the ban of the law. This is the result of Johnston's own conduct. He has put it out of his power to carry out his plan or general scheme of using the property for residential purposes only; he can no longer prevent others from destroying the plan, and by his own acts even the appellee has a perfect right to build a car stable upon the Hepburn lot, now owned by it, and which adjoins the lot as to which the restriction was inserted in the Allman deed, years before this action was instituted. It is impossible, therefore, to carry out the theory or general plan which led to the insertion of the restriction named, and Johnston himself has produced this state of case.

It is true that no other buildings have yet been erected, but they may be at any time, and a court of equity should not lend its aid to one looking to a certain end when it may be defeated at any time by reason of the previous conduct of that person. Its action under such circumstances would be futile, and barren of result. It is urged, however, that Johnston had a right to suppose that the other vendees would not erect any objectionable buildings if the owner of the lot at the entrance to the avenue was restricted from doing so. It, however, appears that the year following the sale to Allman the appellant sold the lot immediately opposite, and which fronts on Baxter and Highland avenues, to Bradas, without any restriction whatever as to its use, and the

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conclusion is irresistible that the plan existing in his mind, and which led to the insertion of the restriction now in question in the Allman deed, was abandoned.

The general scheme has, by the appellant's own permission and conduct, been so changed, and the condition of the property so altered, that it is liable to be defeated at the pleasure of the others, and may in fact be regarded as impossible of fulfillment. The original plan, owing to is own action, is no longer practicable, The restriction has been thus rendered inapplicable in its true intent and meaning, as much so as if the plaintiff had himself erected buildings destructive of the object of the covenant, and in such a case a court of equity will not interfere.

In support of these views we refer to Hilliard on Injunctions, 711; High on Injunctions, section 1,588; Roper v. Williams, 1 T. & R. C. R., 18, and Duke of Bedford v. Trustess of BritishMuseum, 2 M. & K., 552.

A contract, the fulfillment of which becomes unreasonable, will not be enforced at the instance of a party who, by his own conduct, has produced such a result. After treating it as void he can not appeal to a court of equity to treat it otherwise. We must regard the present state of this property; and, viewing it in this light, ought a court of conscience interfere? The power of Johnston to control the premises is now gone. He has voluntarily let the matter pass out of his hands, and, having done so, it is no longer consonant with the principles of equity to interfere, and he can not, to the prejudice of others, now ask a court of equity to aid him. Great injury would likely result to others, and no correlative benefit to him.

The most of the cases cited by his distinguished counsel did not turn upon the question of waiver or abandonment, while some of them are exceptional in fact but not in law.

Indeed the rule above indicated appears to be admitted, but it is denied that this case falls within it. We think otherwise, and the judgment is affirmed.

GREER, &c. v. WINTERSMITH, &c.

(Filed April 30, 1887.)

1. Execution sales—The sheriff's deed to a purchaser at execution sale transfers to the grantee all the title which the defendant held when the execution attached, and thus takes precedence over intermediate liens and transfers. To this extent the deed takes effect by relation, and must be treated as though made on the day when the lien was created.

Land which had been sold under execution was again levied on and sold under another execution against the same defendant. The purchaser at the second sale obtained a deed from the sheriff before the purchaser at the first sale obtained a deed. Held—That the purchaser at the second sale acquired nothing by his purchase, and the fact that he first obtained a deed gives him no advantage.

2. Same—Where an officer has sold land under execution the law presumes that he did his duty by levying the execution while in full force, the return being silent upon the subject.

3. Same—The defendant in an execution may waive a levy upon the property, and an advertisement of it by the sheriff, and where there is such a waiver the sale passes the title as effectually as if a levy and advertisement had been actually made.

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4. The law of champerty does not apply to a deed made to carry into effect a contract for the sale of land, of which there was no adverse possession at the time the contract was made, although the land was held adversely when the deed was made; and this rule applies to an executory verbal contract of sale.

In this case it is held to be no objection to a sheriff's deed that the property was held adversely when the deed was executed, there being no adverse holding at the time the sheriff sold the property.

5. Sureties—An execution was issued against principal and surety. The surety's land was levied on and sold, and the principal became the purchaser. Held—That it was the duty of the principal to discharge the execution; his purchase of the surety's property inured to the benefit of the surety.

W. P. D. Bush and J. P. Hobson for appellants.

Montgomery & Poston for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bennett.

Charlton D. Shean was the owner and in the possession of two tracts of land in Hardin county, Kentucky, one known as the Pearman tract, situated on the old road about one mile from West Point, containing about one hundred and thirty acres, the other, known as the Carrico tract, situated on the turnpike about four and a half miles from West Point. About one hundred acres of this tract were on the west side of the turnpike.

While an execution which issued from the Hardin Circuit Court against Charlton D. Shean was in the hands of the sheriff of that county for collection, and which was in full force, said Shean surrendered sixty acres of the Pearman tract of land to the sheriff, to sell for the purpose of satisfying said execution. The surrender of said land was evidenced by a written endorsement on the execution as follows:

"I give up to the sheriff of Hardin county to sell to satisfy this execution sixty acres of land, at the southwest corner of my tract of land on the old road, about one mile from West Point, known as the Pearman tract, and agree that he may sell without advertising.

"May 21, 1863. C. D. SHEAN."

At the same time the sheriff held another execution against Charlton D. Shean for collection, which issued from the Hardin Circuit Court. And said Shean surrendered to the sheriff one hundred acres of the Carrico tract of land, to sell for the purpose of satisfying said execution. The surrender was by written endorsement on the execution, as follows:

"I give up to the sheriff of Hardin county one hundred acres of land lying on the west side of the turnpike and in Hardin county, about four and a half miles from West Point, to be sold to satisfy this execution, and agree that it may be sold without advertising.

"May 21, 1863. C. D. SHEAN."

The sheriff's written endorsement on these executions show that after having these two parcels of land appraised by two disinterested housekeepers of the county he sold, at public outcry, the two parcels of land at the courthouse door, in Elizabethtown, on the 8th day of June, 1863, and that Charles Greer, the father of the appellants, became the purchaser of both parcels at a less price than two-thirds of their appraised value.

Several years after the purchase Charles Greer died intestate, and no one having redeemed said parcels of land the sheriff of

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Hardin county, on the 2d day of July, 1877, conveed by deed said two parcels of land to the children of Charles Greer. They, after said conveyance, instituted two actions of ejectment. One against Charles G. Wintersmith and others for the puprose of recovering the sixty-acre tract of land, and the other against Wm. Grimes and others, for the purpose of recovering the one hundred acre tract of land. The issues having been made up in each case, they were transferred to the equity side of the docket and consolidated.

The lower court, upon final hearing of the cases, dismissed them absolutely.

The appellants have appealed to this court.

At the time Charlton D. Shean surrendered said parcels of land to the sheriff, to be sold to satisfy said executions, he was the owner and in the possession of both parcels, therefore, they were subject to levy and sale to satisfy said executions. The contention of the appellees, Wintersmith and others, as to the sixty-acre tract of land is: First, That the appellee, Wintersmith, purchased said tract of land at a sale made by the sheriff of Hardin county, Kentucky, by virtue of an execution which issued from the Hardin Circuit Court in his favor, and against Charlton D. Shean; and that he received a deed from the sheriff for said land in 1872, whereby he obtained a title to said land superior to that of the appellants.

This contention can not be sustained because, first, the levy of Wintersmith's execution upon this land and the sale thereof occurred in the summer of 1863, after the land had been surrendered by Shean to the sheriff, and the sale thereof to satisfy the other executions, and it is well settled that "execution liens attach to the defendant's real, instead of his apparent, interest in property. It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by lien subsequently thereto, and before the sale." (Freeman on Executions, section 335.)

"Sales under execution always assume to be of all the title and interest of the defendant in the writ." Nothing more nor less than the defendant's title or interest in the property is presumed to be sold. That title or interest the purchaser gets. If it turns out that the defendant has no title or interest in the property sold, then the purchaser acquires nothing by his purchase.

There is no warranty of title by the sheriff at an execution sale. The purchaser takes just what title the defendant in the execution has. He buys at his peril. The rule of caveat emptor applies to him. (Freeman on Executions, section 301.)

The land having been surrendered by Shehan to the sheriff on the 21st of May, and a sale thereof having been made by the sheriff on the 8th of June, 1863, to satisfy the execution in favor of McMillen, at which sale Charles Greer became the purchaser of the land, and all of which occurred prior to the levy of Wintersmith's execution upon the same land, and the purchase thereof by him at the execution sale he, for the reasons above indicated, acquired no title to the land by his purchase. Second, The fact that the sheriff's deed to Wintersmith is prior in date to that of the appellants can give to the appellees no advantage over the appellants, because the sheriff's deed must be "given such an effect as will preserve and make effectual the lien under which the execution sale was made." And, in order that the deed may have such an effect, "it takes precedence over subsequent liens and transfers, and a sale and conveyance, based upon such lien, transfers to the purchaser all the title which defendant held

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when such original lien attached. To this extent the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created." (Freeman on Executions, section 333; Mellion v. Riley, 1 Dana, 360.)

The appellees also contend that the sheriff did not levy the executions under which Charles Greer bought said parcels of land, upon them or either of them, and for that reason Greer acquired no title to either parcel of land.

As a matter of fact both executions are silent upon the subject of a levy, and there is nothing in the record showing that the sheriff did not levy the executions upon said parcels of land. The sheriff having sold said parcels of land by virtue of said executions, the law in such a state of case presumes, in the absence of all testimony to the contrary, that he, with the executions in his hands, did his duty by levying them, while they were in full force, upon said parcels of land. It was his official duty so to do, and the presumption must be indulged that he discharged that duty unless his return shows that he did not. The silence of his return upon that subject is not sufficient to repeal the presumption that the levy was in fact made. (Freeman on Executions, section 274; Evans v. Davis, &c., 3 B. Monroe, 346.)

It is also well settled that the defendant in an execution may waive a levy upon the property and an advertisement of it by the sheriff, and that his waiver of the levy or advertisement of the property will estop him from objecting to the sale. The waiver will also stop him from setting the sale aside after it has been made. (Freeman on Executions, section 274, and the authorities there cited.) This waiver on the part of the execution defendant does not convert the sheriff into the mere private agent of the defendant. The sheriff, notwithstanding the waiver, still acts in making the sale in his official capacity, and the sale passes the title to the property as effetually as if a levy and advertisement had been actually made. If, however, the interest of the execution plaintiff should be affected by the failure of the sheriff to levy or advertise them, the question as to the sheriff's liability to him in damages would arise. The contention of the appellees that said parcels of land were held by them adversely to the appellants at the time they received the conveyances from the sheriff is not an avilable defense. There was no adverse holding of said parcels of land at the time the sheriff sold them. And it is well settled that the law of champerty does not apply to deeds made to carry into effect a contract for the sale of land, of which there was no adverse possession at the time the contract was entered into, although the land be held adversely when the deed is made, and this rule applies to an executory verbal contract of sale. (12 B. Mon., 164; 4 Dana, 36; 1 B. Mon., 372.)

It is also well settled that a purchaser at an execution sale not only acquires by his purchase the lien created by virtue of the execution, but an inchoate or equitable title to the land, and the deed of conveyance subsequently made to him by the sheriff relates back to the time of the creation of the lien by virtue of the execution, and perfects his title from that date.

It appears that in 1853 said parcels of land were sold by the sheriff of Hardin county, by virtue of an execution against Kelley, Charlton D. Shean and others, and that Kelley was the principal debtor in this execution, Shean being his surety; that at the execution sale Kelley bought these parcels of land for a nominal sum; that he never claimed the benefit of his bids, nor was any conveyance ever made him. It also appears that he never intended to claim the benefit of his bid, and that he had

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been repaid the sums that he had paid on his bid. Also, he being the principal in the execution and Shean his surety, as between him and Shean, it was his duty to have paid off and discharged said execution, and his purchase of the property at the execution sale inured to the benefit of Shean because the property was taken to pay the debt that he, as between him and Shean, was primarily bound to pay, and which he was morally bound to pay. Therefore, the purchase by Wintersmith of Kelley's bid, after this controversy about the land commenced, for the nominal sum of "a dollar or two," did not give appellees a superior title to said parcels of land.

The judgment of the lower court is reversed and the case is remanded, with directions to render judgment for appellants for both parcels of land.

KENTUCKY SUPERIOR COURT.

SMITH v. SMITH &c.

(Filed June 1, 1887.)

Statute of frauds—The assignment of a leasehold estate for a longer term than one year is within the statute of frauds, and can not, therefore, be enforced unless in writing.

Helm & Bruce for apellant.

Kohn & Barker for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Ward.

Appellee, Emma E. Smith, sued appellant to recover a leasehold estate of twenty years in certain real estate situated in Louisville, claiming to be the owner thereof by gift or assignment from S. A. Smith, who, it is alleged, was the owner and in possession at the time of the assignment.

The contract of assignment was denied, and the only evidence conducing to prove it were verbal statements and conversations of Mrs. S. A. Smith. Exceptions were taken to all the evidence, and most of them sustained, yet a judgment was rendered for appellee.

"No action shall be brought to charge any person, * * * sixthly, upon any contract for the sale of real estate, or any lease thereof, for longer term than one year." It is not necessary to plead the statute; it may be relied upon either by demurrer to the pleading or exception to the evidence.

Is the assignment of a leasehold estate for a longer time than one year within the statute? We think it is. It has been so held in many of the States, and is so laid down in the text-books. (Browne on Statute of Frauds, sections 41 and 42; Taylor's Landlord and Tenant, section 427; Saunders v. Partridge, 108 Mass., 556.)

It is true the statute of New York, referred to in Taylor, nd the statute of Massachusetts, referred to in Saunders v. Partridge, are somewhat more explicit than our statute, but they are all modeled after the same statute, and intended to meet the same

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end, and, unless the intention of the legislature to make a change is manifest, must have the same construction.

If the lessee should undertake to let the premises for a term longer than one year, and shorter than his entire term, the contract would certainly be within the statute; it would, therefore, be a strange construction to say that the assignment of the entire term need not be in writing. We can think of no reason against allowing leases for a longer time than one year, unless in writing, which do not apply with equal force to assignment of leases having a longer time to run.

The judgment is reversed and the case remanded, with directions to dismiss the petition of appellee.

ARTERBURN v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 1, 1887.)

Res judicata—Appellant having recovered a judgment in damages on account of the appellee's negligent act of killing four mules, instituted this suit to recover damages on account of the destruction of a wagon then drawn by the mules, and of harness worn by them, caused by the same negligent act. Held—That the former judgment is a bar to this action.

D. M. Rodman for appellant.

Wm. Lindsay for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Presiding Judge Bowden.

The appellant, having recovered a judgment in damages on account of the appellee's negligent act of killing four mules, sued to recover damages on account of the destruction of a wagon then drawn by the mules, and of harness worn by them, caused by the same negligent act. The lower court held that the former judgment was a bar to the latter action.

It is an established principle of law that a judgment in a civil suit upon a certain alleged cause of action is conclusive upon the parties in relation to it, and that another suit for the same cause can not be maintained for any purpose whatever. No man is liable to be twice charged, or to be a second time proceeded against, in a civil suit for the same unlawful act. (Trask v. Hartford, &c., R. R. Co., 2 Allen, 331.) In that case a judgment had been recovered for the destruction of a building ignited by fire from the engine, and it was held to bar a subsequent action for damages on account of the destruction of other buildings, to which fire was communicated from the first. The loss of the houses constituted distinct items or grounds of damage, but in each case it was the result of a single, indivisible act. Where several chattels are converted a judgment recovering part of them was held to be a bar to an action to recover the others, though they were omitted from the former action by mistake of the attorney (Folsom v. Clemence, 119 Mass., 473), or by the fraudulent acts of the defendant (McCoffrey v. Carter, 125 Mass., 330), when the wrong-

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ful taking was one continuous and tortious act (Herreler v. Porter, 23 Cal., 385), and a judgment in repelvin for part of the things so taken bars an action to recover damages for the taking of the remainder. (Bennett v. Hood, 1 Allen, 47.)

In Brunsden v. Humphrey, L. R., 11 Q. B. Dev., 712, it was held that a plaintiff, having recovered for injury to his cab caused by the defendant's negligence, could afterwards recover for personal injuries received at the same time, and caused by the same act. In the lower court it was held by Pollock, B., and Lopes, J., that the former judgment was a bar, and on appeal Coleridge, C. J., agreed with them, but it was held otherwise by the two other judges. But they based their decision on the fact that the wrong done affected two distinct and different rights—the right of personal security and the right to property—and their reasoning, whether satisfactory or not, has no application when, as in this case, there is but one right infringed. As said in Tarsk's case, cited, the mules, wagon and harness were only distinct items or grounds of damage resulting from one indivisible act.

Our statutes should not be regarded as overturning a rule so thoroughly established. That which allows an appraisement of stock, and gives twenty-five per cent. damages in certain contingencies, is to be applied by the court, which can, in every case, require the jury to assess the value of the stock, so it may appear that it is as much as the appraised value. The statute which presumes negligence, when stock is killed or injured by the cars, does not apply in cases where inanimate things alone are injured or destroyed. Even if it should be held that when mules are killed and a wagon is destroyed by the negligent act, the plaintiff must prove negligence to recover for the loss of the wagon, but may recover for the loss of the mules, when the killing is admitted, unless the presumption of negligence is rebutted, the court would have no difficulty in maintaining the rights of both parties by instructions. In that view of the statute the burden as to the wagon would be on the plaintiff, and as to the mules it would be on the defendant, and the plaintiff required to make proof to establish part of his demand, would be entitled to the concluding argument.

These statutes, therefore, do not require an abandonment of a well settled rule.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. FUNK.

Filed April 20, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Railroads—Negligence—One of the appellant's freight trains was compelled to run upon a switch to allow a train proceeding in an opposite direction to pass. After that train had passed the train upon the side track was unable to move forward because the switch was out of order and the locomotive could not back it on the main track because the grade was so heavy. After making several fruitless efforts to get out of the switch the conductor ordered appellee, a brakeman, to go back and signal a train that was following, that it might stop and assist his train. While in the discharge of this duty appellee was struck and injured by the engine of the coming train. In this action by appellee against appellant for negligence the jury found in substance that the conductor was negligent in that he did not send appellee back immediately after the passing of the train in the opposite direction, and that if he had done so appellee could have reached a point on the track at which he could have signaled the coming train and avoided the injury; that the plaintiff used such care, skill and caution as a reasonably skillful and cautious flagman would have used under like circumstances; that he did not, after being ordered, have time to go back the proper distance; that it was about fifteen minutes from the time he was ordered to go back until he was struck, and that he went only 1,500 feet. Held—First—That the appellee is not chargeable with negligence in not going further than he did, as the character of the night and the condition of the track may have been such that he could not have gone faster in the exercise of proper caution.

Second—Appellee is not chargeable with negligence in remaining on the track, as that was his proper place, it being his duty to use every effort to signal the train

Third—The jury are the judges of the credibility of the witnesses, and a verdict will not be disturbed on appeal merely because it is against the testimony of a large majority of the witnesses.

In this case the jury having believed the plaintiff alone in preference to five or six witnesses, who contradicted him, and the lower court having refused to set the verdict aside, this court will not disturb it.

Barnett, Noble & Barnett and Wm. Lindsay for appellant; O'Neal, Jackson & Phelps and Kinney & Kinney for appellee.

LEVY v. KENTUCKY DISTILLING CO.

Filed April 20, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

Fraud—Lex loci contractus—Parties to actions—Appellee instituted this action upon two bills of exchange which were accepted by D. in consideration of a number of barrels of whisky which appellee had sold to him, the whisky remaining in appellee's warehouse, and appellee issuing to D. its warehouse receipts therefor. Appellee attached the whisky. The warehouse receipts having been transferred by D. to G. & M., and by them to appellant, were subsequently sent by appellant to an agent in New York, who sold them "for account of whom it may concern." Appellee became the purchaser, and the agent drew on it for the price, sending the draft to a bank in Louisville for collection, together with the warehouse receipts. Appellee attached the receipts and refused to pay the drafts. The court below held that the transfer of the warehouse receipts from D. to G. & M., and from them to appellant, which took place in the State of Louisiana, was a device to defraud D.'s creditors, and that the whisky was, therefore, subject o the attachment, but as it had been sold and purchased by appellee, it was

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held that it was entitled to hold the amount of the purchase price upon crediting it upon D.'s indebtedness. Held—First—That as the transfers of the warehouse receipts were fraudulent, they will not be upheld by the courts of this State, whatever may be the law of the State where they were made, as our courts will not uphold a contract in regard to property situated here which is contrary to good morals and an actual fraud upon the rights of other parties.

Second—G. & M. were not necessary parties to the action. If the transfer to them was fraudulent, it gave them no right; and if, on the other hand, they had acquired the receipts in good faith for a valuable consideration, and in good faith for value had transferred them to appellant, they would have no further interest in them; nor can the judgment affect them.

Third—Appellant can not complain that the whisky was not directed to be sold to pay appellee's debt, instead of applying the proceeds of the sale already made at his instance to that purpose. Appellant can not question his own act, and, besides, it does not appear that the whisky did not sell for its full value, or that it would bring more if resold.

John C. Russell for appellant; Brown, Humphrey & Davie for appellee.

CHARLES v. BAIN.

Filed April 10, 1887. Appeal from Knox Circuit Court. Opinion of the court by Judge Barbour, affirming.

New trial—In this action by appellants to vacate a judgment in an action begun on the common law side of the docket, but afterwards transferred to equity, they allege in their petition that when the cause was transferred to equity it was under submission upon questions raised as to the sufficiency of their answer, they being defendants in that action, and that the transfer was made without the knowledge of the appellants, and during the absence of their principal counsel from that term of the court, and without the knowledge or consent of their assistant counsel. That the case was pressed through to judgment when appellants knew nothing about the matters, and when they did not expect the case to be tried, because of the heavy criminal docket; and that they knew nothing of the judgment until long after the term at which it was rendered.

Held—That appellants are not entitled to the relief sought, as there is nothing showing that they were prevented from appearing or defending.

S. B. Dishman for appellant; J. H. Tinsley for appellee.

FARMERS NATIONAL BANK OF MT. STERLING v. CITY OF MT. STERLING.

SAME v. SAME.

MITCHELL v. SAME.

Filed April 20, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Ward, affirming.

A judgment against a municipal corporation can not be enforced by process of garnishment against the taxpayer, for the reason that courts have no power to levy or collect taxes.

Cornelison & Mitchell for appellants; Wood & Day and L. Apperson for appellee.

LEE, &c. v. MURRELL.

Filed April 20, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, affirming.

1. Assignment of insurance policy - Consideration—F. was the beneficiary in a paid-up policy of insurance upon the life of G., her father. M. having been compelled, as surety for G., his father-in-law, to pay a considerable sum of money for him, insisted upon the assignment to him of the policy of insurance upon the life of G., to indemnifying him. Thereupon G., and his daughter, F., the beneficiary in the policy, assigned it to M. by transfer and delivery. G. about the same time executed to M. his note for the amount the latter had paid for him, and about six months thereafter the policy was assigned by written endorsement thereon. The insured having died, F., in this controversy between her and M. over the proceeds of the policy, says she assigned the policy only for the purpose of keeping peace in the family, and that there was no consideration for the assignment. Held—That this appears to

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have been a case in which the arguments or considerations usually presented why a person should aid his relative or friend when in embarrassed circumstances were presented, considered and acted upon, and there is no reason why they are not in this case sufficient consideration to sustain the assignment.

2. Same—The condition that the policy should not be assigned was a condition annexed by the insurance company for its protection, and not to prevent the policy from being assigned so as to vest the claim and right of action in others, if the company should consent, or waive the provision.

E. E. McKay for appellants; Brown, Humphrey & Davie for appellee.

SEALE v. CHAMBERS.

Filed April 20, 1887. Appeal from Breathitt Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Witnesses—A judgment will not be reversed merely because a fifth witness was not permitted to testify to a fact proved by four other witnesses. The court may exercise a reasonable control as to the number of witnesses permitted to testify in regard to a single point.

I. N. Cardwell for appellant; H. C. Lilly & Son for appellee.

BOLDMAN v. KITCHEN, &c.

Filed April 20, 1887. Appeal from Carter Circuit Court. Opinion of the court by Presiding Judge Bowden, dismissing.

1. Appellate jurisdiction—When a defendant appeals the amount adjudged against him is the amount in controversy.

2. Same—The fact that a lien on land was adjudged does not give jurisdiction upon appeal if the amount in controversy is less than $100.

3. Same—Appellee G. sued appellant for $114.45 for work done and materials furnished, making K., another appellee, a defendant as the holder of the legal title to the land on which the improvements were made, and asserting a mechanic's lien. Appellant admitted that the work and materials were worth $56.78, and asserted a set-off amounting to $91.50, leaving due him, as he contended, $34.72. The court gave judgment against him for $46, thus making the amount in controversy as against G. $80.72, the aggregate of these two sums. K. filed a cross petition asserting a lien for $213.50, evidenced by a note, being the purchase money for the land. Appellant pleaded a set-off amounting to $89.83, against which K. pleaded claims greater than the set-off. The court rejected all these matters and gave judgment for the amount of the note, which was not disputed, thus making the amount in controversy in this branch of the case $89.63.

Held—That these claims were in no way connected, and can not be added together to give this court jurisdiction.

E. B. Wilhoit and Roe & Roe for appellant; J. D. Jones for appellees.

FELAND v. BALL'S ADM'R.

Filed April 20, 1887. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

"An exhibit will not supply the omission of material allegations. If it were conceded that the plaintiff may maintain an action to recover the amount of taxes paid by him, while sheriff, for the defendant, but not at his request, the allegation that 'among the tax lists in plaintiff's hands was that of Wm. M. Ball, amounting to $81.69,' is not sufficient. It is only by assumption and inference that the State and county tax amounted to the sum named."

W. H. Miller for appellant; P. M. McRoberts for appellee.

ROGERS, &c. v. CARR, &c.

Filed April 20, 1887. Appeal from Trigg Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Vendor's lien—Under the Revised Statutes the vendor had no lien for the purchase price of land unless it was expressly stated in the deed what part of the consideration remained unpaid.

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2. Same—Executors—J. sold land to F., the consideration recited in the deed being $2,000, to be paid as follows: "Two notes of K. for $833.33⅓ cash, due in 1873 and 1874, and one on F. for $333.33⅓, due January 1, 1874." J. died, leaving a will nominating R. and F. as executors, while R., in an action upon the notes of K., which were secured by lien upon land, joined with him his co-executor, F., he alone prosecuted the action to judgment, and, as executor, purchased the land in lien for the payment of the notes for the benefit of the creditors, who are now the owners of and in possession of the land. This land failing to sell for enough to satisfy the assigned notes, R., as executor, brings this action, asserting a vendor's lien upon the land sold to F. for the balance due upon the assigned notes. It is alleged in the answer, and not denied, that the land upon which the assigned notes were a lien was worth more than enough to satisfy those notes.

Held—That R., having purchased in the property as executor, which gave to F., as a co-executor, certainly an equity, can not by an arrangement with the devisees transfer the title to them, and, irrespective of the actual worth of the property, hold F. liable as as ignor for the difference between the amount at which the property was bid in and the amount of the assigned notes.

Fenton Sims for appellants; T. C. Dabney & Son for appellees.

FITZPATRICK, &c. v. COWDEN'S ADM'R.

Filed April 27, 1887. Appeal from Barren Circuit Court. Opinion of the court by Judge Ward, reversing.

Husband and wife—By express provision of statute a married woman is entitled to the proceeds of her land unless otherwise provided in the conveyance or the obligation of the purchaser; and the mere fact that the husband, to secure his own indebtedness, may, with the consent of his wife, have pledged notes executed to her for the purchase price of her land, will not enable creditors of the husband, other than the pledgee, to subject any part of the proceeds of the notes to the payment of their debts

Botts & Hill and W. P. D. Bush for appellants; J. W. Jones and Richards & Hines for appellees.

KAELIN v. RUFENACHT.

Filed April 27, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, affirming.

Instructions to jury—Upon a former appeal in this case an instruction now complained of was condemned because the pleadings did not authorize an instruction upon the subject, and not because it was an erroneous exposition of the law, the former opinion being in effect an approval of the instruction, had the pleadings been sufficient to warrant one on the subject. The objection now made to the instruction is that it is vague, and that its phraseology is misleading. Held—That under the circumstances appellant should have asked an instruction to cure the suggested defects in the one complained of, and having failed to do so the court will not disturb a second verdict for appellee.

Carlisle, Goebel & Carlisle for appellant; J. Creutz for appellee.

WYBRANT v. FIDELITY TRUST CO., RECEIVER.

Filed April 27, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

The petition of the appellee, based upon an account for merchandise, was not sufficient to have authorized a judgment by default, but the defendant answered and admitted an indebtedness of $116.59 on the account. On the filing of the answer the case was, by consent, submitted for judgment on the pleadings. The court thereupon rendered judgment for the $116.59, and granted the plaintiff leave to amend the petition as to the residue of the claim. Held—That the court abused neither its power nor its discretion in allowing the amendment.

Elliott & Hemingray for appellant; Goodloe & Roberts for appellee.

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ATHERTON v. BONNIE BROS.

Filed April 27, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Ward, affirming.

Warehouse receipts—Where warehouse receipts provide for the payment of storage which has in fact been paid in advance, and the warehouseman collects storage from one to whom the receipts have been assigned, he collects it to the use of the original holder, who paid the storage in advance, who may recover it from him.

Brown, Humphrey & Davie for appellant; Dodd & Grubbs for appellees.

GROSS v. LEXINGTON PLUMBING CO.

Filed April 27, 1887. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Bills of exceptions—Unless the objection is that the verdict is not sustained by the evidence the bill of exceptions need not state the evidence, but must state the material facts which it conduces to prove. The bill of exceptions in this case states that there was evidence tending to show certain facts, and there is nothing to show that there was any evidence tending to prove any other fact. Held—That it must be assumed that the bill contains all the evidence necessary to decide whether a rejected instruction should or should not have been given.

Z. Gibbons for appellant; Beauchamp & Allen for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. ZARING.

Filed April 27, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Specific performance—Appellee's written agreement was this: "I will make a deed of right of way through my lands to the Northern Division of the Cumberland & Ohio R. R. Co., as now graded, as soon as the company or its agents or successor shall have made me a safe and convenient crossing, so as to let me out to the Bardstown turnpike road, and keep the same in good order." Held—That the interest appellee contracted for—the keeping of the crossing in repair—was continuous, and as damages for a failure to make the crossing would be conjectural, a specific performance may be properly enforced against appellant, the successor of the company with which the contract was made, appellant having notice of the contract when it acquired its interest.

2. Same—The tender of a deed by plaintiff was not necessary, there being an averment that he was able, ready and willing to convey so soon as the crossing was made. The tender of a deed is not required of the plaintiff when the defendant is to do the precedent act, and that act is one which requires time for its performance.

Bullock & Beckham for appellant; James W. Head for appellee.

HEINTZ v. CHRISTMAN.

Filed April 27, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. New trial—After a judgment of confession had been entered against the defendant, and a jury was sworn to assess damages, the defendant moved to have the swearing set aside, and in support of the motion filed the affidavit of his attorney, which stated merely that he had been unavoidably detained from court that morning, and had had no opportunity to communicate the fact to his client; and that the defendant had a meritorious defense. No answer was tendered, and the affidavit did not disclose the facts which the affiant supposed to be a good defense. Held—That the court did not abuse a sound discretion in overruling the motion.

2. Order of arrest—When the removal of visible property from the State is the ground relied on for an order of arrest in a civil action the statement that the removal was with the intent to defraud is essential, and if that charge is not made the clerk has no authority to issue the order of arrest,

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and the illegality of the act is apparent on the face of the record. It is not a case of mere informality; the omitted averment is the gist of the affidavit.

3. Same—Although an order of arrest be not void, but voidable merely, when it is set aside it ceases to be a shield, and by relation is regarded as invalid from its origin.

J. Creutz for appellant; C. J. Helm for appellee.

MEYER v. FIDELITY TRUST AND SAFTY VAULT CO.

Filed April 27, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Contract for sale of whisky—A contract for the sale of two hundred barrels of whisky to be manufactured, and to be in bond, contained this clause: "We guarantee the shrinkage shall not exceed, upon an average, the allowance for shrinkage provided for in the Carlisle bill." Held—That while the law referred to permits no ascertainment of the average shrinkage on a number of barrels, the shrinkage allowed on each barrel being seven and one half gallons, it does not prevent private persons from contracting, as they will, in regard to the shrinkage, and the quantity in this case was that the average in the two hundred barrels should not exceed seven and one-half gallons per barrel, that is, 1,500 gallons in all.

2. Same—When a distiller pays the tax on whisky which has been sold subject thereto he does not acquire a personal demand against the buyer; his only protection is in the lien he has on the whisky itself. If, therefore, he pays tax on whisky that does not exist, and is, therefore, not deliverable, he has no remedy against the buyer.

Brown, Humphrey & Davie for appellant; W. E. McAfee for appellee.

BARREN COUNTY COURT v. KINSLOW.

Filed May 4, 1887. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Roads—Under section 30 of article 1, chapter 94, General Statutes, the certificate of a road surveyor as to the amount agreed to be paid by him for the use of any "wheel carriage, plow, draught horse, oxen, gear or driver" in making or repairing a road, is conclusive upon the county not only as to the amount, but as to the necessity for the use.

2. Statutes—By an act of March 8, 1880, and applicable to the counties of Barren, Metcalfe, Monroe, Livingston and McCracken, section 30 of article 1, chapter 94, General Statutes, was amended by excepting the counties named from the provisions of the general law. By an act of April 1, 1882, this act, so far as it applied to Barren, Metcalfe and Monroe, was repealed. By another act of the same date, "for the benefit of the public roads in Barren, Metcalfe and Monroe counties," provision was made for taking the sense of voters on the proposition to secure road repairs by taxation, the act providing that if a majority should not favor the proposition, "the present law in relation to public roads shall be in force." Held—That if the two acts of April 1, 1882, are read together, as they should be, they repeal the act of March 8, 1880, as to the three counties named, and leave in force in those counties the general law as found in the General Statutes, as it is not to be supposed that by the "present law" the legislature meant an act it had just declared to be repealed, or to make the repeal of that act depend upon the adoption of the taxing system.

3. Same—Section 22 of chapter 21 of the General Statutes, which provides that "when a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the general assembly," does not apply to the repeal of an act excepting from the general law a particular locality. Such an act merely suspends the general law in that locality, and when repealed the provisions of the general law apply without any act reviving them.

Richards & Hines and G. M. Bohanon for appellant; Lewis McQuown for appellee.

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KENTUCKY COURT OF APPEALS.

KENTUCKY TOBACCO ASSOCIATION v. ASHBY.

(Filed January 15, 1879—Not to be reported.)

1. Measure of damages for breach of contract by one person to advance another money with which to purchase tobacco.
2. Special damages, which are such as do not necessarily follow the breach of an agreement, must be specially pleaded. A general allegation of damage will not authorize the recovery of more than nominal damages.
3. Pleading—An allegation that the defendant failed to honor or pay plaintiff's drafts does not import that the drafts were presented and payment or acceptance refused, and, therefore, is not a sufficient allegation of the breach of a contract by defendant to advance plaintiff money through drafts.
4. The president of a corporation, being the chief officer, is presumed to have authority to make contracts pertaining to the business of the corporation unless the contrary be shown.

Owen & Ellis for appellant.

W. N. Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Cofer.

The appellee alleged in substance that in consideration of a subscription by him for stock, the appellant undertook and agreed to advance to him all the money he might need for the successful prosecution of his business as a tobacco dealer, and, in addition, to pay him a premium of two dollars on each hogshead of tobacco shipped to appellant for sale; that the money was to be paid through drafts drawn upon and paid by appellant; that relying upon the good faith of appellant, he arranged to buy, and did buy, large quantities of tobacco, and drew upon appellant to meet his liabilities therefor; that appellant failed to honor or pay his drafts, in consequence of which he lost bargains on which he would have realized a large sum over and above the cost of the tobacco; that he had made preparations on the faith of this agreement to carry on a tobacco business; that in consequence of appellant's failure to comply with its agreement he lost profits he would otherwise have made on the tobacco, and was himself

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thrown out of employment and lost his services for the year, for all of which he prayed judgment for $5,000 in damages.

It is a fundamental rule of pleading that the petition in an action on a contract should state the undertaking or agreement of the defendant, the breach complained of, and the injury resulting to the plaintiff from such breach.

This rule was not regarded in the answer in this case. The agreement of appellant was perhaps sufficiently stated. But no breach of the contract as stated is sufficiently alleged. Money was to be advanced on drafts drawn by the appellee, but it is not alleged, in terms, that he ever drew any such drafts, and if it may be inferred from the allegation that appellant failed to honor or pay his drafts, that drafts were drawn, still it was not appellant's duty, under the agreement, to accept or pay them, unless they were not only drawn to meet the requirements of appellee's trade in tobacco, but were presented for acceptance or payment neither of which is alleged, nor can either be fairly inferred from anything alleged in the answer. The language is that appellant failed to honor or pay his drafts. If the allegation had been that it rufused, this might, by a very liberal construction, have implied that the drafts were presented, but by no degree of liberality of construction can the language used import that the drafts were presented and payment or acceptance refused. Nor is there anything even approaching an allegation that any drafts that may have been drawn were to meet the requirements of appellee's tobacco trade.

The answer is equally defective in respect to the damages resulting from appellant's failure to comply with its agreement.

It is impossible to learn from the answer the damage claimed. The amount of tobacco purchased is not stated, nor is the price at which it was purchased, or at which it could have been sold, stated even in the most general terms. The appellant had no money to pay for the tobacco he had purchased, and the sellers refused to deliver it, and if he had had money he could have purchased other tobacco, "on which he would have realized a large sum of money over and above the cost of the tobacco, all of which was lost to him by the failure of plaintiff to comply with her agreement."

This is not an allegation of even a loss of profits; for although he might have realized on the tobacco greatly more than its original cost, there may still have been no profit.

But we think the profits he might have made are too remote to constitute an element of damage in this case. Whether he would make profit was dependent upon too many conditions to authorize a recovery on that ground on the agreement as stated in the answer.

Nor was the answer sufficient to entitle him to recover for the rent of his tobacco house, or for loss of his own time, or for wages paid to hands employed to aid in conducting his contemplated business.

If the alleged agreement was made by the president and secretary of appellant, we think it is bound by the agreement unless it can show some valid restriction on their authority to bind the corporation. The president is the chief officer, and ought to be presumed to have authority to make contracts pertaining to the business of the corporation unless the contrary be shown.

If the appellee made known to the appellant or its officers or agents, with whom the agreement was made and who had authority to make the agreement, or if from the circumstances they ought reasonably to have expected that he would make outlays or incur liabilities on the faith of the agreement to furnish him with money, and he made such outlays or incurred such liabili-

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ties relying on the agreement, then he is entitled to recover whatever he lost in consequence of such expenditures and liabilities.

If the corporation, or its authorized agents who made the agreement, were informed, or from the circumstances ought to have expected that he would hire hands, rent houses, or retain for use his own house, which he might have otherwise rented, or that he would abstain from entering into other employment, relying on the agreement, then whatever he paid to hands so hired, or for other expenses about the contemplated business, over and above what the services of such hands and use of the house were actually worth to him situated as he was, and whatever the rent of his house might have been worth over what its use was worth to him as he used it, and whatever any money he may have expended in that way exceeded what he actually realized out of such expenditures, may be recovered as damages for the breach of the agreement, if such breach be shown. So, also, if he was prevented, by relying on such agreement, from engaging in other business, and was kept idle or only partly employed, he may recover whatever he lost in that way. But he can not recover for the hire of hands, for rent or for his own loss of time, except up to the time when he ascertained the appellant would not keep its agreement, and for such time afterward as he had already become bound to pay his hands, or had lost the opportunity of renting his house or until he had opportunity to find employment for himself.

The damages claimed are special—that is, do not necessarily follow the breach of the agreement, and consequently must be specially pleaded. The facts which show how and why the damage follows the breach must be set out, and a general allegation of damage will not authorize a recovery of more than nominal damages. There is no sufficient allegation of special damage.

If I sue for damages for the breach of a contract to deliver a thousand bushels of wheat at a given price, on a named day and at a designated place, I must allege that the wheat was worth more at that time and place than the contract price, and I can not recover such difference in price upon a mere allegation that I have been damaged a given sum by the defendant's breach of contract. So if I sue for an assault and battery, I can not recover surgeon's bills made necessary by the battery, nor for time lost on account of my wounds, unless such special damage be appropriately alleged.

The reason of the rule in each case is the same. In the case of the contract my special damage does not necessarily follow the breach of the agreement. It results from the extraneous fact that the wheat is worth more at the time and place of delivery than the contract price. That is the fact on which my right to special damages depends, and must be alleged. So in the other case. The necessity for a surgeon and the loss of time may or may not result from the battery, and in order to recover for these I must allege the facts.

So in the case at bar. The loss claimed on account of having hired hands, and on account of retaining his house, which might otherwise have been rented, and on account of the loss of his own time, or of his having incurred expenses, are losses not necessarily following the breach of the agreement, and unless the special facts are alleged no foundation is laid for a recovery on account of those matters. The defendant had no notice that they would be presented, and consequently no opportunity to prepare to meet them, except the claim for the loss of appellee's own time, and that is not sufficiently alleged.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the answer and for further proper proceedings.

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HICKMAN'S ADM'R v. HICKMAN'S HEIRS.

(Filed May 3, 1887—Not to be reported.)

Construction of devise—Devise to testator's widow for life, and at her death to his daughter "to support her during life," the remainder, "if any," to be equally divided among the heirs. The daughter died before her mother. Held—That the widow was entitled to a life estate only, and at her death the estate passed to the heirs free from any encumbrance created upon it by the widow or her trustee.

Thos. J. Barker and G. G. Gilbert for appellant.

A. P. Harcourt for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Chief Justice Pryor.

The will of the testator was properly construed by the court below, and no sale of the realty can be made for the payment of the debts due by the widow, or contracted by the appellant as her trustee for her support. If the testator had known that his crippled daughter would die before her mother the provisions of the will might have been different, and although the draftsman of the instrument failed to express the meaning of the testator, still the chancellor is powerless to cure the defect when there is no ambiguity in the language used or as to the meaning of the testator, as appears from the instrument itself.

The testator uses this language: "I give and bequeath to my wife, Elizabeth, all of my real and personal property during her life, after the payment of debts. At the death of my wife I give to my daughter, Emily, all of the landed estate, to support her during life, and at her death I will that the remaining landed estate, if there be any, be equally divided among the heirs."

The daughter dying before her mother, left the mother entitled to a life estate only, and at her death the land passed to the heirs or other children free from any encumbrance the widow or her trustee might have created upon it. The land might have been sold, if necessary, for the support of the daughter, but not so as to the testator's widow, and, however meritorious the acts of the trustee may have been in providing for the widow beyond her income, he can look alone to the generosity of those holding the remainder for payment. Their moral obligation to indemnify the trustee can not be enforced in a court of equity.

Judgment affirmed.

REYNOLDS v. WILLIAMS.

(Filed May 3, 1887—Not to be reported.)

Homestead—The fact that a vendor has waived his lien for the purchase money, or has not retained a lien, does not entitle the vendee to a homestead as against an execution issued upon a judgment for the purchase money.

Browder & Edwards for appellant.

S. A. Bass for appellee.

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Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant sold and conveyed to the appellee a certain tract of land and took the notes of the latter for the purchase money. One of the notes for $185, due on the 1st of January, 1882, was executed by the vendee, Williams, to the appellant, with John R. May as surety, and is the subject of controversy in this action. An action ordinary was instituted upon this note and judgment obtained, upon which an execution was issued and levied on the land conveyed. The appellee claiming a homestead in the land, the sheriff refused to sell, and this action was brought in equity that the claim as to the homestead might be determined. No objection was made to the proceeding in the court below, and the only question raised is as to the right of homestead against the execution. The court below held that the appellee held the land as against the debt. That judgment was based on a clause contained in the deed with reference to this note, to the effect that "said note is not binding on the land."

It is evident that, as to this particular note, the lien on the land conveyed had been expressly waived, and, we suppose, for the reason that May had signed the note as the surety of Williams, the vendee, or had become jointly bound with him.

The fact, however, that the lien had been waived, or that no lien had been retained, gave to the appellee no right to a homestead as against the purchase money note for two reasons: First. The statute exempting a homestead expressly provides that the exemption does not exist as against the claim for the purchase money; and here it is admitted that the note was executed for the land, to which the right of homestead is being asserted. It is not necessary that a lien shall be retained to entitle the vendor to subject the land as against the claim of homestead. If the debt is for the purchase money, whether a lien is retained or not, the land may be sold under an ordinary execution, regardless of the homestead right, as such a right can not prevail against the purchase money note. In Bradley v. Curtis, 79 Ky., — (2 Ky. Law Rep., 329), it was said: "As long as the purchase money can be traced, no matter how often the evidence of the debt may be changed, the lien therefor can not be defeated by a claim to a homestead. Second. The debt existed in fact before the appellee acquired a homestead.

In Purcell v. Dittman, 81 Ky., 148 (4 Ky. Law Rep., 954,) where the debt was contracted simultaneously with the purchase, the debt was treated as existing prior to the creation of the homestead right.

The judgment below is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

MINOR v. GUTHRIE.

(Filed May 3, 1887—Not to be reported.)

1. Revocation of wills—The general rule is that if a will be traced to the hands of the maker, and can not afterwards be found, it is to be presumed that it was destroyed by him animo revocandi.

2. Same—The destruction of a will revoking a former will does not operate to revive the former will.

3. Secondary evidence—Testimony as to the contents of a will was incompetent, as the destruction of the will was not shown, nor its absence explained.

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Thompson & McChord for appellant.

Sam'l Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The paper in contest was duly executed by Josephine F. Guthrie as her will, on June 12, 1875. The appellant, Marion F. Minor, who is a grandchild of the deceased, contested its probate in the county court, but it was admitted to record, and this judgment was, upon appeal, affirmed by the circuit judge, who tried both the law and facts of the case, and it is now here for consideration.

The sole ground of contest is that the testatrix revoked the will by another one, executed either in 1878 or 1879. It appears by the testimony, which is brief, that at the time last named she executed another writing as her will, and which was left by her with the draftsman. He proves its contents and due execution as a will, and says that the last he knew of the paper the testatrix sent her son-in-law, as the latter said, and with whom she was then residing, for it, and that he gave it to him. The propounder of the paper in contest objected to all this testimony, and its competency is now in question. The loss of the writing last executed is in no way shown or its absence explained. Indeed no effort is made in this direction. This is perhaps attributable to the fact that while the contestant receives but a trifling bequest under the will in contest, yet she was entirely cut off, as the oral testimony shows, by the later paper.

The general rule is that if a will be traced to the hands of the maker, and can not afterards be found, it is to be presumed that it was destroyed by him animo revocandi. (1 Jarman on Wills, 119.)

The testimony does not, however, show clearly that the writing last executed came to the hands of the testatrix; but if it did, and the presumption, therefore, arose that she destroyed it with the intention of revoking it, yet it, as the oral testimony shows, revoked all former wills, and its presumed destruction would not operate to revive the paper in contest. (1 Jarman on Wills, 125, note 1.) This is also the statutory rule in this State. (General Statutes, chapter 113, section 11.)

The evidence, however, was not competent or sufficient to establish a revocation of the paper in contest as a will. As already mentioned, the destruction of the paper last executed was not shown, nor its absence explained, hence the testimony relative to its character and contents was not primary, but merely secondary; and was inadmissible for the purpose of showing a revocation of the writing in contest as a will.

If the loss of the writing last executed had been proven, or the inability of the party to produce it been shown, then the secondary evidence would of course have been competent. The best evidence within the power of a party must, however, be produced; and the character or contents of a writing can not be shown by oral testimony unless the party shows that he can not produce the writing, which is the best evidence of its character and contents. (Mercer's Adm'r v. Mackin, &c., 14 Bush, 434.)

This rule is especially applicable to and should be strictly enforced in the case of wills, as otherwise a wide door would be opened for fraud and perjury, although there is no ground to impute it to any witness in this particular case. The maker of the writing is dead, and can not speak in the matter; and to allow the probate of a will to be thus defeated would be likely to lead to much evil. Its probate has been carefully guarded by statute

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because of the temptation to make or destroy wills for persons after their death.

The judgment of the lower court conformed to this view, and is affirmed.

COTTON v. BROWN.

(Filed May 3, 1887—Not to be reported.)

Fraudulent conveyances—Limitation—To avoid the plea of the five years' statute of limitation to an action to set aside a fraudulent conveyance, where the conveyance was executed more than five years before the action was commenced, it is not sufficient for the plaintiff to allege merely that he did not have notice of the deed until within five years. He must allege a state of facts showing that he could not, with ordinary diligence, have discovered the fraud until within five years before the action was commenced.

C. T. Atkinson for appellant.

J. D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

To a petition for rehearing Judge Lewis delivered the response of the court:

The deed from Abraham Brown in trust for his wife, whose heir at law is appellee, was executed and duly recorded January 24 1871. But the cross action of appellant to set aside that deed upon the alleged ground it is fraudulent and void as to him, a prior creditor of the grantor, and to subject the property thereby conveyed to the satisfaction of his judgment, was not commenced until June 10, 1879.

In her answer appellee, in apt terms, pleads and relies on the statute of five years' limitation in bar of appellant's action. And as the record shows more than that period of time elapsed after the execution of the deed before the action to set it aside was commenced, it is manifest a complete defense was, in the absence of a sufficient replication, made out, for section 2, article 3, chapter 71, General Statutes, expressly provides that an action for relief, on the ground of fraud or mistake, shall be commenced within five years next after the cause of action accrued. But section 6, same article, provides as follows: "In actions for relief for fraud or mistake, * * * the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

In Fritschler v. Koehler, &c., 7 Ky. Law Rep., 34, it was said in a case like this that "when more than five years have elapsed from the time the conveyance is acknowledged and lodged for record when the action is commenced, it can only be avoided by pleading and showing the alleged fraud was discovered within five years." And, as further said in that case: "It is often difficult to determine at what time the discovery of the fraud has been made by a party seeking to set aside a conveyance alleged to be fraudulent, and more difficult for the defendant to negative the positive allegation of the plaintiff as to the time of the discovery, which is generally entirely within his own knowledge. This court has, therefore, held that the cause of action shall be deemed to have accrued, and the limitation to commence running, at a time when, by the exercise of ordinary diligence, the

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discovery of the fraud ought to have been made, and while the recording of the conveyance may not be constructive notice to prior creditors, it is a circumstance which it is proper to consider in determining when the discovery might have been made." And in Zachay's Adm'r v. Hicks, decided April 1, 1886 (7 Ky. Law Rep., 756), the same rule was adhered to, the following language being used: "When, in an action for relief on the ground of fraud, the defendant relies on the five years' statute of limitation, and shows that the fraud was perpetrated more than five years before the action was instituted, the plea must prevail unless it is avoided by a replication, showing that the action was brought within five years after the discovery, and the burden of showing that fact is on the plaintiff; but it is not sufficient for the plaintiff to show that the action was brought within five years after the discovery of the fraud; he must establish a state of facts showing that he could not, with ordinary diligence, have discovered the fraud until within five years before the action was instituted."

Tested by the rule of pleading adopted in these cases, we do not think the reply of appellant contains such a statement of facts as to avoid the statutory bar of five years pleaded in the answer, and supported by the facts of this case, for the language of the reply is simply that neither he, appellant, nor his assignors had notice or knowledge of said pretended deed till within the last five years.

More than eight years had elapsed when the action to set aside the deed was instituted, and according to neither the policy of the law nor the doctrine held by this court can it be regarded sufficient to avoid the statutory bar of five years to allege merely the plaintiff did not have notice of the deed.

There is nothing in the case of Ward v. Thomas, 5 Ky. Law Rep., 495, inconsistent with this ruling, it being there decided that the recording of the deed was not to be regarded as actual notice of the fraud.

It seems to us that as the reply did not contain a statement of facts sufficient to avoid the statute of limitation, appellee's defense to the action must be held sufficient.

Wherefore, the petition for rehearing is overruled.

LINENFELTER v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 5, 1887—Not to be reported.)

Railroads—Negligence—One who had for years been employed as watchman in the yards of a railroad company, was, while walking on the track in the yard, met and struck by an engine and killed. The engine was moving at the rate of about five miles an hour, with a bright headlight in front, and as the engine moved the bell rang. It appeared that the engineer did not see the man on the track, but that he could have done so if he had been watching. In this action by the wife of the deceased for willful neglect, Held—That a peremptory instruction to find for the defendant was proper, as the engineer, even if he had seen the man on the track, would have had the right to assume that he would step from the track in time to save his life, the man being an employe in the yard.

Young & Trabue, J. T. O'Neal and S. F. J. Trabue, Jr., for appellant.

Wm. Lindsay for appellee.

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Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

The rule contended for by counsel for the appellant is undoubtedly correct. Where the issue of fact is to be determined by a jury, and the evidence is conflicting, or conduces to make out the plaintiff's cause of action, the trial judge should not direct a nonsuit. In this case the widow of the intestate alleged that the death of her husband, who was in the service of the company, was caused by the willful neglect of the employes of the company in charge of the train.

The deceased had been in the employ of the company as watchman in its yard for a number of years, and at the time of his death was in a like character of employment, or required to see that the cars in the yard were in proper order, and if not, to report their condition. The accident happened at night, when the engine was on a side track, moving south at a pace but little faster than one walking. The deceased, when killed, had his lantern, and was walking north, meeting the engine on the same track as it moved south. The engine moved at the rate of five miles an hour, with a bright headlight in front. The deceased seems to have been a careful prudent man generally, but in the present instance his death was caused by his own neglect, and not that of the employes of the railroad company.

Within the yard was a space between the tracks where the employes were in the habit of walking, but at the time the accident happened there was mud and water in this space, that caused, no doubt, the unfortunate man to go on the track. It seems, however, that it was not unusual for those in the employ of the company to use the tracks in the yard in passing, but it is argued that if those in charge of the train had been looking out they could have seen the unfortunate man and avoided the danger. The bell rang as the engine moved, and with a bright headlight in front, and a lantern in the hand of the deceased at the time, there is but little doubt but that he could have been seen by those in charge of the engine. The fireman in fact saw the deceased the moment before he was struck, and cried out to stop the engine. It was then in a few feet of the deceased, and, although stopped, it was too late to save his life.

It is evident, we think, that the engineer did not see the deceased, and equally apparent that he could have seem him if he had been looking down the track.

The deceased was certainly experienced with reference to the movement of the cars and the danger in standing upon the track when the engine was moving towards him. There was no reason why the deceased did not see the danger as the engine approached. It was approaching slowly, not exceeding five miles an hour, and all he had to do was to step from the track. If the engineer had seen him when fifty yards off, and had known it was the night watchman, he had the right to believe that he would step aside and avoid danger. In fact the engineer, if he had been watching, would doubtless have concluded there was no danger, as the employe would certainly leave the track, while the deceased must have known that the moving train would pass over him if he remained on the track. The company is chargd with being guilty of willful neglect, that is, an entire indifference to the safety of those in its employ, when we think it is plain from the proof that the reckless indifference to personal safety was with the intestate, who, with the slightest effort, might have avoided all danger. If the engineer recognized the danger the man was in he should, if

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in his power, have avoided injuring him, but this record presents no such case. A nonsuit was properly ordered.

Judgment affirmed.

CURD, BY, &c. v. CURD, &c.

(Filed May 3, 1887—Not to be reported.)

1. Construction of devise—Devise by testator of all his estate to his widow and children, not to be divided until youngest child should arrive at age or widow should marry again, construed.
2. Same—The fact that one of the testator's children did not live with the widow, her stepmother, did not deprive the child of the right to her portion of the proceeds of the estate for her support and education.

P. B. Thompson, Sr., for appellants.

T. C. Bell for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Bennett.

R. J. Curd died July 3, 1879, in Mercer county, Kentucky. He left surviving him the appellant, Ella M. Curd, an infant and only child of his first wife. He also left surviving him the appellee, Susan B. Curd, his second wife, and three infant children by her, who are also appellees.

The appellee, Susan B. Curd, married the appellee, D. S. Curd, July 12, 1884.

R. J. Curd, in his lifetime, made a will, which was duly probated in the Mercer Circuit Court and admitted to record.

The appellee, Susan B. Curd, was appointed administratrix, with the will annexed, of R. J. Curd's estate. She continued to act as administratrix until sometime after her marriage with the appellee, D. S. Curd, when B. F. Roach became the administrator, with the will annexed.

This suit was instituted by the appellant, Ella M. Curd, for a construction of R. J. Curd's will, and for a settlement of his estate. By amended pleadings other questions are raised, which will be noticed hereafter.

The 2d, 3d, and 5th clauses of the will, which control its construction, are as follows:

"2d. All my property of every description is to be held together and not divided until my youngest child shall become 21 years of age, my wife, Susan B. Curd, to live upon my farm, and manage my property for the benefit of my children and herself, and she to raise, provide for and school my children in a manner suitable to their condition in life.

"3d. When my and my wife's youngest child by me shall arrive at the age of twenty-one years, then they have the privilege of making an equal division of my said property, if they desire to do so, among themselves, my said wife, Susan, to take a child's part at the time of division.

"5.th Should my said wife, Susan, again marry, then I will and provide that her said child's part shall be allotted to her and to be hers only during her life, and at her death to revert to my said children, to be held together and managed as aforesaid, some

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one being appointed by the proper court, and required to give band with good security, for the application of the interest and proceeds of my property as aforesaid."

The third clause of the will gives to the appellee, Susan B. Curd, a child's part of the testator's estate at the time of its division among the devisees, which division is not to be made until the youngest devisee shall have arrived at the age of twenty-one years. By this clause Susan B. takes, at the time of the division, a child's part of the estate absolutely. But by the fifth clause of the will, if she marries again, her interest in the part willed to her by the third clause is reduced from a fee simple estate to that of a life estate only.

By the third clause of the will, if Susan B. still remains a widow, the estate is not to be divided until the youngest child shall have arrived at the age of twenty-one years. It may then be divided among the devisees, but a division is not even then enjoined. Any of the devisees then have the right to require a division. Unless a division is demanded the estate is to be still kept together for the purposes set forth in the second clause of the will.

Upon the marriage of Susan B., however, then her interest in the estate (a child's part for life) is to be set apart to her, which she has the exclusive right to the use of during her life. But the balance of the estate is to be held together as before. And in the event of her death, then the life estate of Susan B., she having married again, is to revert to the children, and if no division has been made among them at the time of the reversion, then said interest is to be held as a part of the whole estate for the purposes mentioned in the second clause of the will.

The will also appoints Susan B. trustee of the estate for purposes mentioned in the second clause of the will, which trusteeship continues until the youngest child arrives at the age of twenty-one, and as much longer as the estate may be held together, and her second marriage does not supersede her powers as trustee. In the event of her death, however, then, by the provisions of the will, if the estate is not yet divided, the proper court is authorized to appoint a trustee to carry out the trust.

As we understand the decision of the lower court, it accords with the foregoing views, and to that extent is affirmed. But we can not agree with that part of the lower court's construction of the will which denies the appellant's equal right to a support and education out of the proceeds of the estate with the other devisees, simply because she did not live upon the estate with her stepmother. The proof clearly shows that down to the time of the death of the testator the appellant and the appellee, Susan B., did not get along well together, and it was evidently thought by the appellant that it would be more agreeable to her to live elsewhere. But it is not necessary to decide which one was in fault because, as we understand the provisions of the will, the appellant, notwithstanding she is living away from the place and her stepmother, is entitled to her pro rata of the proceeds of the estate for a support and education. She has an equal interest in the estate with the other devisees. Her interest in the estate helps to make up the yield of the estate, and it would evidently be unjust to deprive her of the yield of her property because it is more agreeable to her, and perhaps the best for her, to live with more agreeable kinspeople. The court, however, in fixing the allowance of the appellant should take into account, if the proof justifies it, any increase of the proceeds of the estate earned by the labor of the other devisees, and deduct that sum, and then allow the appellant her pro rata of the balance.

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The judgment of the lower court rejecting the allowance is reversed. In every other respect it is affirmed. In affirming we have not overlooked the various items of accounts allowed and disallowed by the lower court. Notably that for building a house on the farm by Susan B.; that of allowing Susan B. the insurance money, and rejecting her claim to interest thereon, etc., etc.

Upon a return of the case the lower court will also amend its decree so as to reserve the right to require the appellee, Susan B., at any time the interest of the appellant or any of the other devisees may require it, to give bond with sufficient surety for the faithful management of said estate, and the preservation thereof and the application of the proceeds according to the provisions of the will.

SCHILDNECT v. ROMPF.

(Filed May 5, 1887.)

1. In this contest over a will, upon the ground of undue influence and the testator's mental incapacity, it appearing that the testator was a believer in witchcraft, the contestant asked the court to instruct the jury that if the testator believed in witchcraft, and that his mind could not be disabused of that belief by argument or persuasion, then he was laboring under an insane delusion, and if the paper, to any extent, was the offspring of such a delusion, it is not his last will.

Held—That the instruction was properly refused. The court had no right to assume that the testator was incompetent to make a will because he believed in witchcraft, nor should the court have singled out the proof in regard to his belief in witchcraft, and thereby made it more prominent than any other fact.

2. Undue influence—The evidence, which is detailed in the opinion, does not establish the charge that the will was the result either of undue influence, or of an insane delusion on the part of the testator.

M. A. & D. A. Sachs and Joseph G. Sachs for appellant.

O'Neal, Jackson & Phelps for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

The testator, Conrad Rompf, had several children at the date of the execution of his last will. By that instrumnt he gave his estate to his widow, with the power to dispose of the same as she deemed best, but directed that in the final division it was to be distributed in equal portions between his children, save Mrs. Juliana Schildnect and George Rompf. To each one of these two children he devised five hundred dollars. Mrs. Schildnect contests the validity of this will on three grounds: First, a want of mental capacity to execute the paper; second, the undue influence exercised over the testator by his widow in its execution; and, lastly, that the will was the product of an insane delusion, in so far as it affected the contestant.

The testator had been a laborious and economical man during his whole life, beginning in abject poverty and ending life with an estate worth fifteen or twenty thousand dollars. The entire testimony, both on the part of the propounders and contestants of the paper, shows a mental capacity on the part of the testator that enabled him to fully comprehend the character of his estate

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and the objects of his bounty. He procured a business man to prepare the will, and gave to the draftsman, in plain language, the mode in which he desired to dispose of his property. No one seems to have been present when the application to write the will was made, nor was any one present hen it was finally executed but the draftsman and the subscribing witnesses.

That he seemed to have a purpose of his own with reference to the disposition of his property when the will was written is manifest, but whether that purpose was the result of an improper influence previously exercised over him by the wife, and such as he was compelled to follow, it seems to us in the principal question involved in the case. When looking to the question of undue influence, or the facts conducing to establish its exercise by the wife, there is but slight evidence upon which to base the belief that the will was the offspring of the wife's improper suggestions, instead of a fixed purpose on the part of the husband. The two had struggled together for years in raising a large family, and in accumulating the estate disposed of, the wife being as instrumental in acquiring the property as her husband. The children all seem to have been obedient and faithful to their parents but George and his sister Juliana, the present contestant, and when looking to their conduct there is nothing unnatural or unreasonable in the provisions of the will by which they are given less than the other children.

George was a wicked, dissipated man, and his father was often compelled to pay out money to relieve him from trouble. Juliana had been seduced by one who was at the time, as the proof conduces to show, the husband of another. She left her home with this man, who is now her husband, and had by him several children, and the only positive proof of the marriage was its consummation after the death of the testator. She says they were married in Jeffersonville shortly after she left her home, and this may be assumed as a fact for the purposes of this case, although it is involved in much doubt.

It does appear that the father made up with the daughter and had her children christened, still it is also apparent that he was trying to induce her to leave her husband and return to her home. Under such circumstances this paper was executed, and the property or its absolute control devised to the wife, who had aided the husband, who was a mere rag gatherer in the beginning, to become the owner of much real estate in the city, and to occupy an influential position with his friends and neighbors. It is said, however, that his wife caused him to execute this paper, and that he, as well as his wife, was a believer in witchcraft and spiritulism; and that he believed his daughter Juliana was a witch because her grandmother had gone to live with her, whose powers as a scorceress was not doubted by the family. It is attempted to be shown that this operated on the mind of the testator through the influence of his wife, and caused him to give to Juliana only the sum of five hundred dollars.

That these two people who had the mental capacity to transact any character of business they had undertaken in life with success had, by reason of their belief that Juliana was a witch, disinherited her and George, and given the estate to the other children, is attempted to be established by the contestant.

There is some proof conducing to show that the family were inclined to believe that certain persons possessed unnatural powers, but there is nothing in this case leading to the conclusion that the act of the testator in making this will was prompted by any evil spirit, or that he made it under the delusion that his daughter was a witch, when the daughter, too, is insisting that

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her father had made up with her, and exhibited, prior to his death, much affection for both herself and children. There is testimony of a slight character showing that the wife may have attempted to influence the husband, but in looking to the whole testimony, his character for resolution and self-will negative any such conclusions. Besides, the question of undue influence was submitted to the jury under proper instructions, and the verdict has resulted in sustaining the probate in the county court.

The contestant asked the court to say to the jury that if the testator believed in witchcraft, and that his mind could not be disabused of that belief by argument or persuasion, then he was laboring under an insane delusion, and if the paper, to any extent, was the offspring of such a delusion it is not his last will. The court had no right to assume that, because the testator believed in the exercise of unnatural powers by others, he was insane or incompetent to make a will, nor should the court have singled out the proof in regard to his belief in witchcraft that was permitted to go to the jury on the question of mental capacity alone, and thereby made it more prominent than any other fact. (Stokes v. Shippen, 13 Bush, 180.) The court, however, was asked to go still further in this case, and say to the jury that it was an insane delusion.

The effort to show that this belief operated on the mind of the testator when he made the will was in the fact that the mother of the testator went to live with Juliana, and for that reason he concluded that Juliana would be controlled by her, when it appears that the mother of the testator did not remove to the home of her granddaughter until after the will was executed; and whether so or not, there is no proof in this case to show an insane delusion towards the daughter that operated on the mind of the testator or controlled the execution of the paper, and, therefore, the judgment below is affirmed.

PEPPER, &c. v. THOMAS.

(Filed May 5, 1887.)

1. Dower—Where one has purchased land subject to the contingent right of dower in the grantor's wife, and has paid less than its fair value by reason of such contingent claim, he will not be permitted to deny the existence of the dower right.

2. A conveyance or devise by way of "jointure," within the meaning of section 6, article 4, chapter 52 of the General Statutes, is a conveyance or devise of an estate to the wife intended by the husband to be in lieu of dower. This intention must appear either expressly or by implication; the bar does not arise by operation of law.

3. Clerical misprision—Judgment allotting dower in an entire tract of land described in the petition, when the plaintiff was entitled to dower in only one-half of it, which was all the petition claimed, was the act of the court, although inadvertent, and after the expiration of the term the court had no power to set it aside.

4. Allotment of dower—In alloting dower in land which had been sold by the husband the land must be considered in the same condition it was in when alienated by the husband, and without amelioration or deterioration arising from the acts of the purchaser.

5. Partnership realty—If real property be purchased with partnership means and used for partnership purposes, it is treated in equity as held by the partners in trust for the firm, subject to the same rules as apply to partnership personal property, and liable to the debts of the firm and the

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claims of the partners inter se. And this is so whether the title be vested in one or all of the members of the firm. In this case, however, it is not necessary to decide whether the property in which dower is sought was impressed with that character.

Wm. Lindsay for appellants.

Geo. C. Drane for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Holt.

The right of the appellee, Eliza Thomas, as the widow of Alexander Thomas, to dower in two tracts of land which were conveyed jointly to her husabnd and G. F. Thomas is denied, first, upon the ground that the grantees held it as partnership property, and conveyed it to a trustee for the payment of their debts; and, second, because her husband devised to her a considerable estate, both real and personal, the former amounting in value to more than this dower claim, and which affords her a competent livelihood.

It appears that prior to May 19, 1862, her husband and G. F. Thomas were, as partners, largely engaged in farming, buying and selling stock, and transacting whatever was necessary to such business. The answer avers that they owned the two tracts of land in which she now claims dower as partners, and used it for their partnership purposes. This is denied, it being asserted upon her part that they were merely joint owners.

If real property be purchased with partnership means and used for partnership purposes, it is treated in equity as held by the partners in trust for the firm, subject to the same rules as apply to partnership personal property, and liable to the debts of the firm and the claims of the partners inter se. This is so, whether the title be vested in one or all of the members of a firm.

It does not satisfactorily appear, however, that this character had been impressed in any way upon this land. There is no oral testimony upon this subject, and the wording of the deeds and form of the notes, which were executed for the deferred payments, leave it a matter of doubt whether the purchase was by G. F. and A. Thomas as partners or merely as joint owners.

It appears, however, that Robert Lee, through whom the appellants, Pepper and Laughlin, derive title, purchased the land subject to the appellee's potential right of dower. In fact the appellant, Pepper, simply stepped in and took the bid of Lee as to so much of the land as the former obtained. G. F. and A. Thomas became involved, and in 1862 made an assignment of all their property, much of which was undoubtedly held by them as partners, to trustees for the payment of their debts. The deed was a joint one, but executed in their individual names. It conveyed, among other property, the land in which the appellee now claims dower, her husband having died in 1883. In it her right to dower was expressly recognized, and the land conveyed subject to it.

The trustees under the deed brought an action to sell the trust property and to settle the trust. The petition recognized and admitted the contingent right of the appellee to dower, and asked that its value be ascertained and paid to her in order that a purchaser might obtain a perfect title. A judgment of sale was obtained, which also recognized her right and authorized the master to ascertain the value of her right, and to agree to pay it to her if she would release her claim. This was not done, however; and no agreement having been made with her, the land

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was sold and bid in by Lee, subject to her dower right; and the master in his report says that the price of the land was materially affected by its sale subject to her claim and that of the wife of G. F. Thomas.

It is urged that the commissioner's deeds to Pepper and Lee provided that the contingent right of dower of the appllee was not to be affected thereby, if any existed; that the proceedings above named could not enlarge her right; and that the question is yet open to investigation.

The purchasers, however, are affected and bound by those proceedings, and they purchased the land subject to her contingent right of dower. It appears they did so at less than its fair value by reason of such contingent claim, and after doing so they will not now be permitted to deny its then existence.

The distinguished counsel for the appellants contends, however, that the admitted fact that the appellee took as devisee, and as such is now in the enjoyment of her husband's estate, the landed portion of which was worth more than this claim to dower, is a bar to its assertion.

Section 6, article 4, chapter 52 of the General Statutes provides: "A conveyance or devise of real or personal estate by way of jointure may bar the wife's dower; but if made before marriage, without her consent, or during her infancy, or after marriage, she may, within twelve months after her husband's death, waive the jointure by written relinquishment, acknowledged or proved before and left with the clerk of the county court, and have her dower. When she so demands and receives her dower the estate conveyed or devised in lieu thereof shall determine and revert to the heirs or representatives of the grantor or devisor."

The term "jointure" as above used means such an estate as may be conveyed or devised to the wife in lieu of dower. It must be in satisfaction of it; and if transferred to her without any intention or purpose that it shall be so. it does not operate to bar her claim. If, however, the grantor or devisor intends the estate conveyed or devised as in lieu of dower, then it is a jointure, and so operates. The bar arises not by operation of law, but from the express or implied intention of the husband. (Bacon's Abridgement, volume 3, page 230; Yancy v. Smith, 2 Met., 408; Tevis' Ex'ors v. McCreary, &c., 3 Met., 151.)

In the case now before us it is merely averred that the estate was devised to her, and that she is in the enjoyment of it. The land was conveyed to the trustees subject to her contingent right of dower. It is not like a case where the grantor or devisor has conveyed to the party against whom the widow is claiming with covenant of general warranty, and she is in possession of an estate by devise from her husband worth more than the dower claim. In such a case the law rejects her claim, thus avoiding circuity of action.

Here, however, there was no warranty of title by the husband; and where his estate will not be liable to his vendee if dower be recovered, the law will not imply that the estate granted or devised to the wife was by way of jointure or in lieu of dower. Moreover, after the purchase by Lee, Alexander Thomas was discharged as a bankrupt from all his then existing liabilities.

Lee neither purchased nor paid for the wife's contingent right of dower. The husband knew this, and there was no legal or moral reason why he should take it from her and give it to Lee. In such a case an intention to do so by way of jointure can not be presumed.

The judgment, however, gives her dower in all the land, when

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she was only entitled to it in one-half of it, because only that much belonged to her husband. Indeed this is all the petition claims.

Evidently this occurred through inadvertance, but yet it was the act of the court. It fixed the rights of the parties and was of a final character, because it directed the commissioner to allot the dower in conformity to it. It appears that at a subsequent term the court upon notice, and at the instance of the appellee, corrected it and allowed her dower in but one-half of the land. But even if the court had power to do this, yet before it was done this appeal had been taken.

The judgment was also erroneous in another respect, and whether this portion of it was of a final character or not, yet, as the case must go back for further pleadings, it is proper that we should notice it.

The master was directed in allotting the dower to ascertain the value of the land and then deduct from it what the purchase money liens amounted to when the land was sold to Lee; and to then allot as dower so much of the land "as is of the value of one-third of the remainder."

As already said the direction to allot one-third in value of all of the land, less the liens, was erroneous, because she was only entitled to one-sixth; but the basis of allotment was otherwise erroneous.

The master was directed to ascertain the then value of the land, when it should have been its value at the time of the sale to Lee. The value of any permanent improvements which the purchaser or his vendee may have made can not be taken into the estimate.

The land must be considered in the same condition as it was in when it was alienated by the husband, and without amelioration or deterioration arising from the acts of the purchaser.

The statute says:

"Whether the recovery is against the heir or devisee, or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee or purchaser; so as not to include in the estimated value any permanent improvements he has made on the land." (General Statutes, chapter 52, article 4, section 9.)

The commissioner should be directed to ascertain the value of the land when it was purchased by Lee, then deduct from it the purchase money then owing for it, and then allot to the appellee as dower so much of the land as is of the value of one-sixth of the remainder.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

MARKS v. TICHENOR.

(Filed May 5, 1887.)

Vendor and vendee—Destruction of buildings by fire—In the sale of land it becomes the real property of the vendee from the execution, delivery and acceptance of the written contract, and the destruction of buildings on the land by fire between the time of the contract of sale and the time fixed upon for the delivery of possession must be the loss of the vendee unless there was an express contract by the vendor to deliver the land with the buildings thereon in the same situation as when the sale was made, or unless the buildings were destroyed by the culpable negligence of the vendor.

In this case a supplemental contract by the vendor to cover the house and put two coats of paint on the outside and deliver the same to the vendee by

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a certain time is held not to have been an express agreement by the vendor to assume the risk of the destruction of the buildings by fire.

Owen & Ellis and W. B. Noe for appellant.

Jep. C. Jonson for appellee.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Lewis.

Appellee having sold, and by deed executed October 24, 1884, conveyed, to appellants three tracts of land adjoining, and constituting one farm, instituted an action to recover judgment on the notes given for the purchase money, and to subject the land to satisfy it.

In defense appellants state that the deed, as written, does not contain the whole contract entered into between the parties, but a portion of it was, by mistake, omitted, and that they accepted the deed upon the condition of the execution by appellee of the following writing, which embraces the omitted part:

"I have this day sold to James A. and Samuel C. Marks my farm, known as the Daniel McFarland farm. I agree to cover said house and put two coats of paint on the outside, and deliver the same to said parties by or on the first day of January, 1885. Eleven thousand of the shingles is to be hand-shaved shingles and the remainder to be cut shingles. I also agree to furnish as much as two hundred feet of sheeting, if needed on said house, and if any more is needed said Marks is to furnish it.

"T. C. TICHENOR."

It is further stated that about November 29, 1884, the dwelling house mentioned was destroyed by fire, in consequence of which appellee never did deliver it, and they, therefore, ask that the notes sued on be credited by the value of the house, which they aver was one thousand dollars.

It is stated in the reply, and not controverted, that at the time of the sale of the land it was in the possession of a tenant of appellee, whose term did not expire unil January 1, 1885, of which facts appellants were aware, and that time for delivering possession was agreed on in view of such tenancy.

In the sale of land it becomes the real property of the vendee from the execution, delivery and acceptance of the contract. "It is vendible as his, chargeable as his, and capable of being devised or descending as his. Consequently it is a well-established and reasonable rule that the destruction of buildings thereon by fire, between the time of such contract of sale and the time fixed upon in the contract for the delivery of possession by the vendor to the vendee must be the loss of the latter, and not of the former. (Calhoun v. Belden, 3 Bush, 674.)

There are only two exceptions to this rule. The first is when, as was the case in Combs v. Fisher, 3 Bibb, 51, there is an express contract to deliver the possession of the land with the improvements for buildings thereon in the same situation as was the case when the sale was made.

The second is when, as was the case in Cornish v. Strutton, 8 B. M., 586, the building has been destroyed by the culpable negligence of the vendor.

There is no allegation or proof that the destruction of the dwelling house in this case was caused by the negligence of the vendor or any other person. Nor do we think the contract fairly construed amounts to an express agreement by the vendor to assume the risk of the destruction of the building by fire.

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The purpose of the supplemental contract executed by appellee was to provide for the repair by him of the house as therein agreed, and which the evidence shows he did do, but not to insure it against destruction by fire, or to shift the risk from appellants to himself.

He simply covenanted to deliver possession, without any express undertaking to sustain any loss that might arise from the burning of the house.

Judgment affirmed.

NORMAN, &c. v. BOAZ, &c.

WATSON, &c. v. SAME.

(Filed May 12, 1887.)

1. Injunction will lie to restrain the collection of an illegal tax.
2. Constitutional law—While a statute providing for the imposition of a tax may be unconstitutional as to colored persons, because they are not allowed to participate in the benefits derived from the expenditure of the money raised by the taxation provided for, that fact does not render the statute unconstitutional as to white persons.
3. Taxation—While it is not indispensable to the validity of a statute providing taxation for a local purpose that a majority, or any number of those to be taxed therefor, should, at an election, vote in favor of such taxation, yet where the statute makes the taxation to depend upon the sanction of a majority of the votes cast at an election to be held by officers appointed and qualified according to law, an election held by a self-appointed and irresponsible private person is of no validity whatever, and confers no authority to impose the tax.
4. Curative statute—The legislature has no right to intervene during the pendency of an action, and declare that certain acts, which were unauthorized and illegal at the time of their commission, should be deemed and held legal and valid, when the substantial rights of the parties, either plaintiffs or defendants, are thereby affected; and while this rule does not apply where the curative statute relates only to irregularities or informalities, it does apply in this case, the proceedings attempted to be cured being absolutely void.

Robertson, Smith & Robbins for appellants.

C. L. Randle for appellees.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Lewis.

By an act of the general assembly, entitled "An act to incorporate Carr Institute in Fulton county," approved March 9, 1882, and an amendatory act approved March 17, 1884, the college therein mentioned was declared a common school, and as such entitled to draw from the common school fund of the State each year all the money due the school district in which it is situated. And for the purpose of erecting a suitable building, it was provided that the question of a subscription of $5,000 by the district, to be paid for by taxation, should be submitted to the qualified white voters of the district on the first Saturday in May, 1884, and in the event of the votes then cast being in favor of such subscription, the trustees of the college were to be authorized to annually, by some suitable person appointed by them, make an assessment of the taxable property in such district, and to levy a

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tax not to exceed 30 cents on the one hundred dollars of property subject to taxation, and a poll-tax of not exceeding two dollars on each white tithe, for the purpose of enabling them to pay one-fifth of the subscription and accrued interest, the collector of the tax to be appointed by the trustees.

Under these acts an attempt was made at the time indicated to hold an election upon the question of the subscription mentioned, and also of nine trustees of the district as required thereby, when it is claimed the proposition for the subscription was carried by a majority of the votes cast, and the candidates were duly elected trustees.

Afterwards appellees, assuming authority to act as such trustees, caused an assessment of the taxable property of the district to be made by a person appointed by them for that purpose, made a levy of $1,500 tax on the district for the year 1885, and appointed appellee Boaz to collect the taxes so laid.

These two actions, consolidated and tried together, were instituted in July, 1885, by residents and taxpayers of the district, for the purpose of obtaining an injunction to perpetually restrain appellees, claiming to be trustees, from further proceeding to levy, and Boaz from collecting said tax, and from distraining and selling their property therefor. And the lower court having dissolved the temporary injunctions, and dismissed both the actions, the plaintiffs prosecute this appeal.

Before considering the grounds upon which the plaintiffs seek relief we will notice the position assumed by counsel for appellee, that an injunction will not lie in cases of this sort.

Whatever may be the rule in other States, as said in Gates v. Barrett, 79 Ky., 295, "the right to have an injunction ro restrain the collection of an illegal tax has been so long recognized and acted upon in this State that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity."

However, these are not cases in which it is sought to restrain the collection of taxes alleged to be illegal merely by reason of irregularity or misuse of authority by officers duly elected and qualified to act, but the remedy is against persons who, it is stated, are attempting to cause an assessment of property, lay taxes and cause the collection thereof, without being officers with any authority whatever.

The first ground upon which plaintiffs ask relief is that the two acts are unconstitutional because the property of colored persons residing in the district are made subject to the tax, while they are neither allowed to vote upon the question of the subscription nor to participate in the benefits derived from the expenditure of the money raised by the taxation provided for.

As the plaintiffs are white persons, and consequently not at all affected by the alleged discrimination against colored persons of the district, the court, according to a well-settled and conservative rule, will not listen to the objetion made by them to the constitutionality of the two acts on that account. But we do not think, according to a proper and reasonable construction of the acts, the property in the district of colored persons is made subject to taxation to pay the subscription authorized thereby. And as only the property of white persons can be made subject, the acts, according to the decision of this court, in Marshall v. Donovan, 10 Bush, 681, can not be regarded as in violation of the Constitution of the United States.

In that case the same objection was made to the statute as is made here, and this court, after a full consideration and discussion of the question, held that while, if colored persons were taxed for school purposes, and the money expended for the exclusive benefit

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of the whites, the taxation would be unconstitutional as to, and might be resisted by, the former, that fact would not render the act unconstitutional as to the latter.

By the act of March 17, 1884, the same clerk who was appointed to record the votes at the municipal election of police judge, marshal and trustees of the town of Fulton was required, at the same time and place and in the same poll-book, to record the votes given upon the proposition for the subscription to erect the college building, and for the nine trustees of the school district authorized to be then elected; and he was required, in making out such poll-book, to prepare two columns for the purpose of recording the votes given for and against the proposition for the subscription, and to propound to each person offering to vote the distinct question, how he desired to vote upon that proposition. But it is alleged by the plaintiffs in each of these cases and proved that the clerk of the municipal election did not prepare the poll-book as required by the act of 1884 for recording the votes upon the proposition to make the subscription, and for the nine trustees of the school district, nor did he in any book record the votes given for either purpose. On the contrary the only record of such votes was made by a private person on his own motion, and in a book prepared by himself. And though he was in the same room where the election of municipal officers was being held, it is conclusively shown that neither the clerk nor judges of that election did or could supervise or give attention to his proceedings. But he, without being appointed, or authorized by law to be appointed for the purpose, without being qualified, or authorized by law to be qualified, and without the presence of judges to pass upon the qualifications of voters, not only recorded the votes attempted to be given, but assumed authority to decide who were entitled to vote.

It seems to us that an election attempted to be thus held can not be valid for any purpose, nor can the book in which the votes purport to have been recorded by such unauthrized person be taken as evidence that either a majority of votes or any votes were cast in favor of the subscription, or that the persons claiming the power to act as trustees of the school district ever were so elected, for the conditions upon which the subscription was authorized by law have not in any respect been complied with, nor have the persons assuming the right to act as trustees in virtue of that pretended election been thereby invested with any official authority whatever.

As, therefore, when these two actions were instituted the school district was not liable to taxation for the erection of the college building, and appellees had no power, as trustees, to levy a tax for such purpose, or to authorize appellee Boaz to collect it, it would seem that appellants were entitled to the relief sought by them. But January 12, 1886, while the actions were pending, an act was passed, the first section of which is as follows:

"That the election held in the town of Fulton, * * * on the first Saturday in May, 1884, be, and the same is, hereby declared lawful, as much so as though it had been held and conducted in every respect in strict compliance with the law authorizing the election to be held, and all the acts and doings of the trustees then elected within the scope of the authority given the trustees of 'Carr Institute,' when elected, shall be, and are hereby, declared lawful.' And we will now consider what effect that act has upon the rights of the parties to these actions.

A general rule applicable to retrospective statutes is as follows: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something, the

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necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." (Cooley's Constitutional Limitations, 463.)

The question then arises whether the manner in which the election was held, by which it is claimed the proposition for the subscription was carried and the nine trustees were selected, is a mere irregularity or inforamilty, not affecting the substantial and vested rights of appellants as taxpayers.

It is true that it is not indispensable to the validity of a statute providing taxation for a local purpose that a majority, or any number of those to be taxed therefor, should at an election vote in favor of such taxation. And the legislature might have authorized the subscription for the erection of the college building and the imposition of taxation upon the school district through the agency of trustees of "Carr Institute," named in the original act, without submitting the proposition to the voters, or an election by them of trustees. (Slack v. M. & L. R. R. Co., 13 B. M., 22.)

But by the terms of the statutes of 1882 and 1884 the taxation was made to depend upon the sanction by a majority of the votes cast at an election to be held by officers appointed and qualified according to law, not by a self-appointed and irresponsible private person, and the power to impose and cause to be collected the taxes was conferred only upon trustees duly and legally elected.

When these actions were commenced "the law was' therefore, for appellants, and the court would have so adjudged." And, as has been held by this court, the legislature has no right to intervene during the pendency of an action, and declare "that certain acts which were unauthorized and illegal at the time of their commission should be deemed and held legal and valid." when the substantial rights of the parties, either plaintiff or defendant, are thereby affected. (Gaines v. Gaines, 9 B. M., 295; Allison v. Louisville H. & W. R. Co., 9 Bush, 247.)

Of course this rule does not apply where the curative act relates only to irregularities or informalities. But we do not regard the attempted election as merely defective or irregular, but it was absolutely void, and conferred no authority upon appellees or any others to impose taxation on the district.

There was then in fact nothing for the curative statute to operate upon. And the recital in the preamble to that statute shows that the legislature never intended to render legal and valid what, as this record shows, was void. But it was therein erroneously assumed that the person who acted as clerk was duly selected and qualified to act, and recorded the votes upon a poll-book under the supervision of judges of the election. In our opinion, therefore, the act of January, 1886, did not, nor was intended to, have the effect of rendering valid the pretended election, held in the manner and by the person shown by this record. Consequently the judgment of the lower court is reversed and cause remanded, with directions to perpetuate the injunction in each case.

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LOTH & HAAS v. CARTY, &c.

(Filed May 14, 1887.)

1. A mortgage of property to be acquired in futuro is constructively fraudulent as to the creditors of the mortgagor other than the mortgagee, and while it has been said that such a mortgage is good against creditors "until attacked by fraud," it is a sufficient attack to state that the property sought to be subjecred was obtained subsequent to the giving of the mortgage; and is only embraced by it by a clause attempting to cover property acquired in future.

2. Assignment for benefit of creditors—Where the tenant has assigned his property for the payment of his creditors, and the trustee has brought a suit to settle the estate, the landlord need not sue out a distress warrant or attachment for his rent; and where the trustee brings his suit within three months after the landlord's claim for rent becomes due it is immaterial whether or not the landlord asserts his lien within the three months, the property being in the custody of the court.

Z. Gibbons for appellant.

H. Marshall Buford for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Holt.

The lease of W. A. Varty of the store house of the appellee, M. E. Carty, began May 1, 1882, and ended May 1, 1883, at $1,000 per annum rent, payable monthly. It was paid to June, 1882, so that of the unpaid rent the first installment became due on July 1, 1882.

On July 7, 1882, the tenant mortgaged to the appellants, Loth & Haas, his entire stock of merchandise then upon the leased premises, and the mortgage, by its terms, included "all goods that may hereafter be added to said stock."

James Gallahue, as one of Varty's creditors, attached the goods on August 14, 1882, and subsequent thereto, but upon the same day, the debtor made an assignment to one Parker of all his estate for the benefit of his creditors.

The trustee brought an action to settle the trust on September 19, 1882, to which the appellants and Mrs. Carty were defendants. The petition averred that they were claiming liens of some character against the assigned estate, and called upon them to assert them. The appellee, Carty, was summoned on September 21, 1882, to answer, but for some unexplained reason she did not do so until June 23, 1883, when she asserted a preferred lien, or landlord's claim for her rent, from June 1, 1882, to May 1, 1883.

The attaching creditor, Gallahue, also claimed a lien superior to that of Loth & Haas, as to so much of the stock of goods as had been purchased after the execution of their mortgage and before the assignment. Upon the other hand this was denied by them, they claiming that their mortgage, by virtue of its terms, attached to them as they were added to the stock. They also deny the right of Mrs. Carty to any lien for rent, first, because she never sued out any distress warrant or attachment for it; and, second, because if this were not necessary to create or preserve the lien, yet she failed to assert it within three months from the time it became due.

As the question as to her claim apparently presents more trouble in the true solution of it than that between the appellants and attaching creditor, we will first consider the latter.

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The clause of the mortgage relating to anything that might thereafter be added to the stock was valid between the parties; but the mortgage thereby acquired no available right to such subsequently acquired property as against the creditors of the mortgagor. The general rule is that a mortgage of property to be acquired in futuro is void, and can not avail against the claims of other creditors. (Ross v. Wilson, Peter & Co., 7 Bush, 29; Vinson v. Hallowell, &c., 10 Bush, 528.)

We do not regard the case of Zaring, &c. v. Cox's Ass'ee, &c., 78 Ky., 527, as in conflict with this rule. It is true that the facts of that case are not fully shown by the report of it; and it does not appear in it, as it does in this case, that any creditor had intervened by legal proceedings prior to the deed of assignment. Such an effort to mortgage what the debtor may subsequently acquire is constructively fraudulent; and when the court, in the last-named case, said, "such a conveyance is evidently good between the parties, and the lien attaches so soon as any stock is added, and being good between the parties, it is good as to antecedent creditors, at least until attacked for fraud," it no doubt merely meant that it being merely constructively fraudulent, was valid until another creditor asserted his claim and denied the validity of the mortgage as to property acquired after its execution.

In such a case the attacking creditor need only state the fact that the property was obtained subsequent to the giving of the mortgage, and is only embraced by it by a clause attempting to cover property acquired in futuro. This of itself makes it constructively fraudulent as to other creditors; and when averred constitutes an attack upon it for fraud; and the portion of the opinion cited no doubt meant that such a clause in the mortgage was valid as to antecedent creditors if they remained silent. We now return to the other question.

In Petry, &c. v. Randolph, &c., 9 Ky. Law Rep., 14 the question presented was whether a landlord, whose rent had been due more than 120 days, but less than six months, could under the statute distrain for it after the tenant had assigned his property for the benefit of his creditors. It was there held that as between the landlord and tenant the former could distrain for it within six months from the time it became due; that as to lien holders he must do so within 90 days; and as to all other persons having rights or equities against the property of the tenant, he must do so within 120 days; and that in case of an assignment, the rights of other creditors having thereby intervened, he must do so within the last-named period; and that the sections of the statute providing that before the lien holder or an officer under an execution or attachment can remove the tenant's property from the leasehold premises he must pay to the landlord a year's rent due or to become due, related to cases where the landlord had not lost his right as above indicated.

The question now presented is, however, a different one.

Unless the law requires what is needless, clearly where the tenant has assigned his property for the payment of his creditors, and the trustee has brought a suit to settle the estate, the landlord need not sue out a distress warrant or attachment for his rent. This would involve needless trouble and cost.

It is, however, urged that in this instance the landlord did not assert the lien until the expiration of three months after the rent became due. This is true as to nearly all of it, but the assignment was made within three months of the time when the first unpaid installment became due; the suit by the trustee to settle the estate was brought within this time, and the petition averred that

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Mrs. Carty had a lien. By virtue of the assignment the property was held in trust for the payment of her debt as a lien claim. The trustee represented her; and when the suit was brought the estate was in custodia legis for the satisfaction of her claim.

The law made it the duty of the trustee to pay the lien claims first, and then the general creditors; he held the property for this purpose as the representative of the beneficiaries, and upon the bringing of the suit to settle the trust the matter was already in the charge of the court. Then why the necessity of the landlord proceeding by distraint, or how can it be said that her claim is barred by time when the property had already been placed in the hands of a party representing her for its payment? It is true that the landlord has a statutory right merely and a legal remedy only.

Undoubtedly the law requires vigilance upon his part in the assertion of his rent claim. This is to prevent him from enabling the tenant to obtain false credit. No such reason exists, however, in a case like this, where the tenant has already parted with the title to it, and it is in trust for the payment of the landlord.

The statute provides that if the property be removed openly, and without fraudulent intent from the leased premises and not returned, the lien of the landlord shall be lost unless asserted within fifteen days from the time of removal. Here it appears they were removed, and in fact sold, as early as December 15, 1882. It was, however, done by operation of law, and by the assignee, who represented the appellants as well as all the other creditors of the tenant.

The assignee in this instance retained control of the rented premises until the expiration of the lease; and we perceive no reason, either equitable or legal, for depriving Mrs. Carty of her right to be paid out of the proceeds now in the trustee's hands arising from the sale of the property which was upon the rented premises; nor do we think it was error for the court to order the expenses of settling the trust to be paid out of this fund because they were necessary to the settlement of the trust and the rights of the various creditors, including the appellants.

Judgment affirmed.

GRAHAM v. CONGER, &c.

(Filed May 14, 1887.)

1. Taxation—The legislature has no power to impose a tax upon the land bordering on a county road to pay the entire cost of converting such a road into a turnpike. All who are directly benefited by the improvement, or who, by reason of their proximity to the road, will practically derive the benefit, must be required to share the burden in order that there may be such equality and uniformity in the taxation as the Constitution requires.

2. Estoppel—The taxpayers who have procured the passage of an act providing for such an improvement are estopped to deny its validity as against those who have made the improvement under it.

3. Title of act—The subject of an act providing for the improvement of a county road, known as the "Fountain Ferry road," at the cost of the owners of land bordering on the road, was sufficiently expressed by the title: "An act providing for the improvement of the Fountain Ferry road (describing it), at the cost of the property benefited thereby."

Jas. S. Pirtle for appellant.

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C. B. Seymour, Humphrey Marshall and Lafe Joseph for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

By an act of the legislature, approved the 21st of April, in the year 1882, on the petition. as is alleged, of a large majority of persons owning property on either side of the Fountain Ferry road in the county of Jefferson, a tax was imposed on the owners of the land lying between two lines parallel to the center of the road, and distant on each side 800 feet, for the purpose of improving and macadamizing the road (that was then an ordinary county road) from the western boundary of the city of Louisville, extending to the bank of the Ohio river.

The commissioners under the act authorized by its provisions to contract for the construction of improvement gave the contract to the appellee, Conger, who completed the work in accordance with his contract, and is now seeking to enforce his lien on the land bordering on the road and owned by these appellants. The entire improvement, including compensation to the engineer and other expenses, amounted to about the sum of twenty thousand dollars.

The appellants filed an answer presenting several defenses to the action, only one of which will be determined in this case, viz., the validity of the act under which this work was done. It is insisted by counsel for the appellant that the act is unconstitutional for two reasons: First, The title of the act is misleading. Second, that the taxation imposed is unequal, and the property of the appellants proposed to be taken for public use without compensation.

A demurrer was sustained to the answer filed, and the facts therein alleged, connected with the act of the legislature under which this lien is sought to be enforced, presents the constitutional question. The apportionment of the cost of the work was proper, and a lien exists, by the provisions of the enactment, if the demurrer was properly overruled.

It is alleged in the petition that the road improved was, at the time of the passing of the act, one of the ordinary county roads of Jefferson county, under the supervision of the county authorities, worked and kept in order at the usual expense attending the improving of county roads, and the expenses paid out of the county levy.

That the costs to each land owner was only a few cents to the acre for such improvements as were required to keep the road in repair, and paid out of the annual levy.

That the tax imposed for the extraordinary improvement made amounts to fifty dollars an acre on the land lying within the taxed boundary, or one dollar per foot fronting the road on either side; that these appellants were not instrumental in obtaining the passage of the law or benefited by the improvement; that there is no general system of taxation for turnpike purposes within the county, and, therefore, the legislature exceeded its authority in requiring these appellants to pay for this public road, or its imporvement, that belongs to the county, or under its control, and from which they derive no income and no greater benefits than must necessarily be attached to farming lands bordering on a public highway.

The land sought to be taxed is agricultural land, and its annual rental about four dollars per acre.

By section 5 of the act it is made the duty of the Jefferson County Court "to cause to be ascertained the names of the owner of each and every square foot of land within the tax district

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described in the first section of the act, and to assess the entire cost of said improvement of said road, including the compensation to the engineer, etc., equally upon each square foot of land within said district, and a lien shall exist for the same on said property," etc.

By the 7th section it is provided "that after the Fountain Ferry road is improved, as herein provided, it shall be a public road, and shall be thereafter kept in repair by Jefferson county as such." The act is entitled "An act providing for the improvement of the Fountain Ferry road (describing it) at the cost of the property benefited thereby." We perceive no objection to the title. Such is the purpose of the enactment, and the body of the act following the title authorizes the improvement made at the cost of the owners of the land bordering on the road. There is nothing foreign to the title, and the legislature has declared, by the passage of the law, that the improvement is beneficial to the owners. That the improvement is beneficial there is but little room for doubt, and whether or not benefits are equal in all cases to the burden imposed is not a material inquiry.

The constitutional requirement, in reference to uniformity and equality in taxation, and that prevents such a discrimination as imposes the burden on a few for the benefit of all, seems not to have been regarded in the legislation upon the subject-matter involved in this case. While districts may be created and taxation imposed, according to the value of the property within the particular district, for the construction of turnpikes and other improvements upon the idea of benefits derived, we are aware of no rule or principle of taxation that would authorize the taxation of agricultural lands by the square foot, or of compelling those who own land bordering on an ordinary county road to incur the entire expense of keeping the road in repair, and certainly no system exists by which such extraordinary expenditures can be made, as in this case, imposing a burden of fifty dollars an acre on agricultural land for the construction of an improvement for no other reason than that the land borders upon the improvement made. The road is devoted to the public use It is a county road in which the entire public is interested, and where the owners of the adjacent land, although not touching the road, are equally benefited with those liivng directly upon it. The few living adjacent to the improvement have been selected to discharge a burden that should be assumed by all, or at least by those who are benefited by it. It is a local tax for a county purpose—a common burden imposed on a few that violates every principle of just and uniform taxation, and borders on spoliation.

If the owners of land bordering on this particular road can be compelled to improve it by converitng the dirt road into a turnpike, then the owners of land bordering on every other road in the county may be required to make a like improvement, and by this means five-sixths, or a greater proportion of the taxpayers of the county directly interested in such improvements, released from taxation and the entire burden placed upon those who happen to live near the improvement made. The burden may be apportioned according to the benefits received, whether it be a county or district tax, but such an unjust discrimination as has been made in this case, and that would exist if a like system had been adopted for the entire county, is in direct violation of the Constitution, and an appropriation of the property of the citizen for public use without just compensation. Local taxation is often proper because of the local benefits received, and the law-making power can ascertain those who, from the benefits derived, should be made the subject of taxaiton with an approximate certainty,

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and in this manner produce as near as is practicable uniformity and equality in the discharge of the burden; but to say that a few persons living on the road shall pay twenty thousand dollars for improving it, and then have no other interest in it than his neighbor who rides over it and uses it, is so obviously unjust as to require only the statement to show that it is in plain disregard of the rights of these appellants. It may be called a taxing district, but this imparts no efficacy to such legislation where the district, when created, shows that the burden is imposed on a few for the benefit of all. In this consists the wrong done these appellants, and entitles them to the relief sought.

We do not mean to adjudge that turnpike districts may not be created in a county, and those within the district taxed to construct them, but in imposing the burden the district should include, and the burden be imposed on, those who are directly benefited by it, or who, by reason of their proximity to the road, would practically derive the benefits.

The mode of assessments and taxation for street improvements can not be applied to the improvement of highways in the county. The costs of the improvements of streets and sidewalks in cities and towns is usually imposed on the property in each square where the improvement is made, that is, each square is made to improve the street fronting it. This is upon the idea, as said by this court in the case of the City of Lexington v. McQuillan's Heirs, 9 Dana, 513, that all the streets and sidewalks may be expected to be improved at sometime in a similar manner, and each square being liable for the cost incident to the improvement upon which it borders, it approximates uniformity and equality as between the owners of the property; and this is indispensable in imposing such taxation. All the property within the square will in this manner be taxed for like improvements. The improvements may not be made at the same time, but the practical result of such a system is to make all the realty responsible for such improvements. Not so with reference to the taxation in this case. If we could assume that the legislature would require the counties to make turnpikes on all their public roads, as we do with reference to the grading and constructing of streets in cities and towns under the authority of the common council, still the mode adopted in this case is clearly unconstitutional, because it taxes those for the improvements who live or own land on the road, and omits to impose any of the burden on those who derive similar benefits, for no other reason than that their land is not bounded by the improvement. A tax is imposed on a minority for the benefit of the majority, when the improvement is beneficial to all. It is similar to taxing a few feet of the realty on the street in the city fronting the entire square, making it pay for the improvement, and leaving other owners of property within the center of the same square free from any burden. A tax for a public purpose can not be imposed in such a manner, and the system of street improvements, when applied to highways in the country, is not only impolitic but a plain departure from that character of equality constituting the basis of taxation.

In our opinion no lien exists upon this land for the improvement made if the answer presents the facts of this case, and the demurrer should have been overruled. Those obtaining the grant would of course be estopped from denying its validity as against those who have made the improvements under it.

Judgment reversed and remanded.

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McCANN, &c. v. HILL, &c.

(Filed May 14, 1887.)

1. Assignments by operation of law—Where a debtor, in contemplation of insolvency, and with a design to prefer one creditor to the exclusion of others, makes a transfer of property, which under the statute operates as an assignment of all his property for the benefit of his creditors, and a petition attacking the transfer is filed within six months, the right of the creditors to the debtor's property relates back to the time the transfer was made and is not affected by the acts of the debtor between the date of the transfer and the date of the filing of the petition or of the sale of the property.

At the time of the execution of a mortgage, which, in an action filed within six months thereafter, was declared to operate as an assignment of all the mortgagor's property for the benefit of his creditors, the mortgagor did not reside upon the land mortgaged, but after the filing of the petition attacking the transfer removed to it and occupied it as a home. He now claims it as a homestead as against the creditors Held—That the mortgage operated as an immediate transfer of the mortgagor's property to the use and benefit of his creditors, and the mortgagor by subsequently removing to the land acquired no right to it as a homestead.

2. Same—If a debtor, knowing that he is insolvent, and in order to give a particular creditor a preference over other creditors, gives him a mortgage to secure a debt or liability already created, together with a liability simultaneously created, and the creditor, knowing the true state of case, aids the arrangement, he is not a mortgagee in good faith to secure a debt or liability created simultaneously with the execution of the mortgage, and obtains no advantage over other creditors by reason of the fact that a portion of his debt was so created. But where the liability thus simultaneously created is that of surety upon a debt previously existing, the mortgagee is entitled to pro rate with other creditors, if he pays the debt, since the original creditor would be entitled to pro rate, and the surety should be allowed to stand in his shoes.

3. Same—Where a surety subsequently to his becoming bound as such takes a mortgage for his indemnity from the principal, he is not protected by the exception of the statute in favor of a creditor whose debt is created simultaneously with the execution of the mortgage.

W. Montfort and W. M. Fisher for appellants.

Masterson & Gaunt and Geo. C. Drane for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Bennett.

On the 23d day of January, 1885, the appellant, Lon. E. McCann, and his wife, executed to the appellant, Levi McCann, a mortgage, which was duly acknowledged and recorded, on a tract of land containing about seventy-seven acres, belonging to the appellant, Lon. E. McCann, to secure a debt of thirteen hundred dollars, which debt was evidenced by a promissory note bearing even date with the mortgage. The appellees, as creditors of the appellant, Lon. E. McCann, on the 18th day of February, 1885, instituted a suit in the Carroll Circuit Court against the appellants, in which they assailed said mortgage upon the ground that the same was given by the appellant, Lon. E. McCann, in contemplation of his insolvency, and with the design of preferring the appellant, Levi McCann, one of his creditors, to the exclusion of the appellees and his other creditors.

The appellants, by their separate answers, denied that the mortgage was given in contemplation of Lon. E. McCann's insolvency, or to prefer the appellant, Levi McCann, to the exclusion of Lon.

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E. McCann's other creditors. They also alleged that the liability intended to be secured by the mortgage was created simultaneously with its execution. They further alleged that the land mortgaged was the homestead of the appellant, Lon. E. McCann, and was not worth more than one thousand dollars; and, therefore, he had the right to mortgage it to the exclusion of his other creditors.

We will first dispose of Lon. E. McCann's claim to a homestead in the land mortgaged to Levi McCann.

The agreed facts relative to that matter are that the appellant, Lon. E. McCann, before and at the time he executed the mortgage to the appellant, Levi McCann, was a housekeeper with his family in the town of Ghent, some five or six miles from the land mortgaged; that he continued to reside and keep house in the town of Ghent until about a week after process was served upon him in this action, when he moved to the land mortgaged, and took up his residence on it as his home.

So the question is, do the foregoing facts entitle the appellant, Lon. E. McCann, to a homestead as against the claim of the appellees?

The affirmative of this proposition is maintained by the appellant upon the authority of Nichols v. Sennett, &c., 78 Ky., 630.

This case decides that "if the land was purchased, or the improvements made prior to the creation of the debt, the homestead right attaches when the claimant is in occupancy as a housekeeper in good faith at the time the attempt is made by execution to subject the land. The clause of the statute giving the homestead is general in terms, allowing the exemption to all bona fide housekeepers with families, and without reference to the time at which the homestead may have been created by actual occupancy. The 16th section of the 13th article of chapter 38 provides that the exemption shall not apply if the debt existed prior to the purchase of the land or prior to the erection of the improvements. This seems necessarily to imply that if the purchase of the land or the erection of the improvements was prior to the creation of the debt the homestead existed without other condition than that the claimant be a housekeeper with a family, and in occupancy at the time it is attempted to enforce the claim."

The facts of this case readily distinguish it from the case supra.

Section 1, article 2, chapter 44 of the General statutes is in these words: "Every sale, mortgage or assignment made by debtors, and every judgment suffered by a defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and inure to the benefit of all his creditors, except as hereinafter provided, in proportion to the amount of their respective demands, including those which are future and contingent; but nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution."

Section 2 provides that "all such transfers as are herein declared to inure to the benefit of creditors generally shall be subject to the control of courts of equity, upon the petition of any person interested, filed within six months after the mortgage or transfer is legally lodged for record, or the delivery of the property or the effects transferred."

The debtor, by committing the acts denounced in the first section, transfers and assigns all of the property and effects owned by him at the time to the use of all of his creditors. And by section 2 the creditors may avail themselves of such assign-

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ment and transfer for their use by petition in equity at any time within six months after the mortgage or transfer is legally lodged for record. In other words, by committing the acts denounced by section 1 the creditor's property is transferred to the use and benefit of all of his creditors by operation of law. The title is transferred to them, and courts of equity, upon their petition filed within six months after the transfer is lodged for record, must take hold of the property and distribute it equally among the creditors. By filing the petition within the time prescribed the creditor's right to the property and effects relate back to the time the debtor committed the acts denounced by section 1 because these acts operate as an immediate transfer of his property to the use and benefit of the creditors.

The agreed facts conclusively bring the appellant, Levi E. McCann, within the denunciation of the 1st section of the statute, supra, and as he was not entitled to a homestead in the land at the time of the execution of the mortgage, because not occupied as such, and his acts having transferred his title to the land to the use of his creditors before there was such occupancy, and they having resorted to a court of equity within six months after for the purpose of having said land appropriated to their equal benefit, it follows that his occupancy of the land after the acts which transferred the title to it to the use of his creditors did not, and could not, give him a right to a homestead therein.

The agreed facts show that the appellant, Levi McCann, was before the execution of the mortgage surety for the appellant on two notes—one for six hundred dollars and the other for two hundred and fifty dollars; and these sums were included in the mortgage. Also another sum of one hundred and sixty-six dollars was included in the mortgage which was created before the execution of the mortgage.

This court in the cases of Commonwealth v. Sims, 3 Met., 897, and Thompson, &c., v. Heffner's Executors, 11 Bush, 559 has decided that a surety who, subsequently to his becoming bound as surety, takes a mortgage for his indemnity from his principal, is not protected by the exception in favor of a creditor whose debt is created simultaneously with the execution of the mortgage, and he is, therefore, entitled to no preference over the mortgagor's general creditors to the extent of his liability attempted to be secured by the mortgage in the distribution of the insolvent's estate under the insolvent act.

The agreed facts also show that the appellant, Levi McCann, simultaneously with the execution of the mortgage, became bound as surety for the appellant, Lon. E. McCann, on a debt of two hundred and two dollars, which debt existed prior to the execution of the mortgage.

The question is, was the appellant, Levi McCann, entitled to a preference as to this debt?

The record shows that at the time Lon. E. McCann executed the mortgage he was insolvent; that on the same day he executed the mortgage he sold his stock of groceries; that at the time he executed the mortgage he knew that he was insolvent, and the appellant, Levi McCann, also knew it.

While it is true that neither the letter nor the spirit of the statute forbids a debtor from creating a debt in good faith, though he be in failing circumstances, and secure the debt by giving a mortgage on his property simultaneously with the creation of the debt, which would hold good as against his other creditors, yet, if a debtor, knowing that he is insolvent and in order to give a

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particular creditor a preference over other creditors, gives him a mortgage to secure a debt or liability already created, together with a liability simultaneously created, as was done in this case, and the creditor knowing the true state of case, as in this case, aids the arrangement, then he is not a mortgagee in good faith to secure a debt or liability simultaneously created with the execution of the mortgage. Such conduct on the part of the mortgagor and mortgagee would be a fraud upon the rights of the mortgagor's other creditors, and the mortgagee could obtain no advantage over them by reason of holding the mortgage. Such being the case, the appellant acquired no preference over Lon. E. McCann's other creditors, by reason of the fact that two hundred and two dollars of the mortgage debt was a liability created simultaneously with the execution of the mortgage. Whether or not the creditor, under such circumstances, would be entitled to pro rate with the other creditors, where the debt itself was created simultaneously with the execution of the mortgage, is an open question. But the appellant's right to pro rate with Lon. E. McCann's other creditors as to this particular debt is based upon the fact that the original creditor would be entitled to pro rate with the other creditors as to said debt, and the appellant, Levi McCann, if he has paid the debt, may stand in his shoes.

The judgment of the lower court is affirmed.

LANCASTER v. COMMONWEALTH.

(Filed May 19, 1887—Not to be reported.)

Instruction—Self-defense—Upon the trial of appellant for malicious wounding the jury were told that they could not convict the appellant if the wounding was done "in his necessary or apparently necessary self-defense," but they were not informed by any instruction how or under what circumstances the accused could exercise this right, nor was it defined to them. Held—That while the whole law of self-defense was not given to the jury, as should always be done in a proper case, yet as there was nothing to show that the wounding was done in self-defense, the failure to give such an instruction did not prejudice the substantial rights of the accused.

P. B. Thompson, Sr., for appellant.

P. W. Hardin for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Holt.

Upon the trial of the appellant, J. W. Lancaster, for the malicious wounding of John Vandavier, the accused asked the court to give this instruction to the jury:

"If the jury, from the evidence, believe that at the time Lancaster cut and wounded Vandavier (if they believe it is proven beyond a reasonable doubt that Lancaster did cut and wound him) that he, Lancaster, had reasonable grounds to believe and did believe, that he was in danger of great bodily harm or death, or it reasonably appeared to Lancaster that he was in danger of such bodily harm or death, then he, Lancaster, had the right to use such means as were necessary, or reasonably appeared to him to be necessary, to protect himself against such bodily harm or death; the danger of bodily harm or death need not be actual, but only apparent."

The request was refused, and it is now urged as a ground for a

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reversal that the law of self-defense was not given to the jury. It is said, however, that this was done by the first instruction given to the jury, to-wit:

"The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, J. W. Lancaster, in Mercer county, before the finding of the indictment herein, willfully and maliciously, and not in his necessary, or apparently necessary, self-defense, did cut and wound with a knife, with the intent to kill, John Vandavier, but of which cutting and wounding he did not die, they will find the defendant guilty, and fix his confinement in the penitentiary not less than one year and not more than five years."

It is true that by it the jury were told that they could not convict the appellant if the wounding was done "in his necessary, or apparently necessary, self-defense," but they were not informed by any instruction how or under what circumstances the accused could exercise this right, nor was it defined to them. This should always be done in a proper case. The whole of the law of self-defense should then be given to the jury.

The counsel for the appellant is correct in contending that it was not done in this instance. The law of self-defense, however, is but that of necessity. The evidence in this case shows that the appellant provoked and brought on the difficulty; that he declared he had been desiring to do so for a year; and that he cut the injured, and, so far as the evidence shows, unarmed man when the latter was trying to avoid the difficulty by getting out of the way.

Under these circumstances the instructions as given embraced the law of the case. Indeed, so far as they speak of self-defense, they are more favorable to the accused than he had a right to demand; and the case, in our opinion, falls within that provision of the Criminal Code which forbids the reversal of a judgment of conviction for an error of law if, upon a consideration of the entire case, the court is satisfied that the substantial rights of the accused have not been prejudiced thereby.

Judgment affirmed.

ROBINSON, &c. v. HENNING.

(Filed May 19, 1887—Not to be reported.)

Vendor and vendee—The statute empowers the wife to make a conveyance of her separate estate where the husband unites with her, therefore, in this action by a vendor to enforce a contract for the sale of land, it is no objection to the plaintiff's title that he claims through a conveyance by husband and wife of the wife's separate estate.

Simrall & Bodley for appellant.

Bacon & Stites for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

The statute empowers the wife to make a conveyance of her separate estate where the husband unites with her, and in this case it appears that both husband and wife were the grantors, and in the present action of Henning v. Robinson, Henning deriving title through Jewell and wife, has made them parties defend-

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ants. They re-affirm and ratify the original conveyance by them to Meriwether, who conveyed the realty to Henning, and the latter being invested with a perfect title, in so far as any claim might be asserted by Jewell and wife, the chancellor below property enforced the contract by compelling Robinson to accept the title.

Judgment affirmed.

DUNCAN v. COMMONWEALTH.

(Filed May 19, 1887.)

1. House breaking—Under section 4 of article 5, chapter 29, General Statutes, which provides for the punishment of any person who shall feloniously break any dwelling house, and feloniously take away anything of value, it does not make any difference how great or how little may be the value of the thing feloniously taken away from a house feloniously broken, and it is not necessary to aver in the indictment anything more in respect thereto than that the thing taken was of value, but the fact that the indictment in this case averred that the thing taken was of value as much as $5 did not render the indictment defective.

2. Same—Where this offense is charged and proved the punishment can not be for the mere larceny.

3. Same—The offense may be complete whether the owner or any other person be present, and it does not, therefore, make any difference whether, if the owner or other person be present, he does or not object or protest.

4. Prejudicial error—There can be no reversal for an error in admitting incompetent testimony where it appears that the defendant's substantial rights were not prejudiced thereby.

Hanson Kennedy and John T. Morgan for appellant.

P. W. Hardin for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Lewis.

The indictment under which appellant was tried and convicted is for the offense of feloniously breaking the dwelling house of James Boyd, and feloniously taking therefrom silver spoons of the value of five dollars, denounced by section 4, article 5, chapter 29, General Statutes.

It is stated substantially in the indictment that appellant broke and entered the house by raising a window thereof, and taking therefrom the spoons described, neither the owner nor any other person being there at the time.

Upon the trial the wife of the owner of the house testified that she was, on the day the offense is charged to have been committed, returning from a visit to a neighbor, and when she got to a point between two hundred and three hundred yards of the house saw appellant enter it in the manner mentioned, and in a short time come out of it and approach to within about one hundred and fifty yards of where she was, and then turn and go along a path leading to his, appellant's, house.

She further testified that after going into the house she missed the spoons, and thereafter charged appellant with the offense.

She is corroborated to a considerable extent by her husband and other witnesses. And while she was contradicted in some important particulars by others, we are not authorized to disturb

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the verdict of the jury because contrary to the evidence, for they evidently believed her testimony, and of her credibility they were the exclusive judges.

We do not think her statement that on Friday morning her husband found the spoons that Jack had stolen hanging on the gate post could have prejudiced his substantial rights. For her husabnd himself tesitfies to the fact of finding the spoons, and whether appellant stole them or not was to be determined by the jury alone upon the evidence, and doubtless they did in that way, and not upon the opinion of the witness, arrive at their verdict.

It was not proper to permit the witness, Banta, to state that Boyd told him the next day after it occurred that appellant had broken into his house. But in view of the facts testified to by Boyd and his wife, corroborated by other witnesses, we are satisfied that statement did not substantially prejudice appellant.

As one of the grounds for a new trial appellant stated in his affidavit that he had discovered what he could prove by two persons who were not examined on the tiral, the susbtance of which was that Mrs. Boyd told them a day or two after she missed the spoons that she did not know who had stolen them, but that after they were hung on the gate post she then believed Jack Duncan, the appellant, got them.

This evidence, even if it had been before the jury in the precise form stated in the affidavit, would not have affected the verdict of the jury, for the simple fact the spoons were hung on the gate post, in the absence of knowledge of the person by whom they were put there, could not have had any influence on the belief of Mrs. Boyd one way or another. Her statement is she saw appellant go into the house and afterwards missed the spoons, and two or three days thereafter charged him, as he admits, with having taken them, and the next day after the conversation they were found on the gate post.

For appellant two instructions were asked, which it is contended were erroneously refused.

The first one of them is in substance that if appellant broke and entered the dwelling house, in the presence of Boyd or some member of his family, without objection or protest by such person, and took therefrom silver spoons of the value of five dollars, they must find him not guilty.

By the second the court was asked to instruct the jury that upon the same hypothesis they could find him at most guilty of petit larceny, the property taken being of the value of five dollars.

So much of the section under which this indictment was found as is applicable is as follows: "If any person * * * shall feloniously break any dwelling house * * and feloniously take away anything of value, although the owner or any person may not be there, he shall be cofined in the penitentiary not less than two nor more than ten years."

It does not make any difference under that section how great or how little may be the value of the thing feloniously taken away from a house feloniously broken, and it was not necessary to aver in the indictment anything more in respect thereto than that the spoons were of value. And certainly the allegation that the thing taken was of value, as much as five dollars, did not render the indictment defective. Nor when the offense of felonious breaking and felonious taking away is charged and proved can the punishment be for the mere larceny only, either grand or petit larceny.

The offense may be complete whether the owner or any other

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person be present, and it, therefore, does not make any difference whether, if the owner or other person be present, he does or does not object or protest. For if, without regard to the intent with which a person may break a dwelling house and carry away property of value, his guilt must be determined by the conduct of the owner, it would follow that he might escape punishment simply because the owner was too timid to protest or weak to resist.

Perceiving no error to the prejudice of the substantial rights of appellant, we affirm the judgment.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH v. JARRELL.

(Filed February 16, 1887.)

Sales of liquor by distillers in quantities of not less than a quart, whether at the distillery or at the distiller's residence, are not in violation of the local option law.

P. W. Hardin and J. B. Hannah for appellant.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Ward.

The indictment in this case charged the defendant with the violation of the law known as the "Local Option Law." It was not an indictment charging the defendant with a violation of law, in that he sold liquors without a license so to do, but charged a violation of a particular statute, and by that statute his guilt must be shown, if at all. It is therefore, for the purposes of this case, immaterial whether the act of May, 1884, deprived a distiller of the right to sell liquors of his own manufacture at his residence, but not to be drunk on the premises, and in quantities not less than a quart; but it may not be improper to say that this court, in the case of Webb v. Commonwealth, 7 Ky. Law Rep., 299, and Robinson v. Commonwealth, 7 Ky. Law Rep., 453, held that the act referred to did not deprive distillers of the right given them by the previous statutes.

Section 7 of the act of January 26, 1874, General Statutes, page 909, provides:

"The provisions of this act shall not apply to any manufacturer or wholesale dealer who, in good faith and in the usual course of trade, sells by the wholesale." * * *

The evident purpose and aim of the act in question was to regulate or control the licensure of persons to sell liquors and to establish a new agency, composed of the body of the voters of a given locality, to determine whether a license to sell should or not be granted within a certain designated territory.

In construing the act it is, therefore, proper to take into consideration the rights and privileges secured by the laws then in force to certain designated classes of persons: The manufacturer, the wholesale dealer, etc.

At the time the law was passed the distiller had the right to

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sell at the distillery any spirits of his own manufacture in quantities not less than a quart, but not to be drunk on the premises; or the wholesale dealer had the right to sell by wholesale, both classes without procuring a license. It must be assumed that a sale by either, in the manner allowed by law, was a sale in the usual course of trade, as applied to that class. The sale by a distiller of a quart at his distillery was as much a sale in the usual course of trade as a sale of a much larger quantity by a wholesale dealer would have been in the usual course of trade for him. The legislature, by the act of March 20, 1876, General Statutes, page 1055, amending section 3 of article 2 of chapter 106, changing the place at which the sale by a manufacturer might be made, from the distillery to the residence, still recognized a sale by a manufacturer in quantities not less than a quart as within the usual course of trade, and lawful without a license.

It follows that the instruction complained of was proper.

The judgment is affirmed.

COLEMAN v. COMMONWEALTH.

(Filed January 7, 1887.)

1. Waiver of objection to juror—When, in a criminal case, a juror is presented for examination as to whether he has an actual or implied bias, and the defendant fails to make specific inquiry, he waives his right to object to the juror upon the ground that he was a member of the grand jury which found the indictment, and is not, therefore, after verdict against him, entitled to a new trial upon that ground.

2. There can be no reversal in a criminal case for an erroneous decision of the court on a motion for a new trial or upon a challenge to a juror for cause.

Ira Julian for appellant.

P. W. Hardin for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Presiding Judge Bowden.

The bill of exceptions shows "that upon the trial of this cause the Commonwealth's attorney, after stating the nature of the indictment, inquired generally of the trial jury if they had any bias, or were related to the accused, and no answer being made, and no objections offered by defendant, who pleaded not guilty, the jury were sworn to try the issue." After verdict the defendant filed his affidavit that Norwood, one of the jurors, was a member of the grand jury which found the indictment against him, and moved for a new trial on that ground.

The question asked by the Commonwealth's attorney did not call Norwood's attention to the fact that he had been on the grand jury; as matter of fact he may have had no bias; and that is all his silence meant. The defendant made no effort to ascertain whether any of the facts stated in section 210 of the Code, as raising the implication of bias, existed.

If Norwood had stated that he had been on the grand jury the defendant would be held to have waived the objection by merely failing to make it. (O'Brian v. Commonwealth, 9 Bush, 333.) A failure to make inquiry, none having been made, shows the same indifference. The objection was not that Norwood did not have

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the general qualifications of a juror, but that he was presumably unfit to act as such in this case because the law imputed to him a bias. When the juror is presented for examination as to whether he has an actual or implied bias the defendant may require him to answer all questions relevant to that matter, but he is not compelled to do so; if he then feels indifferent about it, and is willing to take the jurors offered without inquiry, we see no reason why he should be heard when a verdict has stimulated his diligence. It is not like a case in which he interrogated the jury, and was misled by his answers. It requires only that the defendant shall at the outset, and at the time prescribed by law, examine jurors respecting particular fitness; and it regards a failure to do so as a waiver of all objections on account of bias. If a defendant is permitted to remain silent when the jury is being made up, and if after he is convicted he may have a new trial because of some fact which a simple question would have elicited before the juror was accepted, it is his interest not to know and not to ascertain. The trouble and expense of a trial would be incurred merely because he declined to be informed at the proper time, preferring to take the chance of an acquittal, and of getting a new trial if convicted. It is not relevant to say that Coleman did not know at the time that Norwood was on the grand jury. He could have known it if he had desired. He had the right to ask Norwood respecting every ground of bias, and base his challenge on the answers given. The Code intends that this right shall be exercised before the jury is accepted, and it economizes time, while it imposes no hardship to require it.

The court committed no error in regard to this matter, and could not have committed any until after the judgment had been rendered, and the motion for a new trial was acted on. The only error then possible was the refusal to grant a new trial. But by section 281 of the Code it is provided that the decision of the court on a motion for a new trial, or upon a challenge for cause, which includes both actual and implied bias, shall not be subject to exception. This section must be taken as a modification of section 340, as to felonies, and section 353, in regard to misdemeanors, as it could not have been intended that there might be a reversal for an error to which there could be no exception taken. (Kennedy v. Commonwealth, 14 Bush, 340.) The amendments of March 4, 1880, to sections 340 and 353 did not affect this question. Section 353 was: "The judgment shall be reversed for any errors of law apparent on the record to the prejudice of the appellant." The trouble was that under this section the errors of the court in regard to motions for new trials and challenges were not subject to exceptions, and could not, therefore, be made apparent on the record. It was so decided in Kennedy's case. The amendment is that there shall be a reversal for errors of law "appearing on the record," and then only "when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby." It still left the class of decisions to which no exception could be taken, and restricted the right to reverse, in regard to the class to which exceptions could be taken, to such errors of that class as were shown by the whole record to have been prejudicial, the amendment limited instead of enlarging the area of reversible error.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

GIFFORD & KELLY v. McBURNIE.

Filed May 4, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

In a sale of goods by sample there is an implied warranty upon the part of the vendor that the quality of the goods sold is equal to that of the sample; and when they are delivered to the buyer he is not precluded from objecting to them by merely receiving them. The receipt, however, will become an acceptance if the right of rejection is not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods. But when the goods have secret defects, not discoverable on an ordinary inspection, the mere fact that the buyer has placed the goods in his store for sale, and has sold some of them, will not deprive him of the right of rejection, provided he notifies the vendor, within a reasonable time, of the discovery of the defects, what is a reasonable time depending upon circumstances and being a question for the jury.

The evidence in this case shows that a part of the goods (shoes) which were sold by sample were received by the vendee on the 11th or 12th of the month, and the remainder on the 18th. The vendee sold $76 worth of the goods. Several pairs of shoes were returned as defective. Upon a critical examination the shoes were found inferior to the sample, the defects not being discoverable on an ordinary inspection. On the 25th of the same month vendors were notified that the goods were inferior, and were asked to direct what disposition should be made of them. The vendees being notified that no reduction would be made, they reshipped the shoes to the vendors. Held—That the jury were authorized to conclude that the examination and rejection were made within a reasonable time.

Rodman & Brown for appellants; O'Neil, Jackson & Phelps for appellee.

OWEN v. HOWARD INSURANCE CO.

Filed May 4, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Jurisdiction—If a foreign insurance company does business in this State, and has resident agents here, the court of the county where the chief agent resides has jurisdiction of an action on a policy issued by the company, and where the company has two or more agents in different counties, possessing the same powers, the action may be brought in any one of the counties, as any one of the agents, for the purpose of jurisdiction, may be regarded as the chief agent.

2. Insurance limitation—A policy of fire insurance provided that no action could be had upon the policy unless commenced "within twelve months next after the fire." It was provided, however, in a preceding part of the policy that the loss should not be payable until sixty days after "preliminary proof" of loss. Held—That, reading the whole policy together, it must be construed as meaning that the assured should have twelve months within which at any time he might bring his action, and, therefore, the limitation of twelve months must be deemed to run from the time when the loss became due and payable, and not from the time it occurred.

3. The provision of a policy of insurance must be construed most strongly against the company, and so as to sustain rather than defeat the indemnity.

Bullitt & Shield and Turner & Cunningham for appellant; A. E. Willson for appellee.

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CULVER v. YOCUM.

Filed May 4, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Heirs can not in any case maintain an action in their own names upon a debt or demand due the ancestor unless it be when there is an administrator who has been informed of the demand and refuses to sue, but even the administrator is a necessary party, and must be joined in the action as a plaintiff or defendant. The mere fac: that the administrator has made a statement of his accounts so far as he has administered the estate does not vest the right of action in the heirs as to unadministered personal assets. When the power of the first administrator cease assets unadministered pass to the second administrator.

In an action on a note the defendant attempts to set off his interest as heir in a claim due by the plaintiff's assignor to the estate of his, the defendant's, mother.

Held—That this can not be done, as there is no right of action in the defendant on account of the claim he seeks to set off.

2. In an action upon an assigned note it is immaterial to the defendant whether the assignment was made in good faith or for the purpose of making the assignee the real owner, except in so far as that question may affect the defendant's right of set-off or a plea in abatement.

3. The promise of the maker of a note to pay the heir of the payee is without consideration and not enforcible, and even if payment is made to the heir it is no defense to an action by the administrator on the note.

4. Alteration of note—Where there is a plea of non est factum, based upon an alleged alteration of the note sued on after its execution and delivery, the court may regard the face of the note in connection with the allegation of the answer, and determine from the location of the words alleged to have been added whether the alteration complained of was material, there being no allegation as to the location of the added words.

Words added at the foot of a note below the signature of the maker were nothing more than a memorandum, and did not affect the liability of the maker.

Cornelison & Mitchell for appellant; Apperson & Woodford for appellee.

THE JONES STATIONERY AND PRINTING CO., &c. v. JEFFREY, &c.

Filed May 4, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Ward, affirming.

1. Mortgages executed in other States—Our laws requiring mortgages of personal property to be recorded in order to be effectual against creditors do not apply to mortgages executed in other State on personal property belonging to the residents of such States, and afterward brought into and used in this State in conducting a business transitory in its nature and purpose.

2. An unrecorded mortgage, as between the parties, creates a lien which may be enforced by a court of equity, and when a suit has been instituted for that purpose, and the property taken into the custody of the court, a lis pendens is created which gives the plaintiff priority over liens subsequently acquired, and secures to him the proceeds of the mortgaged property to the extent necessary to satisfy his demand.

3. The laws against champerty and maintenance do not apply to the adjustment of differences between parties who have conflicting claims to or upon property.

4. Case adjudged—A mortgage was executed in the State of Wisconsin on certain property used in conducting a circus and menagerie, and the mortgage was recorded in that State. The property having been brought into this State by its owners in the prosecution of their business, certain creditors instituted an action and had an attachment levied upon the property. Thereafter the mortgagee filed his petition in the action setting up his mortgage. The property was sold, and there being some dispute as to how the proceeds should be distributed, a compromise agreement was entered

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into whereby the attaching creditors assigned their claims to the mortgagee. Thereafter appellant, a nonresident creditor, instituted suit and caused an attachment to be levied on the fund, claiming priority of payment upon the grounds, first, that there was no mortgage lien because the mortgage had never been recorded; and, second, that the compromise agreement was champertous in so far as first attaching creditors sold and assigned their claims to the mortgagee, the validity of their attachment liens being then controverted by the debtor. Held—That it was not necessary that the mortgage should be recorded in this State to render it valid against creditors, and even if it had been the institution of suit upon it created a lis pendens, and secured the proceeds of the mortgaged property to the mortgagee. And the appellant having no lien when the compromise agreement was made, that agreement was valid.

D. M. Rodman for appellants; Brown, Humphrey & Davie for appellees.

LUPE v. ANDERSON DISTILLING CO., &c.

Filed May 4, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

Duplication of warehouse receipts—A distilling company sold to appellant and issued to him a warehouse receipt for a number of barrels of whisky, for which it had previously issued warehouse receipts to another, to whom the whisky was pledged. The sale to appellant was made through the agency of the N. B. Co., to which the money was paid, it being the general agent and principal stockholder in the company, in the name of which the sale was made. Appellant brings this action against the latter company, alleging that in order to protect himself against loss by reason of the duplication of the warehouse receipts, he was obliged to and did employ counsel, and that his reasonable expenses incurred thereby were $200, which amount he seeks to recover and to have allowed as a claim against the defendant in preference to any claim against its assets by the N. B. Co. Held—That under the provisions of the "warehouse law" he is entitled to the relief sought.

Elliott & Hemingray for appellant; Brown, Humphrey & Davie and James S. Pirtle for appellees.

GALLION S ADM'R v. MOBERLY, &c.

Filed May 4, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Lien—A conveyance having been executed, in which the grantor's wife did not unite, she afterward conveyed to her husband's grantee her right of dower in consideration that he and his brother would provide for her during her life. She having died her administrator asserts a lien upon the land for the value of her support.

Held—That if a lien ever existed it extended only to the life estate conveyed by the wife, and that estate having terminated no lien can now be asserted, nor can the grantee be required to account for profits realized during the life of the dowress, the vendor's lien being upon the estate conveyed and not upon the rents and profits.

Bush & Robertson for appellant; J. P. Hobson and Montgomery & Posten for appellees.

LASWELL, &c. v. BRYAN'S ADM'R.

Filed May 4, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

In the distribution of partnership assets firm creditors are not entitled to preference over a creditor holding a debt against all the members of the firm.

Creditors of a firm instituted actions against the firm, procured attachments and had them levied on all of the firm property. Pending these actions the holder of a note against both members of the firm obtained judgment thereon, and had an execution levied on the attached property. On final hearing the court discharged the attachments, and ordered the payment of the execution debts out of the proceeds of the attached property, the

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residue to be divided ratably among the other debts. The firm creditors base their claim to priority upon the fact that they are firm creditors, and not upon their attachments. Held—That the judgment was proper.

J. D. Irwin and Bush & Robertson for appellants; J. P. Hobson and James Montgomery for appellee.

BROWN v. VANCLEAVE, &c.

Filed May 4, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Bowden, granting cross appeal and transferring to Court of Appeals.

1. Appellate jurisdiction—Where one appeals from a judgment subjecting property claimed by him to the debt of another the value in controversy is the value of the property and not the amount of the debt.

2. Same—To authorize the transfer of an appeal from the Superior Court to the Court of Appeals upon the ground that the value in controversy exceeds $3,000, that act must affirmatively appear, the Superior Court having jurisdiction of all appeals except certain designated classes.

3. Same—Where the Superior Court has jurisdiction of the original appeal and a cross appeal is prayed, it should be granted without reference to the amount in controversy upon the cross appeal, and then if it appears that the amount involved exceeds $3,000 the case should be transferred to the Court of Appeals.

Woolley & Buckner for appellant; O'Neal, Jackson & Phelps and C. B. Seymour for appellees.

HUGHES v. STROTHER, &c.

Filed May 4, 1887. Appeal from Fayette Circuit Court. Opinion of the court by Judge Barbour, affirming.

Debtor and creditor—Fraudulent preference—S., as guardian for H., executed bond, with W. as surety. H. having arrived at age, but being mentally incapable of managing his estate, G. was appointed his committee and as such brought this action, alleging the indebtedness of S. as guardian to his ward, and the transfer of certain personal property by S. to W. in contemplation of insolvency, etc., and seeking to have the transfer adjudged to operate as an assignment for the benefit of the creditors of S. The court rendered judgment in accordance with the prayer of the petition, and directed that in the distribution of the assets of S. the debts due by him as guardian should have priority. Before the assets were distributed appellant was, upon his petition, made a party, his petition setting up the indebtedness of S. to him, and averring that the pretended transfer by S. to W. and this action was a device entered into by G, S. and W. for the purpose of defrauding other creditors and obtaining a preference. To this pleading of appellant a demurrer was sustained. Held—That this was proper. The court says: "A preference of one of his creditors by a failing debtor is not of itself fraudulent. If S. had made a voluntary assignment of his property for the benefit of his creditors, giving preference to those debts due by him as guardian, the assignment would unquestionably have been valid. Or, if in contemplation of insolvency, he had made the transfer to his successor in payment of his liability as late guardian, to the extent of that liability the transfer would have been upheld as against the general creditors."

T. N. Allen for appellant; W. M. Beckner for appellees.

TANDY'S ASS'EE v. HATCHER & CO.

Filed May 11, 1887. Appeal from Taylor Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Alteration of written contract—A written contract for the sale of property provided for the payment of the purchase money in installments. Certain conditions as to payment were annexed, which could not have referred to any payment except the second one, but after the contract was executed the words "on second payment" were interlined, thus expressing what was before implied. Held—That the alteration did not affect the meaning, force, or obligation of the contract, and was, therefore, immaterial.

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2. Mistake—A court of equity can not reform a contract for mistake where the only mistake consisted in one of the parties misunderstanding the contract as written, and not in inserting words not intended, or omitting terms or words that ought to have been inserted.

3. Part performance of contract—A party who has performed a part of his side of a contract, and has failed to perform the residue, is not in all cases without remedy; for, though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract and give him a remedy on a quantum meruit.

A contract for the sale of a sawmill provided for the payment of a part of the purchase money in cash and a part in sawing, at a fixed price. The cash payments were made, and a part of the sawing done, when the vendor failed to furnish any more logs to be sawed, it being his duty to furnish the logs. This is an action by the vendor's assignee to recover the balance due on the contract. The defendants allege that they were ready, able and willing to pay the balance due in sawing, but that the vendor, without excuse, failed to furnish the logs to be sawed, whereby they were damaged $600, the profits they would have realized. The plaintiff replied that his assignor did not have money enough to buy the logs.

Held—That from the amount due the plaintiff should be deducted the damages sustained by the defendants, the criterion being the profits they would have realized. The fact that the vendor did not have the money to buy the logs was not such a preventing occurrence as was contemplated by the contract.

4. The proper criterion of damages where a party has been employed to make an article which the other refuses to receive, and which is not actually made, is the profit which could have been made by the manufacturer.

Thompson & McChord for appellant; R. S. Montague for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. MAZZONE.

Filed May 11, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

1. As the bill of exceptions made up with reference to the motion to quash the return of the officer upon the summons does not show that it contains all the evidence that was heard upon the motion, and the question was one which depended for its solution largely, if not entirely, upon facts, this court can not inquire into the correctness of the rulings of the lower court upon the motion.

2. Venue of actions—This action against a railroad company upon a contract of shipment was properly brought in the circuit court of the county in which the contract was made.

3. Common carriers can not be relieved by contract against their own negligence.

4. Separation of conclusions—Where an ordinary action is tried by the court, and there is no separation of the conclusions of law and fact, the only question to be considered upon appeal is whether the pleadings sustain the judgment.

R. S. Bevier for appellant; G. W. Williams & Son and R. S. Todd for appellee.

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KENTUCKY COURT OF APPEALS.

DERBY'S ADM'R v. KENTUCKY CENTRAL R. R. CO.

(Filed May 7, 1887—Not to be reported.)

1. Railroads—Railroad companies are bound to use reasonable care to provide such appliances as are reasonably adequate and safe for the use of their employes. They are not required to furnish appliances absolutely safe.

2. Same—The employes of a railroad company in accepting the employment assume all the ordinary risks of the business, but if engaged in operating the trains, they are not required to ascertain the condition of the appliances in use unless they are immediately under their care and subject to their control.

The conductor of a freight train having been struck and killed by an overhead bridge, while walking upon the top of a box car, which was higher than the other cars in the train, which were such as were ordinarily used upon the road, in this action by his representative against the company, charging willful neglect, it is held that the conductor, being in charge of the train, was bound to know that there was an increased liability to danger by reason of the unusual height of the car upon which he was walking, and should have used corresponding care.

3. Contributory neglect—In an action under the statute for willful neglect, that degree of neglect being established, the contributory neglect of the person injured is no defense, but an instruction as to contributory neglect was not prejudicial in this case, the general verdict being for the plaintiff, and the special findings being of such a character that they could not have been affected by the instructions.

W. K. Benton for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

Frank Derby, while in charge of a freight train of the Kentucky Central Railroad Company, as conductor, was run over by it and killed. It appears that when near an overhead bridge he had occasion, in the performance of his duties, to go from the front to the rear of the train. It was made up of box cars and flats, over which he was compelled to pass, and in doing which

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his back was to the bridge. When last seen alive he was climbing from a flat on to one of the box cars, and the train was then within three or four hundred yards of the bridge. His body was found just beyond it. It was shown that one could stand upright upon the top of the box cars belonging to the road, and the cars of this character which generally passed over the road, and pass under the bridge in safety. Upon the occasion in question, however, there was a car in the train belonging to another road, which was considerably higher than the others; and although it was not shown by the testimony that the deceased was upon this car when the accident occurred, yet the case proceeds upon the theory that he was, and coming in contact with the bridge was knocked off the train and killed. Indeed the evidence is not entirely satisfactory that he was knocked off at all; and there is ground to suppose that he may have fallen from one of the cars without coming in contact with the bridge.

Some circumstances are proven, however, which tend to show it, but aside from the fact that one could stand upon the ordinary box car and pass under the bridge in safety, and that in this train there was one car uncommonly high, there is nothing tending to prove that the deceased was upon the car last named when the accident occurred.

Inasmuch, however, as both parties, upon the trial below, appear to have proceeded upon the idea that he was, and in view of the fact above named, we will consider the case as if this were clearly shown.

The administrator of the deceased bases his claim to recover upon the allegation in his petition that the death was caused by the willful neglect of the company in permitting a car to be in the train of such uncommon height that its employes, when standing on the top of it, could not pass in safety under the bridge. The jury returned both a special and a general verdict, the latter being for $2,000. The court set it aside, however, and rendered a judgment for the company upon the special verdict.

The court, in its general instructions, erroneously told the jury that the appellant could not recover if there was such contributory neglect upon the part of the deceased that but for it he would not have lost his life.

In a case of this character, where willful neglect upon the part of a defendant has been shown, contributory neglect upon the part of the party injured can not be considered.

The appellant can not, however, complain of this in this instance because the jury in fact returned a general verdict in his favor, and the special findings are of such a character that they could not, to any extent, have been produced by the instructions.

The jury by the special verdict found that the bridge was sufficiently high to enable the deceased to pass safely under it when standing erect upon the cars ordinarily in use upon the road; and that he either knew, or had reasonable opportunity to see and know, that there was in his train a car higher than those ordinarily in use upon the road.

Did these findings authorize the judgment for the company? Undoubtedly a railroad corporation should be held to a high degree of care. It should use all reasonable care in the construction of its road and as to the appliances and machinery connected with its operation. It is invested with extraordinary privileges, and to it is entrusted not only property but human life. It is not an insurer, however, of the latter. Regard for it, however, requires, as said in the case of the Baltimore and Ohio and Chicago Railroad Company v. Rowan, 104 Ind., 88, that "a railroad company is, and ought to be, required to construct and maintain

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its roadway and appendages, and its overhead structures in such manner and condition that its employe or servant can do and perform all the labors and duties required of him with reasonable safety.

In the case of Houston, &c., R. W. Co. v. Oran, 49 Texas, 341, it was said: "It is the duty of the railroad company to use ordinary care to provide such cars, roadbed, tanks, etc., as are reasonably safe; that a failure to do this is negligence chargeable on the company itself; and that the company is responsible in damages to an employe for an injury resulting, without his negligence, from a tank or other appendage of the road so negligently constructed as to subject the employe to unnecessary or xtraordinary danger, which he could not reasonably anticipate or know of, and of which he in fact was not informed."

We think the rule is that railroad companies are not bound to furnish appliances absolutely safe, but that they must use reasonable care to provide such as are reasonably adequate and safe for the use of their employes.

The latter, in accepting the employment, assume all the ordinary risks of the business; but if engaged in operating the trains they can not well know, and it is not a part of their business to ascertain, the condition of the appliances in use unless they are immediately under their care and subject to their control.

They do not contract with reference to them. Thus a brakeman has a right to rely upon the company using reasonable care in providing a safe track. He has no opportunity to inspect it; it is not a part of his business; and unless he in fact knows of its defective condition, and recklessly exposes himself to the danger, he is not chargeable with neglect. The master can not place an additional or extra risk upon the servant without notice to him.

In this instance, however, the deceased was an experienced railroad man; he had been running trains over the appellee's road for several months prior to the time of the unfortunate accident; and the jury have found that the bridge was sufficiently high to enable him to pass safely under it when standing erect upon the cars ordinarily in use upon the road; and that he either knew, or had reasonable opportunity to know, when the accident occurred that there was a car in his train higher than those ordinarily in use upon the road.

If he was knocked off of it he must have known its exact size and height, and have therefrom known that when standing erect upon it there was a liability to injury by coming in contact with the bridge. The company had provided a bridge which was reasonably safe. The cars ordinarily in use upon the road were of such height that one could stand upright upon them and pass safely under it.

The deceased was in charge of the train. He was bound to know its condition and character; the extra height of one of the cars was visible to him; he knew that thereby there was an increased risk of injury; and he was chargeable with knowledge that upon that particular occasion there was one car in his train which, while it could pass under the bridge, yet that it was of such a character that one standing erect upon it would be exexposed to danger from coming in contact with the bridge.

We do not mean to say that a conductor must stop and make a calculation, by feet and inches, as to whether the cars of his train will pass safely under the bridge. It is the duty of the company to use reasonable care in providing those which are safe, but in this instance the deceased was controlling the train and

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knew that the size of one of the cars subjected him to the danger of injury, provided he placed himself upright upon it, and yet he did so and lost his life. It is urged, however, that the company was required by law to so construct its bridges and make up its trains that an employe could stand upright upon any car and pass safely over the road. Consideration for humanity should certainly prompt it to do so; and, as already said, it is its duty to use reasonable care in doing so; but an employe, if he knows that there is a chance of danger or an increased liability to it, must use corresponding care. Here the deceased knew it, and knowing it he, by his own act, placed himself in the way of it.

It is said that if a railroad company should send out an engine so large that it could not pass through a tunnel upon its road, and in charge of an engineer who did not know the fact, and in attempting to pass through it he should be killed by the smoke stack being knocked off and falling upon him, that the company would be liable. Undoubtedly, but tha tis not this case. Here the employe exposes himself to the danger knowing that, by reason of the size of the car, there is a liability to it. Moreover he does so as the superior officer in charge of the train; and if a brakeman or subemploye had thus lost his life the charge of willful neglect would have been based doubtless upon the conduct of the conductor in taking such a car in his train.

It is not a case where the appliance could not pass under the bridge, but, if we may be allowed a homely illustration, it is as if in the supposed tunnel case the engineer had made a smokestack of himself, knowing that it created a liability to danger, and had thus been injured.

Judgment affirmed, Judge Lewis dissenting.

WINNEGAR'S ADM'R v. CENTRAL PASSENGER RAILWAY CO.

(Filed May 7, 1887.)

1. Intentional injuries resulting in death—No action can be maintained, either at common law or under the statute, by the personal representative for the destruction of his intestate's life where the injury from which death resulted was willfully and intentionally inflicted.

2. Actions which survive—An action for an assault and battery does not survive to the personal representative.

3. Same—An action against a passenger carrier, in the nature of an action on the case for the injuries resulting from a breach of the carrier's contract to transport the passenger safely, survives to the personal representative, and the fact that the death of the person injured resulted from the injuries received does not affect the right of recovery, the action being for the injuries and not for the death.

4. Passenger carriers—The law implies a contract upon the part of a carrier of passengers for the protection of the party carried from the insults and wanton interference of strangers, fellow passengers, and the carrier and his servants; and for any violation of the implied contract, by force or negligence, the carrier is liable in an action of contract or tort.

5. Same—The law requires the carrier to transport with impartiality and safety those who offer.

6. Case adjudged—In the petition in this case, to which a demurrer was sustained by the lower court, it is alleged that the plaintiff's intestate offered the driver of one of the defendant's street cars, the defendant being a street railway company, the ordinary fare for carrying passengers, when the driver refused to take it, assaulting and striking plaintiff's intestate, knocking

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him off the car, and that he was then run over by the car, receiving injuries from which he died, after suffering great bodily pain and mental anguish. For the injury, resulting in the physical and mental pain as alleged, the administrator seeks to recover. Held—That the demurrer to the petition was improperly sustained.

Alpheus Baker and J. J. McAfee for appellant.

Brown, Humphrey & Davie for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

A demurrer was sustained to the petition in the court below, and the plaintiff declining to amend has brought the case to this court, insisting that the facts alleged constitute a cause of action.

The plaintiff is the administrator of Wm. Winnegar, and the defendant is the Central Passenger Railroad Company. At the time of the injury complained of the defendant was a common carrier of passengers in the city of Louisville, running and operating its street cars, through its employes, upon and between certain designated streets within the city, and the appellant's intestate boarded the cars of the defendant for the purpose of going from Fifteenth to Eighteenth street on Walnut. It is alleged that his intestate tendered the employe of the company, who was the driver, the ordinary fare, which was five cents, when the latter refused to receive it, and assaulted and struck his intestate, knocking him off the cars on to the ground, where he was run over or struck by the car that the employe was then driving and badly injured, suffering great bodily pain and mental anguisrh from the 14th of June, 1885, continuously until the 26th of the same month, at which time his intestate died, by reason alone of said injuries; that the driver was at the time in the employ of the defendant, and running the cars for transportation of passengers by its authority, and unlawfully, and while actively in the course of his employment, inflicted the alleged injuries on the intestate. The plaintiff as his administrator sues, therefore, to recover the damages caused by said injury, resulting in the physical and mental pain, as before alleged, from the date of the injury up to the death of the intestate. He prays judgment, etc.

The facts stated are in substance those set forth in the petition.

The court below seems to have regarded the action by the personal representative as an action for damages by reason of the death of the intestate; and if so, the demurrer was properly sustained. If the recovery is sought for the death of the intestate, the latter having no cause of action therefor against the company, none could survive to his administrator as injuries affecting life, they are not the subject of a civil action at common law. Our statutes have enlarged the common law rule by making railroad companies and other corporations liable when death ensues to one by reason of the willful neglect of the agents or servants of the corporation; and when the party killed is not in the employ of the corporation, an action may be maintained for a less degree of neglect than either gross or willful neglect.

No question can arise under the statute in this case as it is not alleged that the intestate lost his life or was injured by the negligence of the employe of the company; but, on the contrary, it is averred that the injury was willfully and intentionally inflicted, and in such a state of case as was decided by this court in Spring's Adm'r v. Glenn, 12 Bush, 172, and Morgan v. Thomp-

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son, 82 Ky., 383. no action can be maintained under the statute by the personal representative for the destruction of his intestate's life. An intentional injury, as was said in those cases. can not be said to have been the result of negligence; nor can an action be maintained for the taking of human life intentionally by the personal representative on common law principles.

The statute of this State with reference to causes of action which survive, provides: "No right of action for personal injury, or injury to personal or real estate, shall cease or die with the person injuring, or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted an action may be brought or revived by or against the personal representative." (Chapter 10, General Statutes, page 179.)

The intestate might have instituted an action of assault and battery against the driver prior to his death, but dying before that the action under the statute could not survive to his administrator, but if he had sued the present appellee, alleging its existence as a carrier of passengers for hire, and that it had undertaken for a fixed sum to transport him as a passenger from one part of the city to the other; but in violation of its contract and its obligation to him as a passenger, the driver had thrown him from the cars, it can not be said that such an action would die with the injured party; but, on the contrary, it would survive to the administrator; and if so, the administrator can maintain this action.

The action is not for the loss of life, but for a personal injury growing out of the violation of the obligation on the part of the appellee to carry the intestate while on its cars to his place of destination, when paid or offered to be paid the regular fare.

The general doctrine with reference to the master and servant, employer and employe, is that when the employe committing the injury is not at the time executing the employer's business, or not acting within the scope of his employment, the employer is not responsible. If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible. Such an assault could not be said to have been authorized by the company, or a part of the driver's employment, nor can it be said that it was done in the course of the employment. In this case the appellant's intestate had entered the appellee's car, tendered his fare, and placed himself under the care and protection of the driver, to be carried as a passenger from one part of the city to another. It then became the duty of the driver to accept the fare, and to carry the intestate from the one street to the other without offering him personal violence, unless necessary for his own protection, the preservation of order in the car, or the safety of the other passengers. It is a matter of contract with obligations assumed by the carrier to protect and care for the passengers on its train. Whether that contract is violated willfully and intentionally, or through ignorance on the part of the driver, is immaterial.

It is the duty of the carrier to furnish competent and careful drivers that its passengers may be transported without fear or molestation from either the driver or others in the car, if in the power of the driver to prevent it, unless the conduct of the passenger requires violence to be used towards him. The doctrine is now well established "that the law implies a contract for the protection of the party carried from the insults and wanton interference of strangers, fellow passengers, and the carrier and his servants, and for every violation of the implied contract, by force

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or negligence, the carrier is liable in an action of contract or tort." (Addison on Torts, volume 1, page 33, note and authorities there cited.)

The law makes the carrier responsible for the acts of those who are placed in charge of the car, and who for the time had the voluntary custody of the passenger, with the implied obligation that he will exercise the highest degree of diligence to transport him safely. In Goddard v. The Grand Trunk Railway, 57 Maine, 202, it was held that the carrier was obliged to protect his passenger from violence or insult from whatever source it arises. He must use all such reasonable precautions as are necessary for that purpose.

In Railroad v. Finney, 10 Wisconsin, 388, it was held that where the misconduct of the agent causes a breach of the principal's contract, he will be liable, whether such conduct be willful or merely negligent.

In the case of Sherley, &c. v. Billings, a carefully considered case by that court, reported in 8 Bush, 147, it was said "that every one who commits his person to the custody and control of others has the right to expect from them the highest practicable degree of care and skill." In that case a boy, about fifteen years of age, was assaulted by an officer of the boat and severely injured. The suit was against Sherley and others, the owners, to recover damages for injuries sustained. It was urged there, as in this case, that the wrong was not done by any authority from the owners, or in the discharge of any duty imposed upon the agent arising from the terms of his employment; that it was the willful and unauthorized tort of the officer on the boat, but this court held that the compensation the carrier received from the passenger is not only in consideration that it will transport him from one point to another, as may be agreed on; but further, that during the time he is so transporting him reasonable diligence will be used to protect the passenger from insult and injury; and again, if the officers fail to use reasonable diligence in the protection of the passenger from injuries at the hands of strangers or other passengers, the contract is violated, and the carrier can be made to respond in damages.

Here the agent in charge of the car committed the wrong, and if the statements contained in the petition are true, and they must be so regarded on demurrer, the tort was of a most aggravated character and in palpable violation of the duties incumbent on the carrier, by reason of its relation to the passenger, arising from the implied contract. The moment the appellant's intestate entered the car and tendered his fare he became a passenger, and was entitled to be carried to his destination, that is, from the one street to the other. It is argued, however, that in the case of Sherley and others v. Billings, the boy injured had himself instituted the action and obtained a recovery, while in this case the personal representative is seeking to recover for the death of the intestate the loss sustained by his death. Such is not the object of the petition, and the fallacy of the argument consists in the assumption that this is an action for an assault resulting in the death of the injured man.

It is not to recover for the death, nor is it an action of assault and battery, but an action in the nature of an action on the case for the injuries resulting from a breach of appellee's contract.

The relation the parties occupy, the one to the other, is from the contract, and the failure to discharge the duty imposed by it may be a tort, but nevertheless it springs from the contract, and the action survives to the administrator. Cooley on Torts gives the case of the carrier as an illustration of the rule. "The law,'

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says Mr. Cooley, "requires the carrier to transport with partiality and safety those who offer. If he fails to do so he is chargeable with a tort." (Cooley on Torts, page 91.)

It is not material whether the violation consists in putting the passenger off at a point before his destination is reached, or by insulting him, or in assaulting him; they are all plain violations of duty for which a recovery may be had.

In this case the administrator is claiming to recover damages for the physical and mental agony of his intestate from the time of the commission of the wrong up to his death.

This is the distinct claim made in the petition, and we perceive no reason why a recovery should not be had if the case is made out. The fact that the injury finally resulted in the death of the intestate did not destroy the right of action on the contract or for the tort growing out of it, for without the contract no liability would exist against the company. If Billings had died in the case against Sherley the action would have survived, and a recovery been permitted for his mental and bodily sufferings previous to his death. It is true it is said in the opinion that Billings was assaulted, but it is further said that the assault was a violation of the contract between the carrier and the passenger, and for that reason the recovery below was affirmed by this court. At common law torts to the person survived when the action could be framed in form ex contractu.

In the case of Hanford's Adm'r v. Payne, 81 Ky., —, the statute in regard to the character of actions that survived was considered, and there held that, although the statements of the petition were not sufficient to authorize a recovery for the death, by reason of willful neglect, under the statute, still the administrator was entitled to recover for the suffering and mental agony of the intestate, caused by taking the poison, from the time it was administered up to his death. In our opinion the facts alleged present a cause of action, and the judgment below is, therefore, reversed, with directions to overrule the demurrer and for further proceedings consistent with this opinion.

SWOPE, &c. v. SCHAFER.

(Filed May 7, 1887.)

1. Instructions—While the court may, in civil cases, instruct the jury without being moved to do so, it is not bound to instruct.

2. Same—While the court in instructing the jury in a civil case on its own motion may not be required to give the whole law of the case suited to every state of fact upon which the jury might properly find a verdict for either party, yet it should not direct the jury unconditionally to find against a party upon a given hypothesis, when there may be another hypothesis alike supported by the evidence, but withheld from the jury, upon which they might find in favor of such party.

In this action to recover land the court instructed the jury, on its own motion, to find for the defendant if they believed the land in controversy was within a certain boundary. This was the only instruction given. The evidence tended to show an adverse possession by the plaintiff for a sufficient length of time to authorize the recovery. Held—That, as the court of its own motion undertook to instruct the jury, it should not have so framed the instruction as to exclude from the consideration of the jury the rights of the plaintiffs arising from their possession of the land.

3. Adverse possession—While in case of concurrent possession under two adjoining surveys the true location of the line of the elder patent must gov-

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ern, still the actual possession under a junior patent may ripen into a perfect title in the absence of such possession and claim under the elder patent.

O'Hara & Bryan and E. W. Hawkins for appellants.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Lewis.

Appellants instituted this action to recover a parcel of land, of which they allege appellee unlawfully and without right holds the possession and detains from them, the owners.

It appears that from about the year 1816, when the ancestor of appellants obtained a deed therefor, they, and those under whom they claim, by their tenants and agents, had the actual possession and claimed a tract of —— acres of land, patented to Reuben Talyor, until the year 1856, when it was divided into lots, one or more of which were allotted to appellants, and have been in like manner held and claimed by them ever since.

In 1880 appellee entered and took possession of the tract in controversy, containing ——— acres, claiming under a patent for another tract issued to Mosby, which is older than the Taylor patent, and called for in the recital of the boundary of the latter.

On the trial the court, on its own motion, gave the following instruction to the jury, no others being asked by either party: "The court instructs the jury that the back line of the 7th and 8th Mosby surveys constitutes the southerly boundary of the Reuben Taylor patent, unde which the plaintiffs claim title to the land in controversy; and if the jury believe, from all the evidence, that said land is within the Reuben Taylor patent, they should find for the plaintiffs; but if they find that said land is within the 7th Mosby survey then they should find for the defendant."

Counsel for appellants contend that as the lower court assumed the province of instructing the jury unasked, it should have given the whole law of the case suited to every state of fact upon which the jury might properly find a verdict for either party.

This rule has never been applied to the trial of civil cases to the extent stated by counsel; for though the court may, in such case, instruct the jury without being moved so to do, it is not bound to instruct. (Clark v. Baker, 7 J. J. M., 197.) Nevertheless it seems to us that if the court does, on its own motion, instruct in a civil case, it should not direct the jury unconditionally to find against a party upon a given hypothesis, when there may be another alike supported by the evidence, but withheld from the consideration of the jury, upon which they might find in favor of such party. By the instruction given in this case the jury is directed to find for the defendant in case they believe the land in controversy is within the Mosby patent boundary.

The precise location of the dividing line between the two surveys is one of the questions that arise in the case. And while we think there is a decided preponderance of the evidence showing it to be the line A B, appellants contend for, as laid down on he map of J. D. Ellis, the surveyor, still one witness locates the mulberry corner at another place, and his evidence tends to show the dividing line is further north than the line A B indicates. We are not, therefore, authorized to say the verdict of the jury should be set aside because flagrantly against the evidence.

But it is almost conclusively shown that appellants and their ancestors have, since 1816, held and claimed under the Taylor

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patent up to the line A B, which is, or was, before the land was cleared, a marked line.

While in case of concurrent possession, under two adjoining surveys, the true location of the line of the elder patent must govern; still the actual possession under a junior patent may ripen into a perfect title, in the absence of such possession, and claim under the elder patent.

The evidence does not show that at any time within a period of twenty years, after the year 1816, any one did hold and claim under the Mosby patent. Consequently, if the southern line of the Taylor patent, as actually located and marked, does extend from A to B, appellants acquired a title thereto whether the north line of the Mosby patent was or not at a different place.

But whether the dividing line extends west form A, or from a point north of A, it still runs through a field cleared and cultivated by the tenant of appellants and which the evidence tends to show was so cleared and cultivated for more than fifteen years before the entry of appellee in 1880. Consequently appellants, upon that hypothesis, had a right to recover so much of the land in dispute as was enclosed for that period before appellee entered, whether it was or was not included in the Mosby patent. And the instruction given to that extent, at least, prejudiced the substantial rights of appellants. We think, therefore, that as the lower court, of its own motion, undertook to instruct the jury, it should not have so framed the instruction as to exclude from the consideration the rights of appellants arising from their possession of the land in controversy.

Judgment reversed and cause remanded for a new trial and for further proceedings consistent with this opinion.

ASKIN v. LEBUS.

(Fild May 7, 1887.)

1. Fraud—Alleged fraudulent representations as to title and boundary relied upon by the defendant as a defense to this action on notes executed by him for the purchase price of land are not established by the evidence.
2. Usury—Where a greater than the legal rate of interest is agreed to be paid as part consideration for land it is not usurious.
3. Exhibits filed as evidence after the submission of the cause do not constitute a part of the record.

R. K. Smith for appellant.

J. Q. Ward for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Chief Justice Pryor.

The defense relied on by the appellant to the recovery in this case is, as to the one note, that usurious interest had been paid upon it, and as to the other note that there was a deficit in the boundary of land sold, it having been sold by the acre, and the alleged fraudulent representations made by the vendor as to the title, and the loss of a valuable spring supposed to have been on the land, when in fact it belonged to another, by which the value of the land purchased was greatly lessened.

The vendee, who is the appellee, accepted the deed and went

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into the possession, and from the testimony shows that he has sold the land upon which the spring was located to a third party at the price he was to pay per acre for the land purchased.

There was no fraudulent representation made by the appellee or his vendor as to the boundary or title, and in fact the proof shows that the appellant once owned the land, or a part of it, and knew as much about the boundary as his vendor. Nor is there any defect of title shown, but on the contrary the testimony of the appellant conduces to show that the part of the land he claims to be in the adverse possession of other parties belonged to his vendor, and had been recovered in an action of ejectment by her before the sale to the appellant. Besides, there is no allegation of insolvency and no fraudulent representations established, but an answer filed that shows more of a purpose to delay than to present a substantial defense to the recovery.

The amount of usury paid was deducted from the amount of the judgment, and this is the only defense interposed. The ten per cent. on the first note being a part of the consideration to be paid for the land, was properly allowed. The exhibits filed as evidence after the submission of the cause do not constitute a part of the record, and have not been considered.

Judgment affirmed.

RUSSELL, &c. v. GREENWADE.

(Filed May 7, 1887.)

1. Vendor and vendee—Pleading and practice—In this action to enforce a vendor's lien the defendant filed an answer, alleging a deficit in the land. The court thereupon ordered judgment for the amount to which the plaintiff was entitled, admitting the allegations of the answer to be true, and left the question of the deficit to be thereafter ascertained. Held—That this judgment was proper, as it compels the defendant to pay only for the land which he admits is in his possession.

2. Same—In his answer to this action the defendant attempts, by a general averment, to make the answer of himself and others in an independent action a part of his answer in this action, with a view of consolidating the two cases. Held—That the mere reference to what had been pleaded in some other case could not make the defense good in the present action; the facts constituting the defense must be specifically pleaded.

3. Same—As the defendant holds a deed and has entered into possession of the land purchased by him, and no one is attempting to disturb his possession or title, the mere fact that the deed to the plaintiff embraced more land than his grantor intended to convey will not enable the defendant to resist the payment of the purchase money.

T. Turner & Son for appellants.

Wood & Day for appellee.

Appeal from Menifee Circuit Court.

Opinion of the cout by Chief Justice Pryor.

This record is in such a confused condition that it has required much labor to understand it, and would be condemned but for the suggestion by counsel on each side that it is impossible to obtain a better one.

The appellee, Thomas Greenwade, Jr., sold to the appellant a

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tract of 1,577 acres of land, for which he paid all the purchase money except $4,098, and for that sum two notes were executed, payable at different periods. A conveyance was made and recorded, in which a lien was retained for the unpaid purchase money. This action was instituted to enforce the lien on the land conveyed. The appellant filed an answer, alleging a deficit in the land of several hundred acres, and if the statements of the answer are true reduces the amount of each payment to less than $1,500.

The court below rendered a judgment for this amount, and left the question of the deficit to be thereafter ascertained. We perceive no objection to this judgment so far as it affects the appellant, as it compels him to pay for the land only that by his answer he admits is in his possession.

Thomas Greenwade, Jr., had purchased this land of his father, and was in the possession when he sold to the appellant. It seems that his father owned a large tract of land in the county where this land sold appellant is located, and that after his death the heirs of the father, Thomas Greenwade, Sr., sold and conveyed this large body of land to the appellant and others for the sum of $18,000. The land sold by the appellee to the present appellant was not included in this sale.

When the large tract of land was purchased by the appellee and others from the heirs it appears that a petition in equity had been filed for a settlement of the estate of Thomas Greenwade, Sr., and his personalty being insufficient to pay the debts the land was sought to be subjected to their payment. To obviate the trouble the purchaser might have, in acquiring the title as against the claims of creditors, the appellant and those purchasing with him, by an agreement with the heirs, deposited $12,000 in bank to be applied to the payment of the debts when ascertained, and executed their notes for the balance.

An action was instituted by the heirs on the purchase money notes due on this large purchase, to which various defenses were set up, and among them that there was a large deficit in that sale, and that much of the land was in the adverse possession of others at the date of the purchase. Also that the money deposited in bank was not sufficient to pay the debts; that the heirs were insolvent, and had covenanted that they had title, and were in fact seized of the land in the actual possession when the sale was made; that there was a breach of the covenant for the reason that much of the land was held by others under an adverse title, a fact known to the vendors and unknown to the appellant and others when they purchased.

The appellant in his answer to the present action attempts, by a general averment, to make the answer of himself and others in the suit for the large tract of land a part of his answer in the present action, with a view of consolidating the two cases.

The present action is independant of the other, and in making the defense it was necessary to make it complete, and the mere reference to what had been pleaded in some other case could not make the defense good in the present action without pleading specially the facts constituting the defense. There is no allegation of insolvency on the part of the appellee in this case, and if there was the appellant admits that he is in the possession of the land sold him and can not question his title, as it seems to be perfect, except so far as the deficit is concerned in the number of acres. It is alleged that the boundary of land conveyed by the father to the son embraces more land than the father intended to convey, but if this be true the appellant as purchaser has entered

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into the possession and holds a deed, and no one is attempting to disturb his possession or title.

The fact is, the amount deposited in bank, with the amount owing by appellant and others on the large purchase, is ample indemnity to the appellant, and there is no reason why the judgment as rendered should not be enforced.

If the answer of the appellant is regarded as good as to the present action it stops the coercion of any of the purchase money notes on either sale until the entire litigation is ended.

If the contract for the larger tract of land is rescinded or not enforced, it affords no reason for rescinding the conveyance in the present case.

The appellant is made to pay only for the land he gets.

Judgment affirmed.

JACKSON, &c. v. ANDERSON.

(Filed May 12, 1887.)

Assignment of insurance policy—Rescission—Appellants, for a valuable consideration, assigned to appellee a policy of insurance which was not assignable. Appellee having permitted a forfeiture of the policy by nonpayment of dues, now seeks to have the contract of assignment rescinded upon the ground that the assignment did not vest him with any right to the proceeds of the policy. Held—That as appellee can not now place the assignors in statu quo, he can not have the contract rescinded.

Wm. Lindsay and James D. Black for appellants.

Dishman & McClary, J. H. Tinsley, John H. Wilson and Richards & Hines for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Pryor.

After the reargument in this case the court is still disposed to adjudge that the appellant is entitled to a reversal. The parties were dealing at arm's length in regard to these policies that seem to have had a marketable value.

The husband of Mrs. Jackson was one of the beneficiaries, and, besides, the benefit certificate on its face made the sum due at the death of the member her assigns as well as those named as the beneficiaries. Lawyers had been consulted and opinions given pro and con as to the right to assign.

That ordinary life policies are not assignable, and can not be placed on the market as a promissory note or bank paper, is well established, but here all the certificates issued by the Grange purport to confer on the insured the right to assign, and it may well be doubted whether the corporation can make any defense to a bona fide holder who has been induced to purchase, not by the representations of the agents that they were assignable, but by the express terms of the policy transferred.

Speculation was freely entered into by many parties in the county of Knox in these policies, and the appellee, who should have informed himself as to the rights of the parties, was an actual participant in the purchase made. He purchased this policy in 1872, and there was no complaint made until the year 1872, when it is apparent the members of the Grange were being

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reduced in numbers, and the inducement to continue purchasing was not so great. There was never any tender of the policy back to the appellant, or any offer to pay the premiums that were unpaid, but on the contrary there was a forfeiture of the policy while in the hands of the appellee, and no notice, from the decided weight of the testimony, given by him of his intention to abandon the contract. He had a policy on his own life besides others that he forfeited about the same time, and it is evident that the speculation was becoming a burden, and the causes prompting the appellee to sue consisted in the lessening of the ability of the corporation to pay by reason of its failing condition.

He was offered by Vaughn $500 for the policy, and by Panch $600. He asked $1,800, and if Mrs. Jackson had died would have been entitled to $2,000 in the event he acquired the interest of all the children.

As to the husband's interest he acquired that in the event he survived his wife, because the policy assigned by the husband and wife gave the right to assign, and estopped the husband from asserting any claim to the insurance money.

The appellants, from the proof, have entered upon the land, erected buildings, improved the place and lived on it some five years before this suit was brought; that from the preponderance of the proof was the first notice appellants had of the purpose on the part of the appellee to seek a rescission of this executed contract. The land was worth not exceeding $600. Mrs. Jackson could have sold her policy at any time upon a risky bargain for that sum. The appellee refused to sell it until he saw that it was becoming worthless, and when in no condition to place these parties in statu quo asks to have the contract rescinded.

This judgment is reversed and cause remanded, with directions to dismiss the proceeding as to Jackson and wife.

It appears that all of the children of Mrs. Jackson are of age but two. There are eleven children in all, and as the mother has obtained the benefit of the policy by accepting for it a conveyance for this land, the appellee should be allowed to amend his petition, making the children defendants, and have the policy to be renewed by the corporation payable to the appellee.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

PECK'S EX'OR, &c. v. PRICE, &c.

(Filed May 12, 1887.)

1. Devise by husband of wife's land—A testator devised to his daughter land belonging to his wife, the will reciting that the devise was with the consent of the wife, who signed the will. Held—That the wife's title to the land was not divested by the will of her husband, and, therefore, the land can only be taken from her and transferred to those to whom it was devised by the will upon such terms as she may dictate.

2. Pleading—There is no rule of pleading which forbids the asking of relief in the alternative.

The plaintiff in this case averred in her petition that she was entitled either to enforce a lien upon the land described in the petition for a named amount or to recover the land itself, but that she did not know which; but she asked first that she be awarded a lien, and that it be enforced. Held—That it was error to require the plaintiff to elect which cause of action she would prosecute.

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Bush & Robertson and Irwin & Smith for appellants.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

It is an admitted fact that the land devised to Catherine Almeda Price by the will of her father, H. B. Peck, belonged in fact to her mother, the appellant, Catharine Peck.

The fact that she signed the will of her husband did not divest her of title. The will provides:

"I will and bequeath to Catharine Almeda Price, with the consent of my wife, Catharine Peck, the tract of land known as a part of Dr. William Smith's old farm, containing 237½ acres. I estimate it worth two thousand dollars. I give her seven hundred and fifty dollars out of the above two thousand. This land is hers, and after her death it must belong to her children. She is to execute her notes to me for the balance.

In a subsequent part of the will the testator directed that the notes should be executed after his death, and to his wife; and again changed it by a codicil, and provided that they should be given either to him or to his executrix. His wife was nominated as such representative, and to her bequeathed all his personal estate, save a legacy of $500 to a son.

He died in February, 1879, and in the same month Catharine Almeda Price, who was then a married woman, executed to her mother, as the widow of H. B. Peck, a note for $1,250, which recites that it was given for the balance on land willed to her by her father, and that a lien is to be retained on the land for its payment.

Her husband did not sign it. It has been held by some courts that the acceptance of a devise of land, charged with the payment of money or a legacy, creates a personal liability for its payment by the devisee; that an implied contract arises; while others have held that an express promise is necessary to create such a liability, and that without it the action, though in form that of debt, must be regarded as a proceeding in rem merely.

Mrs. Price, however, being a married woman when she executed the note, there is no express assumption of payment which is valid, and hence no personal obligation exists. The remedy, if there be any, is necessarily in rem.

The appellant, Catharine Peck, both as executix and in her individual name, brought this suit, but not within five years after her husband's death or the execution of the note setting forth the history of the matter and averring that she was either entitled to enforce a lien against the land for the $1,250 or to recover it; that one or the other was true, but she did not know which; but she asked first that she be awarded a lien for the money and that it be enforced.

The lower court, upon the idea that there was a misjoinder of cause of action, compelled her to elect whether she would proceed to recover the land or to enforce a lien against it; and being compelled to do so she elected to proceed for the lien.

The court compelled an election upon the wrong side of the case. It should have required the defendants to elect whether they would surrender the land or submit to the enforcement of the lien against it. Inconsistent statements in a pleading should be stricken out; but the Code provides that a party may aver alternatively the existence of one or another fact if he state that one of them is true, and that he does not know which of them is

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true. Here, however, the statements related merely to the relief to be granted.

By the Civil Code a party must demand the specific relief to which he thinks he is entitled, and may also pray generally for any other proper relief.

This the appellant did in this instance. It is true she asked for specific relief in the alternative, but we know of no rule which forbids it.

It appears that D. W. Price and children are in possession and claiming the land, he having separated from his wife; and he, upon the idea that the appellant has no claim, relies upon the statute to defeat it.

The parties are in equity; the title to the land is in fact in Catharine Peck; the appellees are claiming it under the will of her husband; she says to them, you may have it if you will pay the charge which was put upon it by the will, but otherwise I claim the land. It is plain that. under such circumstances, a party who claims the land, but has never obtained the title, must pay for it before he can ask a court to divest the title holder of it. No principle is better settled, and none rests upon a higher equity. The plea of limitation would avail in such a case if the title had passed and time had run against the claim; but in a case like this the party claiming the land can not say to the owner that he will hold the land and yet refuse to pay for it.

If the title to the land had been in the husband, and he had charged it with the payment of a legacy to a third party, or with the payment of a sum to his estate, then a different case would have been presented from that now before us. Here, as the title to the land is in the appellant, it can only be taken from her and transferred to those to whom it was devised by the will upon such terms as she may dictate; and these having been fixed by her, they must either elect to accept them and submit to an enforcement of a lien against the land for the $1,250 or surrender it to the appellant.

Upon the return of the cause, if no statutory guardian appears for the infant defendants, the court should appoint a guardian ad litem, and a reasonable opportunity given the parties to whom the land was devised by the will of H. B. Peck, and who are defending this suit, to elect whether they will submit to an enforcement of a lien against the land for the $1,250, the guardian acting for the infants, subject to the supervision of the court; and if this be not done then a judgment will be entered for the appellant, Catharine Peck, for the land.

Judgment reversed and cause remanded for further proceedings consistent with this opinion. The cross appeal is dismissed.

MEDLEY, &c. v. TANDY.

(Filed May 12, 1887.)

1. Sureties—Husband and wife—The written notice by a surety to the creditor requiring him to sue, provided for by section 11 of chapter 104 of the General Statutes, may be given by the husband in his own name where the wife is surety by virtue of a contract made before marriage.

2. A surety having been released by the creditor's failure to sue at the next term at which he could have sued after receiving notice to sue, a subsequent request by the surety not to sue did not revive his liability.

3. Husband and wife—Judgment—A judgment may be rendered against the husband for the wife's antenuptial debts, to be levied only on such prop-

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erty as he may have received from her by virtue of their marriage, without an allegation that he has received any personal estate from her.

Warren Montfort for appellants.

J. W. Rodman and Masterson & Gaunt for appellee.

Appeal from Carroll Crcuit Court.

Opinion of the court by Judge Bennett.

The appellee instituted suit in the Carroll Circuit Court against the appellants, Herman Medley and his wife, Amanda, and E. J. Sanders for the purpose of recovering judgment on a promissory note dated the 23d day of August, 1880, and due twelve months after date, and executed to the appellee by E. J. Sanders and the appellant, Amanda, while she was a feme sole. Sanders made no defense, and judgment was rendered against him by default.

The appellants defended the suit and asked to be relieved from the payment of the note upon the ground that the appellant, Amanda, was only a surety of Sanders, and that after her marriage with the appellant, Herman Medley, he instructed the appellee in person, by writing, to sue on said note, as he and his wife did not wish to be bound for the debt any longer.

The appellee in his reply did not deny that the appellant, Amanda, was only the surety of Sanders. Besides, the proof abundantly shows that fact.

The appellee in his reply denied that he had been instructed by writing to bring suit on the note. He also alleged that in a few days after the alleged instruction the appellants verbally requested him not to sue on the note, and in obedience to that request he did not sue. Issue was joined on the latter plea. A jury trial resulted in a verdict and judgment thereon for the appellee; and the appellants' motion for a new trial having been overruled they have appealed.

Chapter 104, section 11 of the General Statutes provides in substance that if a surety, by notice in writing, served in person on the creditor, requires him to sue, and if he fails to sue after receiving such notice to the next term of a court having jurisdiction at which he can obtain judgment, then such failure releases the surety from all liability on the obligation.

The proof, as it appears in the record, shows conclusively that about the 1st of August, 1883, the appellant, Herman Medley, by written notice addressed to the appellee, which he received, directed him to sue on the note. The appellant swears that such was the substance of the written notice, and the appellee's sons, who saw the notice after appellee received it, swears that such was its substance. No witness contradicts this testimony. But it is contended that as the written notice was signed by the appellant, Herman Medley, alone, who was not personally bound on the note, the notice was not such as the statute requires; and, therefore, placed the appellee under no obligation to sue. We can not concur in this construction of the statute. For by chapter 52, article 2, section 4 of the General Statutes the husband is liable for any debt or responsibility of the wife contracted or incurred before marriage to the amount or value of whatever he may receive by her independent of her real estate. And by section 1 of the same article the husband has power to rent the real estate of his wife for not more than three years at a time, and receive the rent, and if he appropriates such rent to his own use he is liable to that extent for the debts of his wife contracted be-

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fore marriage. He is also entitled to the use of his wife's real estate during her life, and after her death he is entitled to curtesy in her real estate, provided he has reduced it to possession during her lifetime, and there has been issue born of the marriage. Also her real estate being liable for her debts contracted before marriage, and the husband's right to its use during her life, and his right of curtesy therein being held subject to the right of the wife's antenuptial creditors, to have the land itself taken and applied to the payment of their demands, it follows that he may be deprived of his right to the use of the land during the life of his wife, and his right of curtesy therein by the land itself being subjected to her debts contracted before marriage; also his right to the use of the land during his wife's life being but a chattel interest, he may be made liable to the extent of the value of such use for any debt of hers contracted before marriage.

For these reasons, if there were none other, the husband has a direct pecuniary interest in protecting his wife's estate from unjust demands, as to prevent her being made liable for unjust antenuptial debts, and to take such action as the law allows to relieve her from her antenuptial liabilities. So to deny him such remedies as his wife would have were she still a feme sole for her protection would be manifestly unjust.

But by virtue of the marital relation it is the right and the duty of the husband to protect and guard the interest of his wife; to shield her estate from unjust demands; to take all legal steps to protect her property interest and her legal rights growing out of her contracts, or otherwise, and when she is sued to join with her and make all proper defenses for her. This duty is enjoined upon him by virtue of his marital relation. The law gives him this right for the protection of his wife and her property interests, which he can not neglect without violating his duty, and which duty he can discharge independently of the wishes of his wife.

For these reasons also the husband should not be denied the right to resort to any remedy the wife would have had for her protection had she remained a feme sole.

It was, therefore, legitimate for the appellant, Herman Medley, in his own name and in his own personal right, as well as that of his marital right, to give the notice to the appellee to sue. And if he gave said notice in either capacity it was sufficient, and the jury should have been so instructed.

As to the defense that within a few days after the notice was given the appellants verbally requested the appellee not to sue, the appellant, Herman Medley, swears that neither he nor his wife made such request. The appellee, on account of his affliction, did not swear in the case, and there is no proof whatever contradicting that of the appellee. Nor is there any proof that the appellee and the appellants, or either of the latter, ever had an interview relative to that matter. The burden of proof to establish that fact was on the appellee, and the only evidence introduced by the appellee was that given by his son-in-law, Mr. Williams. He swore that after the fall term, 1884, of the Carroll Circuit Court, which was long after the appellee was notified to sue, the appellant, Herman Medley, told him that "he was sorry that he had not made Tandy sue before. The appellant flatly denies this. The witness concludes his evidence by saying that "Medley at all times told me, when he spoke of the matter, that any waiting on Sanders was without his consent, and always told me to sue."

Now the notice having been given to sue, which is established beyond a reasonable doubt, and the improbability of the appel-

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lants, without any apparent cause, within three days thereafter changing their minds and requesting the appellee to sue, together with the fact that the appellant, Herman Medley, swears most positively that no such request was made, are persuasive facts and circumstances too cogent and strong to be overcome by the testimony of Mr. Williams alone, to the effect that the appellant, Herman Medley, should have said months afterwards that "he was sorry that he had not made Tandy sue before."

The jury could not have based their verdict upon the ground that no notice in writing was served on the appellee to sue. Their verdict, therefore, must have been based upon the ground that the appellants had, within a few days after the notice was given, changed their minds and requested the appellee not to sue. In this we are constrained to say their verdict was clearly against the weight of the evidence.

Mr. Williams also testified, over the objections of the appellants, that several months after the notice was given Mrs. Medley told him that she did not want him to sue. This conversation occurred after one or more circuit courts had passed from the time of giving the notice. The evidence was incompetent because, by the failure of the appellee to sue at the next term at which he could have sued after receiving the notice, the appellants were released from all liability on the note, and any request made by them, or either of them, after such release, was without any consideration whatever, and did not revive their liability on the note.

The appellee failed to allege in his petition that the appellant, Herman Medley, had received any personal estate by his wife, or that he had collected and appropriated any rents arising from his wife's land, or that he had realized any profits arising from the use of her land. Notwithstanding this, the lower court rendered judgment against him for the debt, interest and cost, which was to be "levied on such property as he may have acquired from the said Amanda by virtue of his marriage with her."

The appellants complain of this as error. They contend that no judgment could have been rendered on the petition against the appellant, Herman Medley, because the petition failed to allege any of the foregoing matters in reference to the appellants' having received any estate from his wife, and that to entitle the appellee to a judgment against him the petition should have alleged what estate the appellant had received by his wife, and its value, and, therefore, asked personal judgment against him for that amount. We can not agree to this proposition.

This court, in the case of Beaumont v. Miller, &c., 1 Met., 68, decides that in such actions the plaintiff need not allege that the husband received any estate outside of land by his wife; that in the absence of such allegation the plaintiff is entitled to judgment against the husband, to be levied only on such estate as came to him by his wife, independent of her real estate.

The logic of that case is sound, and to the reasons therein announced it may be added that the rule contended for by appellant must subject the creditor to a multiplicity of suits before he could obtain his rights, because, if the husband, at the time the debt became due, had received no estate from the wife outside of her real estate, then no suit could be maintained against him; or if he had received some estate by his wife, but not enough to pay the debt, then judgment could be obtained against him only to the extent of the value of the property received, and the suit dismissed as to the balance of the debt; and after awhile another

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suit, if the husband had acquired any other property by his wife, would have to be brought to recover judgment against him for the value of that property, and so on. Also the rule contended for would deprive the creditor of the benefit of a judgment against the husband and a return of no property found, so as to reach such estate as could not be otherwise reached. For these reasons, together with the reasons expressed in the case supra, we are not inclined to overrule it.

The judgment of the lower court overruling the appellants' motion for a new trial is reversed and the case is remanded, with directions to grant appellants a new trial and for other proceedings consistent with this opinion.

CLEMENTS v. RAMSEY, &c.

(Filed May 12, 1887—Not to be reported.)

1. Guardian and ward—In an action by a guardian for the sale of his ward's real estate the guardian executed bond as required by statute. At the sale the guardian became the purchaser, and the commissioner reported that the "guardian being the beneficiary," no bond was required. The sale was confirmed and a deed made to the guardian in his individual right. In this action to require the sureties of the guardian to account for the proceeds of the land—

Held—That those holding under the guardian are invested with a perfect title to the land, and the infant, therefore, had no right of election; but if he could elect he has elected to recover the purchase money, which secures to the guardian and surety relief from any further litigation with reference to the land or its proceeds.

2. Same—An insolvent guardian having left the State without making a settlement of his accounts, the ward by his next friend had the right to maintain an action for the purpose of having a settlement of the guardian's accounts and determining the liability of his sureties.

3. Infants—Action by next friend—Where an action has been instituted in the name of an infant by his next friend, and the infant arrives at age pending the action, the court may permit the infant to prosecute the action in his own name without filing an amended petition.

4. Guardian's bond—The fact that years before the appointment of a guardian some one else had been appointed and never removed, does not render a bond executed by the last guardian void or release his sureties from responsibility.

L. W. Long, Hughes & Hughes and W. P. D. Bush for appellant.

Ken. Chapeze for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Chief Justice Pryor.

William Southern qualified as the statutory guardian of Forest Ramsey, and gave bond as required by law. The ward owning an interest in land lying in Hopkins county, in this State, the guardian instituted proceedings in the Hopkins Circuit Court for a sale of the land, as then authorized by chapter 86 of the Revised Statutes. In order to obtain a sale, and by virtue of the statute empowering the chancellor to adjudge a sale of realty belonging to the infants, a bond was executed by the guardian, with the appellant, Aaron Clements, as surety, conditioned "that the guardian would legally account for all moneys that goes into his hands as such, and that he would faithfully dis-

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charge all the duties imposed on him by the statute authorizing such a sale, or any judgment or decree of the court in pursuance thereof."

This bond, therefore, made the surety liable for all moneys coming to the hands of the guardian as such from the sale of the infant's land, and the statute requires that the proceeds of the sale of the land shall be paid over to the guardian. The land was sold as directed by the judgment, and purchased by Wm. Southern, the guardian, in his own right for $3,000, and the commissioner reported that the guardian being the beneficiary no bond was required, evidently meaning that as the guardian was entitled to the money he required no bond. In a few minutes after this the report of sale was confirmed, and a deed directed to be made to Southern in his individual right. This, then, was a confirmation by the court of the act of the commissioner, and as the guardian was entitled to the purchase money for the benefit of his wards (there being more than one), it was useless to require the money to be paid into court by the guardian and then repaid to him. The conveyance cancelled his obligation to pay, and invested the guardian with the title in his own right, who after this sold the land for $2,800. The guardian settled with his ward, Henry Ramsey, after he arrived at age, but made no settlement of his accounts with Forest Ramsey, who was an infant.

The infant, Forest Ramsey, filed this petition in equity in the Union Circuit Court by his prochein ami against the guardian and his sureties, the surety in the county court bond and the surety Clements in the bond executed in the circuit court of Hopkins county, for the sale of the land, in which the insolvency of the guardian is alleged; that he had removed from the State without making any settlement of his accounts, and asking for a settlement, and that the liability of the sureties be fixed and a judgment against Clements, the surety in the circuit court bond, for the interest of the infant in the land, and for all equitable relief.

There was a demurrer to the petition, and it is now urged that the infant plaintiff had no right, by his next friend, to institute this action against the guardian and his sureties to require the guardian to pay over the money to the next friend or to the infant. The prayer of the petition in this character of proceeding can not affect the cause of action set forth in the petition. Here was an insolvent guardian who had left the State without making any settlement of his accounts, leaving his sureties, denying any liability for such of the ward's estate, and under such circumstances a court of equity has been applied to so that a settlement may be had of the accounts of the guardian, and the estate of the infant secured or ascertained by determining the liability of the surety.

The infant plaintiff had in fact no other remedy, and being the ward of the chancellor and deserted by his guardian it was eminently proper that a settlement should be had, and the liability of the sureties determined. The forum selected to try the question as to the liability of the guardian was the proper one, and if not no objection was made to the proceeding on that ground. It is true the next friend might have been authorized to sue at law, or the surety entitled to a common law verdict, but no such demand was made, and the case being within the jurisdiction of the chancellor a settlement was directed and made, by which the liability of the surety was ascertained. While the chancellor would not direct the money due by the surety to be paid to the infant or to the next friend, there is no reason why the surety should not have been required to pay the money into court, and in his failure to do so an ordinary execution

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would have issued to compel payment; or if the facts authorized or require it, a summary remedy by attachment to recover the debt upon the execution of a bond of the next friend, with the money in court, the chancellor could preserve it for the infant.

While this action was pending and when ready for trial the fact was suggested and shown of record that the infant plaintiff had arrived at age, and he was, therefore, permitted to prosecute the action in his own name. It is objected that such a proceeding is making a party plaintiff to an action without an amended pleading, and no time given the defendants to respond.

There was in fact no party plaintiff made to the action. Forest Ramsey had been the plaintiff from its inception. He had instituted the action in his own name by a next friend, who stood responsible for the costs, but when he arrived at age the next friend was no longer a necessary party, and the action abated in fact as to him and proceeded to judgment in the name of the real plaintiff, and with whom the litigation had been had from the bringing of the action up to the rendering of the judgment. It is argued, however, that as the infant, when he instituted the action, had no right to a judgment for the money, that his arrival at age did not enlarge his rights.

The only reason the infant was not entitled to a judgment consisted in the fact that at law and in equity he was regarded as incapable of managing his estate, and the chancellor, instead of placing it in his hands, would have placed it with his commissioner to loan out or permitted the prochein ami to hold it for the infant upon his giving bond and surety.

If the chancellor could direct its payment by the surety for that purpose, we perceive no reason why he could not direct its payment to the infant on being satisfied the disability no longer existed. The action had been progressing all the while in the name of Forest Ramsey, and the defense had every opportunity of making any defense that he could have made if Forest Ramsey had been an adult, and instituted the action as such.

The case of Irvin v. McDowell, cited by counsel for the appellant, and reported in 4 Dana, —, has no application to this case. In that case the guardian and ward undertook, in the year 1818, to sell the land of the ward, and when sold the guardian receiving the money, the ward attempted to make the sureties of the guardian responsible. The guardian nor ward had the right to sell the land. The guardian had the right to the rents and profits, nothing more. The sale by the guardian was not authorized by law, nor was it an official act. In the present case the chancellor adjudged the sale under the statute, and the bond signed by the appellant, Clement, executed to secure the infant in the purchase money. This was the prime object in securing the bond, and without it the chancellor would not have adjudged a sale. The purchase was made by the guardian in his own right. Having been made by the guardian the chancellor could have refused to confirm the sale. He saw proper to confirm it, and directed a deed made to him by the commissioner. That deed invested him with title, and where he sold to a third party the latter held it against the infant and all others claiming under him. The sale was not void. The infant had no right of election, because the land had been sold to an innocent party by one invested with a perfect title. If the infant could elect, he has elected to recover the purchase money. This secures to the guardian and surety relief from any further litigation with reference to the land or its proceeds. The fact that years before the appointment of Southern as guardian some one else had been appointed and never removed does not render the bond executed by

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Clements void or release him from responsibility. The bond is binding on the principal and surety, and the mode of release is to pay the appellee his money. (Cotton, Guardian v. Wolf, 14 Bush. 238.)

Judgment affirmed.

YORK v. STEELE.

(Filed May 14, 1887—Not to be reported.)

Ejectment—Transfer to equity—It was error to transfer this action of ejectment to equity against the objections of the defendant. The mere fact that the mode of holding or the evidence of title is set out in the pleadings, either by the one side or the other, does not convert such an action into an equitable proceeding.

E. F. Dulin and R. D. Davis for appellant.

Wm. Bowling for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Pryor.

The only question involved is as to the ownership of the fifty-three acres of land.

The appellee instituted an action of ejectment for its recovery, and the appellant pleaded title in himself. The issue was purely legal, and the mere fact that the mode of holding or the evidences of title was set out in the pleading either by the one side or the other did not convert the action into an equitable proceeding.

The issue remained the same. The appellee must show title. The case, therefore, should not have been transferred to equity against the objections of the appellant. He was entitled to a trial by jury of the legal issue.

Judgment reversed for proceedings consistent with this opinion.

STAMPER v. THE CENTRAL KENTUCKY LUMBER AND MINING CO.

(Filed May 19, 1887.)

1. Venue of actions—An action by a vendee to recover for a deficit in land is transitory, and may be instituted in any county where the defendant is served with process.

2. Same—A sold to B land situated in Perry county. B sold the same land to C. There being a deficit, C instituted this action against A and B in the Clark Circuit Court to recover therefor, B having assigned to C his claim against A. Process was served on B in Clark county and on A in Letcher county, where he resided. Judgment by default was rendered against A, who appeals. Held—That the service of process on B in Clark county gave the Clark Circuit Court jurisdiction of the action against him, but the service of process on A in Letcher county did not confer jurisdiction as to him, and the judgment against him was void. The assignment by B to C of the former's claim against A did not confer a jurisdiction over A that would not have applied if B himself had instituted the action.

3. An appeal can not be prosecuted from a void judgment until there has first been a motion in the court below to set aside the judgment.

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John L. Scott for appellant.

W. M. Beckner and C. H. Stoll for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellees, Stewart, &c., purchased of the appellant, Stamper, a large tract of land in the county of Perry, for which they paid him the sum of 5,000, the tract supposed to contain several thousand acres more land than was found to be in the boundary when the survey was made. A deed was made by Stamper, and his vendees placed in possession. Stewart after this sold the same land to his co-appellee, the Central Kentucky Lumber and Mining Company, for $7,500, and by the terms of the sale a survey was accordingly made, and there being a deficit of several thousand acres this action was brought by the appellee to recover its purchase money by reason of the deficit, and an attachment obtained against Stewart and Stamper on the ground that they had not sufficient property to satisfy the demand, and its claim would be endangered by delay. Stewart was served with process in the county where the action was instituted, and Stamper with process in Letcher county, where he lived, and the attachment levied on his land. Stewart answered, admitting the grounds of the attachment, or they were conceded to be true on an agreed state of facts, and Stamper, the appellant, failing to answer, a judgment by default was rendered against him, and his land in Letcher sold to satisfy the demand of the lumber and mining company against Stewart.

The appellant, Stamper, brings the case here, insisting that the Clark Circuit Court had no jurisdiction to render the judgment against him because is was in fact an action affecting land, and, therefore, local.

The action to recover for the deficit was a transitory action, and could have been instituted in any county where the defendant was served with a summons, and, therefore, the Clark Circuit Court had jurisdiction to hear the complaint of the lumber and mining company against Stewart, as he was served in the county where the suit was brought, but as to Stamper the facts present a different state of case. The conveyance by Stamper to Stewart had been accepted and was entirely independent of the transaction between Stewart and the lumber and mining company. The sale to the company by Stewart vested in the former no right of action as against Stamper.

It is said, however, that Stewart assigned to the lumber and mining company the benefit of his claim against Stamper, and, therefore, the company could sue Sewart, its vendor and assignor in Clark county, and make Stamper, who was liable to Stewart, a party to the action. Stewart would have been compelled to serve Stamper with process in the county where the suit was brought, and if so we can not well see how his assignment to some one else could confer jurisdiction over the appellant that could not have applied if Stewart himself had instituted the action.

Suppose Stewart had made his answer a cross petition against Stamper, asking that if a recovery is obtained against him that he have a judgment over against Stamper for the benefit of his (Stweart's) vendee, could it be maintained that a service of process in Letcher would have given the Clark Circuit Court jurisdiction to render a judgment by default against Stamper? We think not. The Code provides that "an action (other than those

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made local) may be brought in any county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned." (Section 78.) Section 79 provides that "in an action brought against a single defendant there shall be no judgment against him unless he be summoned in the county wherein the action is brought, or unless he reside in such county when the action is brought and be summoned elsewhere in the State, or unless he make defense to the action before objecting to the jurisdiction of the court." This can be considered as an action only so far as the recovery against Stamper is concerned by his vendor, Stewart, against him, instituted in Clark county, with service of a summons in Letcher county.

The judgment is void as to Stamper, and should be so treated. This court can not reverse the judgment because no motion was made in the court below to set it aside, as it is provided by section 763 of the Code a void judgment can not be modified or reversed until a motion to set aside or modify the judgment shall have been made in the inferior court and overruled.

The appeal is, therefore, dismissed without prejudice.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. GRIEST.

(Filed May 19, 1887.)

1. Corporations—Where one corporation sells to another all its property, franchises, etc., under authority conferred by its charter, the bona fide purchaser for value takes the property free from the claims of creditors of the vendor who have no lien upon the property, just as if it were an individual transaction.

2. Same—Where the purchasing corporation undertakes to pay "all current indebtedness" incurred by the vendor in the operation of its railroad, the contracting corporations being railroad companies, even if the contract can be construed to render the purchaser liable for a tort committed by the vendor in the operation of its road, the claim must first be reduced to judgment in an action against the vendor, the corporation which committed the tort.

3. Same—When a corporation has sold all its property, franchises, etc., and thus in effect been dissolved, the creditors of the corporation may enforce their demands in a court of equity, the proceeds of the property being regarded as assets in the hands of stockholders for the payment of debts.

Holmes Cummins, Wm. Willson, J. P. Hobson and P. H. Darby for appellant.

Matt O'Doherty, R. C. Davis and C. D. Walker for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, William F. Griest, while in the employ of the Paducah & Elizabethtown Railroad Company, and running one of its excursion trains from Cecelia, in Hardin county, to the city of Paducah, was severely injured by the collision of the engine with horses upon the track, by which the engine ran off the roadbed, capsized, crushing and wounding him in a frightful manner. He instituted this action against the Chesapeake, Ohio & Southwestern Railroad Company and the Elizabethtown & Paducah Railroad Company, alleging in substance that the injury resulted from insufficient air brakes that were defective, and so known to the defendants and unknown to the plaintiff, and

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which, if in proper condition, would have enabled him to check the train and prevent the injury. His claim for damages was allowed to the extent of $10,000 against the Chesapeake, Ohio & Southwestern Railroad Company alone, the Elizabethtown & Paducah Railroad Company not being served with process or appearing in the action.

The Chesapeake, Ohio & Southwestern Railroad Company was incorporated in the month of January, in the year 1882, and the accident resulting in injuring the plaintiff occurred in July, 1881.

The claim against this corporation is attempted to be maintained on the idea that by its charter and the contract by which it became the owner of the Paducah & Elizabethtown Railroad Company the two were consolidated and constituted the one corporation; and further, that by the terms of the purchase the present appellant undertook to discharge all the liabilities of the Elizabethtown & Paducah Railroad Company.

A demurrer was filed to the petition on the ground that it presented no cause of action against the appellant, and the demurrer overruled. An answer was then filed to the petition, the first paragraph of which denied any responsibility for the tort complained of, or for any personal injury to the employes while engaged in the service of the Elizabethtown & Paducah Railroad Company, maintaining that the agreement by which it became the owner of the last-named corporation was a deed of bargain and sale entered into by both corporations under their respective charters. The identical question in fact is made by this paragraph of the answer that was raised by the demurrer to the petition.

We must look to the writing, therefore, by which the appellant acquired the Elizabethtown & Paducah Railroad to determine the liability of the one for all the debts and liabilities of the other. The facts alleged in the petition constitute a cause of action against the Elizabethtown & Paducah Railroad Company, and if the appellant is liable in this case it must be by reason of the contract between the two corporations

The deed of bargain and sale recites that "the one has bargained and sold, and by these presents doth grant, bargain and sell, alien, convey and confirm unto the Chesapeake, Ohio & Southwestern Railroad Company all the railroad and its properties, naming them specifically, to have and to hold in fee, including all debts, dues and demands of whatever nature, due or to become due to it, and all the rights, privileges and franchises belonging to or appertaining to the Elizabethtown & Paducah Railroad Company."

The consideration for the sale was over $70,000 in money, and $2,853,000 in negotiable bonds, and the assumption of certain mortgage liens that were upon the road; and further, the appellant "bound itself to pay all sums lawfully due for taxes, and all current indebtedness incurred by the party of the second part in the operation of the said railroad and property."

The Elizabethtown & Paducah Railroad Company was authorized by its charter, with the assent of a majority in value of the stock of the company, to sell or lease its road, and the power to purchase was conferred on the appellant, so no obstacle existed to the consummation of such a transaction but the consent of the stockholders as provided by the several charters. That consent was obtained, and the legal effect of the agreement was to transfer to the appellant all the rights, property, etc., of the Elizabethtown & Paducah Railroad Company free from the claims of creditors.

It was a bona fide purchaser, paying full value for the road, at least the validity of the transaction is nowhere assailed, and in such a state of case we are aware of no rule of law or equity that would follow the property in the hands of a bona fide purchaser

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for the benefit of a creditor who has no lien by law or contract as against it on the property sold.

If the corporation had but changed its name, with the same stockholders or with additional stockholders, it would be regarded as the same corporation. Here, however, is a great line of railroad, incorporated under the name of the Chesapeake, Ohio & Southwestern Railroad Company, with responsibilities greater than those belonging to the corporation whose property has been purchased by it; with different stockholders, and property rights that were before and after the purchase disconnected from the interest of stockholders in the corporation purchased, and it can not be well argued that the two have consolidated, or have each a common interest in the appellant. No stockholder in the Elizabethtown & Paducah Railroad Company held stock as such in the Chesapeake, Ohio & Southwestern Railroad Company, but on the contrary the stockholders in the Elizabethtown & Paducah Railroad Company were paid off in bonds by the appellant, extinguishing the existence of all the property rights of the latter company, and in fact it may be said to have no longer an existence except for the purpose of winding up the affairs of the company.

A creditor of the corporation, whether from an express or implied contract, subjects himself when dealing with it to the powers conferred by the charter.

If the power to sell is given by the terms of the grant the purchaser for value holds the property as if it had been an individual transaction. There is no reason for making the distinction, and the rule in individual transactions should apply as between corporations where the power to sell and purchase is conferred by the charter. While a dissolution of a corporation would entitle the creditors to enforce their demands in a court of equity, or, where there is a consolidation, to follow the assets of their debtor in the consolidated company, still where there is a sale of the corporate property it passes the title as to all, in the absence of some reservation in the charter protecting the rights of creditors. (Morawetz on Private Corporations, 567, 568, 569.)

Where the corporation is dissolved or is consolidated the assets of the company is a trust fund for the payment of its debts, and may be reached by a court of equity.

What, then, is the remedy of the appellee in this case in the event he is entitled to a judgment against the Elizabethtown & Paducah Railroad Company?

If a sale in good faith has been made to the appellant, and that is not questioned, the stockholders of the Elizabethtown & Paducah Railroad Company, having received a consideration for their stock, would scarcely be permitted to hold the proceeds in their pockets and the debts of the corporation left unpaid. An equivalent has been paid by the appellant in money and bonds that have passed to the stockholders of the old corporation. This must be regarded as assets for the payment of debts, if not already appropriated in that way.

This court held, in the case of Smith & Davis v. Gower, 2 Duvall, 17, that where the property and franchise of a railroad company had been sold under a mortgage, that the liabilities of the corporation still existed, and the corporation still lived, at least for the payment of its debts.

It is urged, however, that the appellant undertook to pay the current indebtedness incurred by the Elizabethtown & Paducah Railroad in running its road, and that this embraced the tort complained of or the liability of the company to the appellee under its implied contract to furnish safe machinery in operating the road.

In the case of Coggin v. The Central Railroad Company, 62 Ga., 685, where the one company absorbed the former, one of the

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provisions of the act was that the living corporation should discharge all the contracts of the extinct corporation. There the court permitted the injured party to sue for a tort and to recover on the agreement to pay all the debts, the reasoning being based on some provision of the Code in which the word debts was used, the court saying that there was a strong probability that the word was intended to embrace liabilities of all classes, torts included.

Whether the words "to pay all current indebtedness in operating the road" embraces such a tort as is complained of in this case is not necessary to be determined, as we think it evident that before such a recovery could be had some claim should be established against the party or corporation committing the injury. If we could construe the words current indebtedness as meaning what the appellee insists it does mean, we are not disposed to adjudge that an action for negligence, in which punitive as well as compensatory damages can be recovered, may be maintained against one not in existence when the tort was committed.

This action should have been prosecuted against the Paducah & Elizabethtown Railroad Company for the purpose of establishing the claim, and then the equity of the appellant as against the stockholders of that corporation, or the claim, if any, against the present appellant could be asserted.

The case of Powell v. The Northern Missouri Railroad Company, 42 Mo., 68, was a case where seversal railroad companies were, by an act of the legislature, merged into one, and constituted one body under the name of one of them. It was there held that where, by the terms of the deed, the first corporation was extinguished, and the second only continued to exist, the case was not one of consolidation or amalgamation. There the one corporation was authorized by a majority in interest of its stockholders to transfer its effects, assets, rights and privileges to the North Missouri Railroad Company, and upon such transfer the company was to cease to exist, and the road thenceforth to be styled the West Branch of the North Missouri Railroad, their franchise to be completely vested in the North Missouri Railroad Company, etc.

It was there said that the one corporation was absolutely extinguished. It was a matter of contract and made upon a valuable consideration to a bona fide purchaser, and that while a court of equity will not allow a corporation to give away its property to the prejudice of creditors, it will not follow the property into the hands of bona fide purchasers. (20 Ind., 463.)

In this case the appellee is proceeding on the theory that the Elizabethtown & Paducah Railroad no longer exists; that its property and franchise have passed to the appellant by the deed filed with the petition. It has no interest in common with the appellant, nor have any of its stockholders any stock in the new company, and the fact that the president of the appellant was the owner of most of the stock in the Elizabethtown & Paducah Road can not have the effect of making a new and distinct corporation, that is a purchaser for value, liable for its debts except as made so by the terms of the sale.

We do not mean to adjudge that one corporation can be relieved of its liaiblity by passing its property over to some other company, or that a creditor is deprived of his rights as such in a case where the company liable to him consolidates with another. The right to consolidate can not be prevented by the creditor, but he may, in such a case, have the assets applied by a court of equity to the payment of his debt, because in effect the corporation is dissolved.

The creditor, in the event the agreement of consolidation bound the consolidated company to pay the debt, could not be com-

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pelled to accept the agreement and thereby destroy his right to look to his own debtor, and as said in Morawetz it has sometimes been held that when a new company is formed by consolidation of several companies it thereby impliedly assumes debts and obligations of the old. But this doctrine is not universally accepted, and there seems to be no sufficient reason for implying such an assumption of liabilities, particularly as creditors are not compelled to accept the same. (Morawetz on Coporations, 558.)

In the present case it is apparent that there was an absolute sale of the Elizabethtown & Paducah Railroad, and the action should have been prosecuted to judgment against the latter company. The demurrer by the appellant should have been sustained.

The judgment is, therefore, reversed and cause remanded, with directions to sustain the demurrer.

ANDERSON v. WINFREE.

(Filed May 19, 1887.)

1. Elections—Under the provision of the Constitution, which declares that "laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other crimes or high misdemeanors," the legislature has the power to pass laws excluding from suffrage not only those who may be convicted of crimes by the common law, but those who may be convicted of any other crime or high misdemeanor.

2. Same—One who has been convicted of grand larceny is deprived of the right to vote by virtue of the statute, which provides that "any person convicted of robbery, forgery, counterfeiting, or any other crime, shall forfeit his right of suffrage and right to hold office." The expression or other like crime," includes all crimes not previously specified which are inconsistent with the common principles of honesty and humanity, and convict the perpetrator of degredation, depravity, and moral turpitude.

3. Same—Where the elector casts his vote by secret ballot, which is fatally defective, he ought not to be permitted to testify that he voted the particular ballot and intended it for a particular candidate, but where the vote is viva voce, and the clerk makes a mistake in recording it, evidence to show for whom the vote was cast should be admitted, and the mistake corrected.

4. Same—Mere irregularity on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll.

5. Same—Where the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that the performance is essential to the validity of the election, they will be regarded as merely directory unless they affect the actual merits of the election.

Votes were cast within voting hours, but before the clerk and judges were sworn. The clerk and one of the judges were present. After these officers had been sworn they ratified and certified those votes. Held—That the merits of the election were not affected, and that the votes were properly counted.

John Feland & Son, A. H. Clark and James Breathitt for appellant.

R. T. Petrie and Joe McCarroll for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Bennett.

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The appellant, A. H. Anderson, and the appellee, W. P. Winfree, were opposing candidates for the office of county judge of Christian county at the August election, 1886.

The election comparing board of the county found that the appellant, Anderson, received three thousand and ninety-five votes at said election for the office of county judge, and that the appellee, Winfree, received three thousand and sixty-five votes for the same office, making a majority of thirty votes for the appellant, Anderson, which entitled him, according to the face of the returns. to a certificate of election, which he received.

The appellee, Winfree, contested the appellant's right to the office upon the ground that a large number of illegal votes were cast and counted for the appellant at said election; that some were not citizens of the State; some had not resided in the State a sufficient length of time to entitle them to vote; some were nonresidents of the county; some were nonresidents of the various voting precincts in which they voted. He also relied upon the fact that between sixty and seventy persons voted for the appellant in the two Hopkinsville voting precincts who were nonresidents of said district.

The appellant, Anderson, denied these several grounds of challenge, and alleged that a large illegal vote was cast for the appellee at said election, on substantially the same grounds as those urged by the appellee.

The case was heard by the county contesting board, which decided that thirty-eight of the votes cast for appellant at the election were illegal; and also decided that twenty-three of the votes cast for appellee at said election were illegal. And these respective numbers being deducted from the whole number of votes cast for each candidate elected the appellant by a majority of fifteen votes.

The appellee appealed to the circuit court.

The case was elaborately prepared in the circuit court by both sides, and the learned judge of that court, after hearing all of the evidence in the case, by a learned and exhaustive opinion covering all the questions, both of law and fact in the case, decided that the apellant only received three thousand and forty-four votes at said election, the remaining fifty-one votes cast for him being illegal; that the appellee received at said election three thousand and forty-seven legal votes, the remaining eighteen votes cast for him being illegal; and that the appellee was elected to the office of county judge by a majority of three votes.

From that judgment the appellant, Anderson, has appealed to this court.

The appellant's counsel complains here, first, that the lower court erred in sustaining the challenge to the votes of Warner Duguid and Jack Smith, who voted for the appellant, which challenge was sustained upon the ground that they had been previously convicted and sent to the penitentiary of this State upon a charge of grand larceny.

By section 4, article 8 of the State Constitution it is provided: "Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery or other crimes or high misdemeanors."

Pursuant to this provision of the Constitution section 15, article 12, chapter 33 of the General Statutes, declares: "Any person convicted of robbery, forgery, counterfeiting or perjury, or other like crime, shall forfeit his right of suffrage and right to hold office."

The contention of appellant is that the crime of grand larceny is not like any of the crimes named in the statute, not even that of robbery. We can not agree to this proposition.

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"Larceny or theft" at comomn law, as defined by Blackstone, book 4, page 229 of his Commentaries, "is distinguished into two sorts: The one called simple larceny or plain theft, unaccompanied with any other atrocious circumstances; and mixed or compound larceny, which includes in it the aggravation of taking from one's house or person."

"Simple larceny, then, is the felonious taking and carrying away of the personal goods of another."

"Mixed or compound larceny is such as has all of the properties of the former—simple larceny—but is either accompanied with either one or both of the aggravations of taking from one's house or person." (See page 239.)

"Larceny from the person is either by privately stealing from a man's person or by picking his pocket, or by open and violent assault." (See page 240.)

"Open and violent larceny from the person or robbery is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear." (See page 241.)

Says Metcalfe, J., in the case of The Commonwealth v. Clifford, 8 Cushing's Reports, page 216: "Robbery by the common law is larceny from the person, accompanied by violence or by putting in fear; and an indictment therefor must allege that the taking was from the person, and that it was done by violence or putting in fear, in addition to the averments that are necessary in indictments for other larcenies." (See also the cases there cited.)

By the common law it could hardly be correct to say that larceny is like robbery, because robbery is compound larceny, which has all of the properties of plain stealing, accompanied by the additional aggravating circumstance of taking the property from the person of the owner by force, or from his presence by putting him in fear."

It is this circumstance that increases the atrocity of the crime and distinguishes compound larceny or robbery from simple larceny—both are larcenies. But when the theft or larceny is accompanied by the aggravating circumstance of taking the property from the person of the owner by force, or putting him in fear, it is called robbery simply to distinguish the manner of committing the theft or larceny from other larcenies.

But the statue supra has a broader meaning than that we have been considering.

By the common law the crimes which render the perpetrator infamous are treason and such felonies as are inconsistent with the common principles of honesty and humanity, and convict the perpetrator of depravity and moral turpitude, and also every species of the crimen falsi, such as perjury, conspiracy and barraty. (Greenleaf on Evidence, volume 1, section 363; Berker v. The People, 20 Johnson's Reports, 460.)

Such crimes by the common law deprive the perpetrator of the right to vote, to hold office, to testify. (McCrary on Elections, section 20, volume 1; Greenleaf on Evidence, section 373.)

It is the perpetration and conviction of the infamous crime and not the degree of punishment that renders the perpetrator infamous.

By the provision of the Constitution, which declares that "laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery or other crimes or high misdemeanors," it was evidently intended the framers thereof having in their minds that class of crime that rendered the perpetrators of them upon conviction infamous, to

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give the legislature an express constitutional sanction for passing laws excluding those from suffrage who might thereafter be convicted, not only of infamous crimes by the common law, but convicted of any other crime or high misdemeanor.

The legislature having this constitutional provision as a guide, and knowing what crimes are denounced by the common law as infamous, and that the perpetrators are, among other things, excluded from the right of suffrage upon conviction, doubtless enacted the law declaring that "any person convicted of robbery, forgery, counterfeiting or perjury, or other like crime, shall forfeit his right of suffrage and right to hold office," with a view to crimes declared infamous by the common law; and meant by the words "or other like crime" to include all crimes not previously specified which are inconsistent with the common principles of honesty and humanity, and convict the perpetrator of depravity and moral turpitude. The several crimes enumerated in the statute are of this class known as infamous crimes; and it is to be presumed that the expression "or other like crime" was intended to apply to and embrace such other crimes as are likewise inconsistent with the common principles of honesty and humanity, and convict the perpetrator of depravity and moral turpitude.

The poll-books showed that the votes of Carter, Croft and Glover were recorded and counted for both appellant and appellee. The proof shows conclusively that Carter and Croft voted for the appellee, and that Glover voted for the appellant. The lower court deducted the two former votes from the appellant's vote and counted them for the appellee, and deducted the latter vote from the appellee's vote and counted it for the appellant.

Where the elector casts his vote by secret ballot, which is fatally defective, he ought not to be permitted to testify that he voted the particular ballot and intended it for a particular candidate, because the ballot having been written by the elector himself or by his direction, or if printed, adopted by him as his own act, and no one having the right to control his action or to become a party to it, the act being peculiarly his own act, it follows that if such act is so defective that it can not be ascertained from it and the surrounding circumstances for whom his ballot was intended to be cast, he will not be permitted to testify for whom he intended to cast it. In such a case no evidence should be admitted that would be inadmissible under "the general rules of evidence for the purpose of supporting or explaining other written instruments where the parties themselves would not be permitted to give evidence of their actual intention, when the instrument itself wholly failed to express their intention. So the elector having prepared his ballot himself and for himself; no party to it but himself; no one having a right to share in it but himself; and he prepares it so defectively that it wholly fails to express his meaning, such as leaving the name of the candidate blank, and writing the name of Jones where he intended Smith, he will not be permitted to supply the defect in the first place by testifying as to his intentions, nor in the second by testifying that he intended to write the name of Smith instead of Jones. (Cooley's Const. Lim., sections 612, 626, 5th edition.)

But, says Cooley, section 626: "If votes were taken viva voce, so that it could always be determined with absolute certainty how every person had voted, the objections to this special form of scrutiny, after an election had been held, would not be very for-

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midable." The elector, under the Constitution and laws of this State, exercises his right of suffrage by a viva voce vote. He proclaims openly at the polls, in the presence of the clerk and judges of the election, for whom he votes, it is then the duty of the clerk, in the presence of the judges, to record his vote for that person. This duty is not devolved upon the clerk as the agent or representative of the elector; the elector has no right to record his vote; he can only announce for whom he votes. It is then the duty of the clerk to record it for that person as an officer of the election. Now the clerk, by inadvertance or designs, records the vote for another person than the one announced by the elector, so by the record he has voted for a candidate against whom he had in fact openly and unequivocally voted. Now whose mistake is this? The elector's? No. Because he has committed none, for when he announced for whom he voted, not intended to vote, his act was full and complete—it was all that he could do. Then it was the clerk's mistake. The clerk by this mistake has disfranchised the elector for the time being. Indeed worse, for he has voted him without his knowledge and against his will for a candidate that he did not want, and against whom he had in fact voted. That vote was not secretly deposited as by ballot, but proclaimed in the presence of at least four persons, and usually in the presence of a large crowd. It would be a rare case indeed that witnesses could not be had other than the officers of the election, not only as to the fact of voting, but the candidate voted for. Not so, however, as to secret ballot voting. Then as the mistake is not that of the elector, nor caused by any misconduct or oversight of his, nor by the misconduct of any person representing him or acting in privity with him, but caused by an agency beyond his control, and by which he is not only disfranchised of his choice but voted for a candidate whom he may believe is unworthy of his vote, and as the fact as to how he voted can be established with absolute certainty, and the misapplication of his vote be in nowise attributable to him, we ask by what principle of fairness should the correction be denied? Is it because the proof will contradict the record? The answer is, when it can be clearly demonstrated that the record is a mistake it should not be adhered to when the adherence would deprive the citizen of his free suffrage—the dearest, highest and most sacred privilege he enjoys. Is it because the temptation to corruption and fraud would be so great that public policy forbids it? As in the case of the ballot, the answer is that the elector's act is done publicly and openly in the broad daylight, and in the presence of witnesss, and is, therefore, in a very large majority of cases capable of the most convincing proof. If the proof is doubtful then the record as made by the clerk ought to stand, otherwise it ought to be corrected and the vote counted as it was really cast. In this case the record shows that the clerk in recording these votes made a mistake, and we think it is clear, according to the principles just announced, that the mistake ought to be corrected by counting the votes for whom they were actually cast.

The appellant also contends that the votes of J. S. Cox and Million Cravens, who voted in the Belleview precinct, for the appellee, ought not to be counted because at the time these gentlemen voted, which was early in the morning, but within voting hours as fixed by law, one of the judges of election was absent and the other judge and the clerk had not been sworn.

It is admitted that Cox and Cravens were legal voters in the Belleview precinct. It also clearly appears that the judge and clerk who received the votes of these gentlemen, as well as the absent judge, had been legally appointed clerk and judges for the

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Belleview precinct. It also appears that these gentlemen were apprised of the fact that the clerk and judges present had not been sworn, but wishing to go to another precinct they voted with the understanding that when the absent judge arrived and all were sworn that they would ratify the act. This the judges and clerk did.

In McCrary on Elections, section 126, it is said "that mere irregularity on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll." As to what is a mere irregularity that will not vitiate the poll the author says: "The language of the statute to be construed must be consulted and followed. If the statute expressly declare any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts, whose duty it is to enforce such statute, must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election."

In this case Cox and Cravens were certainly legal voters in the Belleview precinct, and they voted in that precinct for the candidate of their choice. Their votes were cast at the regular election place and within lawful voting hours, and the officers of the election, after having been sworn, ratified and certified their votes. The merits of the election were not affected. We must hold, therefore, that the lower court did right in counting these votes.

The opinion of the lower court clearly defines what it takes to constitute citizenship in this State, and what residence is required in the precinct to entitle a person to vote therein. Also what absence, and its kind, will debar one's right to vote. We also think that the lower cout in overruling or sustaining the objections to the vote of each contested voter, save possibly in case of one set of voters not prejudicial, however, to the appellant, was sustained by competent and positive evidence, and we can not say that in any case his decision was clearly against the weight of evidence.

This view of the case renders it unnecessary to determine whether the appellant's majority, according to the face of the returns, was thirty-two instead of only thirty, as the result will be the same.

The judgment of the lower court is affirmed.

To a petition for rehearing Judge Bennett delivered the response of the court:

The attorneys for the appellant suppose that we misconceived the evidence relative to the votes of Cox and Cravens. They say: "We think the inference is clear * * * they had no understanding with the clerk and judge present that when the absent judge arrived and all were sworn they would ratify the act."

The language of the only witness, the clerk of the election, is: "I told Cox and Cravens the officers of the elcetion had not been sworn, and they said they reckoned it was all right; that the officers could fix it when they came. When the officers were sworn the attention of S. H. Underwood, the absent judge, was called to the votes of said Cox and Cravens, and their votes were counted as the other votes. The officers of the election knew Cox and Cravens were legal voters of said precinct."

So we repeat that these gentlemen evidently voted with the

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understanding with the clerk and judge present that when the absent judge arrived and all were sworn they would ratify the act. And they did ratify it.

The attorneys offer no objection to the propositions of law discussed and settled by the court. But they insist that we incorporate in our opinion the definition of citizenship, residence, etc., given by the lower court, which we and the attorneys alike approve for the benefit of the profession. While we are thankful for the suggestion, we must be permitted to say that the definition is substantially that given in the General Statutes and the Constitution of the State, which are well known to the profession and easily understood, and in the following of which one may fear no evil.

It is insisted that we should investigate the case with the view of correcting any error of fact occurring at the trial. We did.

Besides investigating the facts of the case, off and on for several weeks, more than a week was devoted exclusively to them. We did not, however, go into an analysis of the facts in our opinion, for the reason that such a course would have spread the opinion over much paper to no purpose. And in the investigation of the facts we were unable to say that the lower court had interpreted them against their proper weight.

It is insisted, however, that the opinion of the contesting board as to the weight of the evidence should receive some consideration here. It is a sufficient answer to that proposition to say that we are not reviewing an appeal from the decision of that board; we are reviewing an appeal from the decision of a circuit judge, who was the trier of the facts of the case de novo.

It is insisted that the question of citizenship, residence, etc., is one of mixed law and fact, and, therefore, this court should review the whole case, uninfluenced by the findings of the lower court as to the facts. We think that the law fixes what residence, its place and duration, entitles an individual to vote; but whether such residence in fact exists is purely a question of fact. If the question was submitted to a jury the court would instruct them that under the law certain facts must exist to constitute a legal residence; and the jury would be the sole judges of the existence of the facts; and this court would not be authorized to set aside their finding unless it was clearly against the weight of the evidence.

And the lower court having clearly and correctly stated the law relative to residence, citizenship, etc., and having separated the facts and passed upon them from the standpoint that a well-instructed jury should, we feel bound, therefore, to test the findings of the court by the same rule that we apply in reviewing jury trials. Any other rule would not only be generally unsatisfactory, but often result disastrously.

The witnesses, their relative standing, their passions and prejudices, their intelligence, are more or less known to the jury or presiding judge. On the other hand we know nothing of these things. We might believe the evidence of Jack and Bill over that of Tom, because they are two to one, and their story is well told, whereas Jack and Bill might be most incorrigible scapegraces and Tom a most estimable gentleman, and readily believed by all that knew him. Furthermore, if we set the precedent of reviewing the decisions of the lower courts upon mere questions of fact, and deciding without reference to their opinions, or only giving them just a little weight, then these courts had as well be abolished if they could be, and address all litigation directly to this court. The evils of such a policy on the part of this court would be felt by every citizen in the State.

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The attorneys for the appellant are not unknown to this court, and their utterances of high respect for the judicial department of the State, and reverence for the laws, and their criticism of that class of persons in and out of profession who contemn judicial decisions that fail to accord with their particular views, and which tend to degrade the wholesome administration of justice, by weakening the confidence of the people, and thereby inciting them to lawlessness and evil deeds, is highly appreciated by the court.

Therefore, we have deemed it proper, though compelled to overrule the petition, to write a response.

ENGLISH v. DYCUS, &c.

(Filed June 11, 1887—Not to be reported.)

1. It is the duty of the county judge in taking official bonds to see that they are executed properly, and each surety has the right to rely upon that officer to see that the signatures of his co-sureties are genuine, so as to create an obligation to pay in the event the principal is in default.

The names of two sureties in a county levy bond were signed by another for them without their written authority. Other sureties afterward signed the bond, and the county judge accepted it in good faith, believing that a mere verbal authority from a surety to sign his name was sufficient. Held —That each surety had the right to presume that the names of the other sureties were genuine, and the two sureties whose names were signed without written authority not being bound, none are bound.

2. Sureties—Estoppel—A surety's name having been signed by another for him, without his written authority, to a sheriff's bond, the mere fact that he has stated that he was bound, believing it to be a fact, did not estop him to deny his liability, although that statement may have prevented the county judge from taking steps to require the execution of a new bond.

(Appeal from Superior Court. See Ky. Law Rep., 331.)

Wm. Lindsay and Gilbert & Reed for appellant.

J. M. Bigger for appellees.

Appeal from Marshall Circuit Court.

Opinion of the court by Chief Justice Pryor.

The question in this case arises as to the liability of the sureties of W. W. English, as sheriff of Marshall county, on his county levy bond for the year 1883.

The statute provides that "no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing signed by the principal, or if the principal do not write his name, then by his sign or mark, made at least in the presence of one credible attesting witness." (General Statutes, chapter 22, section 20.)

There was a special plea of non est factum by the sureties, and by two of them, John and Wilson English, that either of them signed the bond nor authorized anyone in writidg to do so for them; that the writing purporting to be a power of attorney conferring the authority of the sheriff to sign their names was not signed by them, or any one of them, in their presence, or by anyone authorized in writing by them to affix their signatures to that instrument. The liability of these two sureties must determine the liability of the remaining sureties.

The bond was accepted by the county judge as the bond of all the sureties, and in fact the names of John and Wilson English

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appear first on the bond with one exception. The sureties signing the covenant were executing it as co-sureties of each other, and with no fraud alleged or shown it must be he'd that such was the legal effect of the instrument, and that the county judge so accepted it.

The judge in fact knew that John and Wilson English had not signed the bond or the power of attorney authorizing the principal sheriff to sign it, but doubtless accepted it in good faith on the idea that a mere verbal authority from the surety to sign his name was sufficient. The other sureties signing the bond had the right to presume that the signatures of John and Wilson English were genuine.

It is the duty of the county judge to see that the bonds are executed properly. They are to be approved by him, and each surety has the right to rely on his vigilance to the extent at least of his knowing that the signatures of their co-sureties are genuine, so as to create an obligation to pay in the event the principal is in default. (Fletcher v. Light, 4 Bush, 303; Chamberlain & Tapp v. Brewer, 3 Bush, 561.)

If John and Wilson English are not liable the other sureties are released. The mistake as to the law on the part of the county judge can not affect their right or enlarge their obligation. Some vigilance must be exercised with reference to the execution of official bonds, and it is an easy matter for the county judge to know that the signatures to such writings are properly made, and by the parties who propose to make themselves bound for the acts of the official.

It is insisted, however, in this case that John and Wilson English are estopped to deny their liability because they believed they were liable on this bond, and so stated. If such a doctrine can apply then the statute for the protection of those whose names are affixed to obligations without authority, and their liability established by parol proof that such authority was given, becomes nugatory.

If one can not bind himself unless affixing his own signature or authorizing some one else in writing to do so, then his mere acknowledgment that he is bound, or that he authorized in parol one to sign his name, will not create the liability or make that valid which before was invalid. The facts relied on constitute no estoppel.

Sometime after this bond had been executed and accepted the county judge was attempting to take a bond from the sheriff for the collection of the revenue, and while examining the two Englishes as to their solvency, or making inquiry as to the sufficiency of the sureties in the bond about to be taken, asked them if they were not already sureties, and bound as such on the county levy bond, and they responded yes.

There was nothing said to them about a proceeding to take a new levy bond. No steps had been taken for that purpose or any suggestion made by the judge or the county attorney that their signatures were not made to the bond under the authority required by the statute. There is nothing to show that the Englishes ever believed that the county judge would require a new levy bond, and they no doubt supposed they were liable as sureties, and for that reason acknowledged their liability. They were at the time about signing some other bond, and while the county judge or the attorney was making inquiry in reference to a matter then not before the court, or involved in the investigation then going on, except to show the solvency of the sureties. If the purpose was to make the surety approve or ratify the act of an unauthorized attorney in reference to some other bond, it was the duty of the court to inform them as to the condition of this levy bond, and that they must then and there, by their own sig-

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natures or mark, attested as required by law, acknowledge their responsibility, else a new bond would be required. This was not done, but the question as to the liability left to be determined by the voluntary act of the surety in making payment when his principal failed, although the judge had then heard that these sureties were saying that they were not bound.

It was with these sureties, at their option alone, to make good the default of the principal on such a signing. No coercive steps could have been successfully taken, and the facts presented contain none of the elements of an estoppel in a court of law or equity.

Judgment reversed, except as to the sheriff, and cause remanded for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

OWENSBORO & NASHVILLE RAILWAY CO. v. HILLMAN.

(Filed October 28, 1886.)

Special verdicts—New trial—Where any of the special findings of a jury are so palpably wrong as to indicate that they were found under the influence of passion or prejudice, the entire verdict should be set aside; in such a case the court can not say that any of the findings are free from the same taint of passion and prejudice.

W. N. Sweeney and R. S. Bevier for appellant.

Chas. Eaves for appellee.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Barbour.

Appellee sought to recover of appellant damages for its negligent crippling and for its conversion of his ox.

Appellant denied negligence, admitted the conversion, and pleaded as a counterclaim damages done its road by the trespassing of appellee's cattle.

The jury found a special verdict in answer to a number of questions submitted to them, in which they in substance said that the appellant's agents recklessly and willfully run over and injured the ox; that the appellant converted the ox into beef, and that it was worth for beef $45; that appellant's roadbed or track was not injured by the tresspassing or driving of appellee's cattle over it.

Upon the return of this verdict appellant moved the court to grant it a new trial upon the ground that the verdict was flagrantly against the evidence, and the result of passion and prejudice. The court below sustained the motion in respect to the findings, numbers 1, 2, 3 and 4, which were all the findings upon the questions of negligence, and overruled the motion as to all the other findings.

There was not the slightest evidence which could have authorized the jury to find that there was any negligence upon the part of the appellant or its agent at the time its cars run against and injuretd the ox. On the other hand the evidence showed conclusively that the injury was, so far as appellant was concerned, unavoidable. The only question which it is nceessary for us to consider upon this appeal is, can the trial court, when any of the special findings of a jury are so clearly against the evidence as to indicate that they were made under the influence of passion

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or prejudice, set aside such findings and refuse to set aside the other findings, which the court may be of opinion are warranted by the evidence, and render judgment upon those findings?

We do not wish to be understood as holding that the special verdict of a jury, in answer to several questions submitted to them, must in all cases be regarded as an entirety, and that all or none must be allowed to stand. But we do hold that when any of the findings are so palpably wrong as to indicate an improper motive upon the part of the jury the entire verdict should be set aside.

It is the right of every litigant whose cause is submitted to a jury to have it tried by impartial men—to have every material question affecting his right fairly and intelligently passed upon by a dispassionate and unprejudiced jury.

When part of the findings of a jury are so palpably against the evidence as to indicate passion or prejudice, how can it be said that any of the findings are free from the same taint of passion and prejudice? How can it be held that the jury is composed of impartial and unprejudiced jurors?

In this case part of the verdict, which the record shows was not warranted by any evidence whatever, and which could never have been arrived at by an intelligent jury except through passion or prejudice, was set aside. Still the court allows a part of the verdict rendered at the same time by the same jury to stand, and upon it renders the judgment complained of. This should not have been done, but the court, finding that the jury were actuated by passion or prejudice in any of their findings, should, on the appellant's motion, have set aside the entire verdict, and have granted a new trial.

The judgment is reversed and cause remanded, with directions to set aside the judgment and verdict and grant the appellant a new trial.

COLVIN v. PAIRPOINT, EX'OR.

(Filed February 23, 1887.)

If a legacy depends upon a condition precedent, no right can arise under the will unless the condition is performed; and it is not equivalent to performance that the condition was, or became, impossible, whatever may have caused it to be impossible.

A testatrix directed the payment of a legacy to C. if he should live with and take care of her as he was then doing until her death. C sued the executor to recover the legacy, alleging that he took care of the testatrix until her death, and lived with her until she rendered it impossible for him to do so, by ceasing to keep house and failing to provide any place for him to stay. Held—That the petition does not show a right to the legacy.

Wilson & Sprigg for appellant.

Montgomery & Poston for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Presiding Judge Bowden.

When one claims as legatee under a will his right must be established by the will. If the legacy depends upon a condition precedent, no right can arise under the will unless the condition is performed; and it is not equivalent to performance that the

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condition was or became impossible whatever may have caused it to be impossible. The rule is so laid down by Jarman and Redfield on the authority of many adjudged cases. A legacy is a bounty which can be claimed only by reason of the fact that the written will, published and probated in conformity to the law, provides that it shall be given. If that will prescribes a condition, and the claimant were permitted to show by oral evidence that the testator released him from the performance of it, his claim would rest on that evidence, whereby a conditional legacy would be converted into an absolute legacy. Nor can the right of the testator to do an act which renders performance impossible be more plausibly denied than his right to revoke the legacy, about which there is no doubt.

In January, 1880, Sarah Vanmeter published her will, containing this provision:

"I will that should Luther Colvin still live with me and care for me as he is now doing until my death, I direct that Frank C. Pairpoint shall pay to him out of my estate two hundred dollars as soon as that amount can be collected or realized out of my estate."

The appellant sued the appellee as executor of the will, and alleged that for many years before the will was published he had been living with her and taking care of her, and looking after her interests generally; and that desiring to make him some compensation she bequeathed to him $200, to be paid him by her executor upon condition that he still continued to live with her and care for her as he was then doing until her death. He then alleges that "he did continue to care for the said testatrix from the date of her said will and the time of its execution up to the time of her death, and did still continue to live with her from that time, to wit, — years until she ceased to keep house, and put it out of his power to do so, and did well and truly perform the conditions upon which said $200 was to be paid him, except in so far as the testatrix by her own act put it out of his power to do so by voluntarily ceasing to keep house, and having no place for him to stay with her."

The executor's demurrrer was overruled, and his answer denied the alleged partial performance, except up to December, 1880, when it is averred she ceased to keep house. After the plaintiff's evidence was in the executor asked a peremptory instruction, which was refused. There was a verdict for the plaintiff for $200, and on the executor's motion a judgment was rendered for him notwithstanding the verdict. The only question, therefore, is whether the petition states a cause of action.

The petition is not drawn with a view to assert a right to be paid for services rendered at the request of the testatrix. The character of the service is not stated, nor is it alleged it was worth anything. The action is to recover a bounty, not pay. The condition upon which he was to get the legacy was to live with her till her death and care for her till her death, as he was doing when the will was written. He alleges that he did care for her till she died. The words "as he is now doing" did not characterize the manner in which he should continue to care for her so as to make it necessary to aver that he had cared for her in that manner, but merely recited the fact that he was then living with her and caring for her. The averment as to care is, therefore, sufficient.

How long he lived with her is not alleged, but he admits that he did not live with her till she died. When a condition has two or more substantive terms the rule would manifestly require a performance of each one of them, and the condition that he should live with her till she died being continuous in its nature, would

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require performance as well as the condition to care for her, unless it could be held as a mere interpretation of the will that "care" is the substance of the condition and residing with her is only the casual incident to that condition. The care of personal presence is doubtless different from the care of personal absence, and it would be an unwarranted assumption to say that the care of one residing elsewhere is the equivalent of the care of one who is present. In addition companionship is a fact independent of care.

Under the rule which requires performance of every precedent condition to be alleged by the claimant of a legacy, we think the petition fails to show a right to the legacy.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

BENNETT v. GREGORY, &c.

Filed May 11, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Damages—What constitutes a market—In this action to recover the amount found to be due upon a settlement between plaintiff and defendant of their accounts, growing out of the sale of lumber, the defendant pleads as a counterclaim the damages sustained by reason of the failure of the plaintiff to deliver a lot of lumber which he agreed at the time of the settlement to deliver at Hawesville at a subsequent date. It is insisted for the defendant that there was no market at Hawesville or vicinity for the kinds of lumber described in the contract, and that, therefore, the nearest market to the place of delivery must govern in fixing the damages. The evidence shows that at Hawesville and Cloverport a great deal of lumber was bought and sold. and that they were places where lumber might be disposed of by barter or sale. Held—That this constitutes a market; it was not necessary to show that just the kind and description of lumber, which is the subject of this contention, was at the time on sale in the market of those places.

2. Action not premature—The defendant contends that the action is premature because the amount found to be due upon settlement was not to be paid until the delivery of the lumber which the plaintiff agreed to deliver at a subsequent date. Held—That as the delivery of this additional lot of lumber was not the consideration for the payment of the amount found to be due upon settlement, and the contract for its delivery has been broken, and the defendant is suing for damages by reason thereof, he can not deny the plaintiff's right to recover the amount sued for, which was in fact due when the settlement was made, but the payment of which was postponed.

C. B. Seymour and John W. McGhee for appellant; E. J. McDermott and Rodman & Brown for appellees.

SPRADLIN v. ELLIOTT COUNTY COURT.

Filed May 11, 1887. Appeal from Elliott Circuit Court. Opinion of the court by Judge Barbour, affirming.

Appeals—The order of the county court dismissing appellant's application for license to keep a tavern recites that the court refused to entertain the application upon the ground that the local option law was in force in the district. Appellant's appeal to the circuit court was dismissed, and from that judgment this appeal is prosecuted. Held—That in the absence of a bill of exceptions it must be presumed that the judgment of the lower court was correct.

J. G. Whitt for appellant.

BERGEN v. FARMERS AND TRADERS BANK.

Filed May 11, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, setting aside order awarding damages.

1. Supersedeas—There having been no judgment against appellant for the recovery of money except as to cost, damages can not be awarded upon the affirmance of the judgment. The fact that the supersedeas bond recites that a judgment was rendered against appellant for a named sum of money, the recital being clearly a mistake, does not entitle appellee to damages.

2. Same—If the supersedeas bond is not a part of the record at the time the judgment of affirmance is rendered the court will not, upon a subsequent filing of the bond and motion therefor, award damages.

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3. An error in awarding damages apparent on the record will, on motion made at any time during the same term, be corrected.

J. W. Head for appellant; L. A. Weakley for appellee.

WITTY v. GOLAY.

Filed May 11, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Passways—To create the presumption of a grant of way by prescription the use by the claimant or the public must be of such a nature as to indicate a claim of right without regard to the wishes of the owner of the land, and must have been continued for fifteen years. That the owner has allowed the mere possessory use of it by others, no matter for how long a time, confers no right to the way upon the persons using it.

2. Same—A private passway can not be created by dedication, nor can a person assert any right to a passway over the lands of another under a parol agreement of the latter to allow him the use of such passway.

Landes & Clark for appellant; E. P. Campbell for appellee.

TYLER, &c. v. EXCHANGE BANK OF KENTUCKY.

Filed May 11, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Parties to actions—Every action must be prosecuted in the name of the party in real interest, except those named in section 21 of the Code, which may be prosecuted in the name of the party in legal interest; but while one in whose name a contract is made for the benefit of another may sue under section 21, the beneficiary also may sue under section 18.

An action on an official bond executed to the Commonwealth may be brought in the name of the real party in interest.

2. A master commissioner may, as such, be required to perform every duty which can be devolved on a receiver.

3. Sureties of master commissioner—On a motion to appoint a receiver it was ordered "that the master commissioner be, and he is hereby, ordered," etc. Under that order the commissioner did nothing but rent property and take bond from the renter. Subsequently he was re-appointed mast r commissioner, and executed bond as required by law; and thereafter, in the progress of the case, and under orders of court, he collected rents, part of which were adjudged appellee, who brings this action against the sureties in the bond executed by the commissioner after his re-appointment. In some of the orders of court and in some of the reports made by the commissioner he was called receiver, and in others he was called master commissioner. Held—That the sureties are liable, as the acts which their principal did were such as it was his duty to do unless some one else was specially designated; and that he was called receiver is immaterial.

Corneilison & Mitchell for appellants; H. L. Stone for appellee.

MEGUIAR, HELM & CO. v. WILSON, &c.

Filed May 11, 1887. Appeal from Clark Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Separate estate—A married woman, with the consent of her husband, borrowed money, secured by a mortgage on her land, with the understanding that certain personal property to be bought with the money should be her separate estate. The bill of sale to the wife for the personalty thus purchased, prepared under the direction of her husband and the vendor, did not express that the property was sold to her as separate estate. The creditors of the husband seek by this action to subject the property.

Held—That the bill of sale did not create an interest, but simply evidenced an existing interest; and the interest existing before the writing, and independent of it, can not be taken from the wife merely because the writing failed to state that it was sold to her as her separate estate. Nor can the husband's creditors complain of the agreement whereby the property was to

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be the wife's separate estate, as the money was borrowed and secured by a mortgage upon her land with that understanding.

2. Same—While the wife can not become a trader for her own benefit with respect to her separate estate without a decree of court empowering her to do so, the mere fact that she attempts to do so does not justify taking from her the property out of which she has undertaken to make the profit.

H. L. Stone and Haggard & Benton for appellants.

COCHRAN v. GERMAN INSURANCE BANK.

Filed May 11, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. A bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder.

2. The drawer of a check which is void by reason of the fact that it is based upon a gambling consideration can not be made liable by reason of the fact that he had no funds in bank when he drew the check, had never had any, and had no right to suppose that the check would be paid.

Dulaney & Lindsay for appellant, P. A. Gaertner for appellee.

COFER v. GARDNER.

Filed May 11, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Judge Ward, affirming.

Evidence as to transaction with decedent—No one can testify as to a transaction with a person who is dead at the time the evidence is offered so as to affect a person who is living, unless such person, not being under disabilities, was present at the transaction referred to, or offers as evidence to the transaction.

C., G. and W. executed their joint note for $3,000 borrowed money. G. received $1,000 of the money and C. $2,000. G. paid $1,000 on the note and C. $2,000. W. being dead, and his estate insolvent, C. seeks to recover of G. one-half of one-third of the note, claiming that W. was a joint principal in the note, and liable for one-third of the amount thereof. G. relies upon the fact that C. received two thirds of the amount of the note and W. no part of it. C. offered to testify that W. owed him $1,000, and that one-half of the $3,000 received by him was received to W.'s credit. The testimony was excluded as incompetent.

Held—That this was proper. W. being dead, C. could not testify as to a transaction with him so as to affect G., who was not present at the transaction and who did not testify in regard thereto. The testimony of G., that C. received $2,000 of the money, was not in regard to the same transaction as to which C. offered to testify.

Wilson & Sprigg for appellant; J. P. Hobson and J. C. Posten for appellee.

RICHARDSON v. HAGAN.

Filed May 18, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

Attorney and client—When an attorney deals with his client in a matter affecting his own interest, and the result is beneficial to him and detrimental to the client, the transaction will be set aside unless it appears not only that the consequences were explained to and understood by the client, but that all the considerations which should operate against his doing the act were laid before the client and earnestly enforced.

A client represented to her attorney that she had some money to invest, and sought his advice as to the investment. He told her of some street warrants which he had purchased, and represented to her that if she would purchase them she would make from 6 to 10 per cent. on the investment. She agreed to buy the warrants, and they were assigned to her after judgment had been rendered upon them. It was impossible for her, by the enforcement of the judgment, to realize upon what she paid for the warrants as much as the legal interest. She seeks by this action to set aside the assignment.

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Held—That however honest the attorney may have been in the transaction, it was to his advantage and to the disadvantage of his client, and, therefore can not stand.

S. B. Richardson, H. M. Lane and E. E. McKay for appellant; J. S. Pirtle for appellee.

BLADES v. ROBBINS, &c.

Filed May 18, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Bills of exceptions—This court can not pass on the correctness of the ruling of the lower court in giving or refusing instructions unless it appears from the bill of exceptions what instructions were given or refused.

The bill of exceptions in this case recites that the plaintiff asked for two instructions, numbered 1 and 2, which were objected to by defendants, and that the defendant asked for instructions 2, 3 and 4, to which plaintiff objected; that the court refused plaintiff's instruction No. 1, and overruled plaintiff's objections to defendant's instructions, and gave instructions 2 and 4.

Held—That this court can not infer that plaintiff's instruction No. 2, or defendant's instruction No. 3, was given. The presumption would rather be that the motions of the respective parties to give those instructions were not acted upon. Giving to the bill the most liberal construction, the only questions presented are as to the correctness of the ruling of the court in refusing to give plaintiff's instruction No. 1, and in giving defendant's instructions 2 and 4.

2. Questions for court—Whether or not the alteration of the note sued on was material was a question of law for the court, and not a question of fact for the jury.

3. Sureties—The principal in a note for $150 paid the creditor, a few days after the note was executed, $6, being 4 per cent. upon the money borrowed for one year. At the end of one year he paid $15, being for 6 per cent. upon the note for the past year, and 4 per cent. for the second year; and at the end of the second year paid 39, being for 6 per cent. upon the note for the second year.

Held—That these facts warranted the jury in finding that the first $6 was paid by the principal and accepted by the creditor as the price of indulgence for one year, and if so paid and received, whether as usurious interest or not, the sureties in the note were released, the creditor being thereby precluded from suing upon the note at the expiration of six months, when by its terms it became due.

C. H. Lee for appellant; L. T. Applegate for appellees.

HAMILTON v. REIKE & SONS.

Filed May 18, 1887. Appeal from McCracken Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Warning order—The clerk had no authority to issue a warning order against nonresident defendants, it not being stated in the plaintiff's affidavit that the affiant believed that the defendants were then absent from the State.

2. Garnishment—It was error to render judgment against a mere garnishee before the case was prepared against the principal defendants.

Gilbert & Reed for appellant; Henry Burnett for appellees.

FREDERICK v. ACKLER.

Filed May 18, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Judge Ward, dismissing.

Appellate jurisdiction—As appellant obtained judgment for all he claims except a small amount, less than $100, this court has no jurisdiction of the appeal, and it is, therefore, dismissed.

L. A. Weakley for appellant; Bullock & Beckham for appellee.

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HILLMAN, FOR USE, &c. v. MORTON, &c.

Filed May 18, 1887. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Practice—In order to an appeal it is not necessary in an action in equity to have conclusions of law and of fact separately stated; nor to move for a new trial; nor to have the evidence preserved in a bill of exceptions.

2. Mortgages—As between the parties a mortgage creates a lien merely, and not a title, and the mortgagee may in equity insist that his lien adheres to the proceeds received by the vendee of the mortgagor.

3. Same—A mortgage of personal property having been recorded in the county where the property was at the time, and where the parties resided, the law does not require that it shall be recorded in another county to which the property has been removed.

4. Same—The mere fact that a mortgagee does not promptly begin proceedings to enforce his lien when the debt matures does not constitute laches.

5. Payment—Pleading—A traverse of the averment that no part of the debt has been paid is not an allegation that it has been paid, and does not properly raise the issue of payment.

Petree & Downer for appellants; J. I. Landes for appellees.

BERTMAN v. EBERT'S ADM'R.

Filed May 18, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Grounds for new trial—Where it is assigned as a ground for a new trial that the verdict is contrary to the "law," the complaint relates to the "law" as given by the court in its instructions to the jury.

2. Same—"Errors of law occurring at the trial and excepted to by the defendant," assigned as a ground for a new trial, is not sufficient to call in question any error of the court.

C. J. Helm for appellant; J. Creutz for appellee.

KENTUCKY GRANGERS' MUTUAL BENEFIT SOCIETY, &c. v. HOWE'S ADM'R.

Filed May 18, 1887. Appeal from Gallatin Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Benefit societies—Assignment of policy—Under the charter of the Kentucky Grangers' Mutual Benefit Society a member has no power to designate the beneficiary of the fund payable upon his death. The charter names the widow and children of the deceased member as the beneficiaries of the fund, and the only power the member has over it is to designate by will in what proportion it shall be divided among these beneficiaries. There can, therefore, be no assignment of the policy by the member so as to divest his widow and children of their rights to the fund.

In this case the member having assigned his policy to a creditor, the assignee is entitled, as against the children of the deceased member, to only so much of the fund as will reimburse him for what he has paid in assessments and in making proof of death.

J. F. Askew for appellants; J. J. Landram for appellee.

ALLISON'S EX'OR v. RUSSELL, &c.

Filed May 25, 1887. Appeal from Todd Circuit Court. Opinion of the court by Judge Ward, reversing.

1. A vendor who sells land by verbal contract may, when there has been a partial performance, enforce the contract by showing that he is able to convey, and by tendering to the party a deed to the property, but as the vendor in this case did not make, or offer to make, a deed to the passway which he claims to have sold to the defendant, and does not even show what land he was to convey, he is not entitled to relief.

2. A conveyance to a vendee in possession under a verbal contract relates back to the time when the contract was made, and prevails over a conveyance to a third party made subsequent to the verbal contract.

Ben T. Perkins, Jr., for appellant; H. G. Petrie for appellees.

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KENTUCKY COURT OF APPEALS.

NEWMAN, &c. v. THOMPSON.

(Filed May 21, 1887—Not to be reported.)

Common schools—Taxation—An act of the legislature authorizing a particular district to vote a tax in aid of the common school fund in order that the school may be taught the entire year, or the higher branches of education brought within reach of all the children, is not in violation of the Constitution, State or Federal. Nor is the teaching of the higher branches of learning in violation of the common school law of the State.

John H. Fryer for appellants.

L. T. Applegate and John H. Barker for appellee.

Appeal from Pendleton Chancery Court.

Opinion of the court by Chief Justice Pryor.

The indefinite statements contained in the petition from which the alleged illegal action of the board of trustees is attempted to be charged present no fact upon which it might even be inferred that they had violated their duties. It is in effect alleged that they are not trustees, and then admitted, impliedly at least, that they are trustees, and that as such have been authorizing the collection of this tax; that they have exacted no valid bond from the officers having the custody of the money, but in what respect the invalidity exists does not appear. That they have levied on property outside of the district belonging to one of the appellants is averred, but what kind of property, or where located, that the error may be seen, or the parties defendants enabled to respond, does not appear. How the money has been wasted, or in what manner the trustees are expected to make an improper use of it, is not alleged.

That Latin and Greek are taught in the school is not in violation of the act under which this tax is collected, nor is the teaching of such branches of learning in violation of the common school law of the State.

If the ordinary branches of education are taught, and the school open to all, the fact that the teacher may have a class in Latin or Greek should not prevent the collection of the tax, or authorize

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an injunction against him or the trustees to prevent it. A system of education adopted in the particular district in aid of the common school fund authorized by the legislature by which a tax is imposed that the school may be taught the entire year, or the higher branches of education brought within reach of all the children, is not in violation of the Constitution, State or Federal, and, therefore, we see no reason for granting the relief sought in this case.

Judgment affirmed.

DAVIS v. BENEDICT.

(Filed May 21, 1887—Not to be reported.)

Vendor and vendee—Rescission—Appellant instituted this action, in the nature of an ejectment, to recover a tract of land. Appellee set up a contract with appellant for the sale of the land to him, evidenced by title bond, and asked for its enforcement. Appellant pleaded a parol rescission of the contract sought to be enforced by appellee. The appellee tendered into court the entire purchase money with interest, which the court required appellant to accept, directing him to make to appellee a deed warranting the title, which appellee was willing to accept. Held—That appellant was properly required to make the deed, as proof of such a rescission by parol as is relied on by appellant should be clear and convincing, whereas the evidence only conduces to show that a rescission was in contemplation in the event the vendor could not perfect his title.

Geo. W. Griffey for appellant.

N. P. Moss for appellee.

Appeal from Hickman Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

The appellant is attempting in this case to show that a contract evidencing the sale of a lot in the town of Clinton has been rescinded by a parol agreement between herself and the appellee, Benedict, who is the vendee. The latter held her bond for title, by the terms of which she was to make a conveyance with a general warranty of title, and if she failed to do so the vendee was to retain the possession until his rents satisfied or were equivalent to the value of any improvement he might make on the property.

The purchase money fell due and the appellant not being invested with a perfect title, there was some conversation about rescinding the agreement, and an understanding that it would be done, as shown by the testimony for the appellant. This is all denied by the appellant, and neither the bond for title had been surrendered by the appellee, nor had his notes given for the land been surrendered to him by the appellant, and in fact the evidence only conduces to show that a rescission was in contemplation in the event the title could not be obtained. The proof of such a rescission by parol should be clear and convincing, and we think the testimony falls far short of producing such a conviction with reference to the alleged rescission in this case.

The appellant proceeding on the theory that the contract had terminated, and that the rents had paid for the improvements placed on the property by the appellee, brought an ordinary action, in the nature of an ejectment, to recover the lot. The appellee filed an answer setting forth the terms of his title bond, and filing it with the proceedings, asking that the contract be en-

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forced. He also tendered the entire purchase money, with the interest into court, and this was required to be accepted by the appellant, and the appellee accepted appellant's deed or was willing to accept such a conveyance as the chancellor directed the appellant to make, and that was a deed warranting the title. We see, therefore, no reason for affording the appellant any relief at law or equity. She gets her purchase money and interest, and was properly compelled to make to the appellee the deed.

The judgment is, therefore, affirmed.

WALLACE, &c. v. ARNOLD.

(Filed May 21, 1887—Not to be reported.)

Vendor's lien—Assignment—S. holding three notes against C., executed by the latter for the purchase price of land, assigned two of them to A., agreeing with the assignee at the time that a set-off claimed by C., by reason of a lien which he had discharged, should be credited on the last note. S. afterward assigned the last note to W., who now asserts a lien. Held—That W. took the note subject to the equities that C. and A. had against it by reason of the agreement of S., and while W. should have been made a party to an action by A. to enforce his lien, yet as it appears that the credit claimed by C. is sufficient to extinguish W.'s note, no lien exists.

Walker & Hubbard for appellants.

McHenry & Hill for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Pryor.

Thomas Crowder purchased of one C. W. Stewart a tract of land, for which he executed three notes, payable to his vendor.

Stewart assigned two of the notes to the appellee, Job. S. Arnold. Arnold brought his action in equity against Crowder to subject the land to the payment of the two purchase money notes without making Stewart a defendant, and had the land sold, Arnold becoming the purchaser. The last note due had been assigned by Stewart to the apellant, Wallace, or to others who assigned it to him.

Wallace then instituted the present action against Arnold and Crowder, seeking to enforce his lien, alleging that neither himself nor Stewart were parties to the action by which Arnold enforced his lien for the two first notes; and that as the land was liable for all the purchase money, it should be again sold or Arnold made to account for the amount. The defense relied on by Arnold was that before he purchased the two notes first due he inquired to know if any set-off existed against the notes, and was told by Stewart that there was a defense by Crowder; that one Lisle had a lien on the land that Crowder had agreed to pay off, but that the last note would be sufficient to satisfy this claim of Lisle, if Corwder should pay off Lisle's lien, and with this agreement he took the two notes. Stewart then assigned the last note to Wallace, or to the assignors of Wallace, and when this action was brought by him Crowder alleged payment by him to Lisle in a sum sufficient to satisfy the note, and claimed that he was entitled to a credit on either the notes of Arnold or on the note held by Wallace; that when Arnold brought his action to enforce

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the vendor's lien on the two notes he saw Stewart, who agreed that the credit should be placed on the Wallace note, and for that reason he made no defense. While the appellee, Arnold, should have made the holders of the last note due parties to his action, whether Wallace or Stewart, still if Crowder, the purchaser, has paid off the Wallace note by his payment of Lisle's lien then Wallace nor Stewart have any claim on the land, or any against Arnold. Stewart having agreed that the set-off or claim of Lisle should, when paid by his vendee Crowder, be applied as a credit on the note afterwards assigned to Wallace, and thereby induced Arnold to purchase the two notes first due, can not now assert any lien on the land, for the reason that the note has been fully paid by Crowder in discharging the Lisle lien, and when Wallace took this last note from Stewart by assignment he held it subject to the equities that Crowder and Arnold had against it by reason of Stewart's agreement. The assignee of Stewart occupied the same position that Stewart did with reference to the notes assigned Arnold. When Wallace sues it appears that the note had been paid, and, therefore, no lien exists. The court acted properly in dismissing the petition.

Judgment affirmed.

TORBETT, TRUSTEE, &c. v. CITY OF LOUISVILLE.

(Filed May 26, 1887—Not to be reported.)

1. Recovery of taxes paid by mistake—If, in the absence of any compromise, one pays a tax under the belief that it is valid, and when it is being demanded and compulsory collection threatened, such payment is involuntary, and if the taxation be in fact void the taxpayer may recover back his money.

2. Taxation by municipal corporations—While land held for and adapted to agricultural purposes only can not be subjected to ordinary municipal taxation merely because of proximity to a city, nor merely because of improvements constructed by the municipality, yet if the land is adapted to municipal uses, derives an increased value from the proximity of the municipality, and there is a town or city population on or near it creating a necessity for municipal government, or at least rendering the extension of it over the land reasonable, then the owner must contribute his proper proportion of the public burden, without regard to the use which he makes of the land.

Hargis & Eastin for appellants.

L. N. Dembitz for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

It is evident that the taxes which the appellants seek to recover back, upon the ground that they were paid under a mistake of law and fact, and in ignorance of their rights and through compulsion, were paid under a belief upon their part that the city had the right to impose and exact them. It demanded them of them, and notified them that if not paid by a certain time a penalty would be imposed, and then, if not paid by the expiration of a further time, their property would be sold to satisfy them.

The taxpayer has a right to presume that the taxing power has been properly exercised and not abused. Moreover, although the assessment may be illegal and void, yet there is an apparent

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means of enforcing it without resorting to judicial procedings, thus depriving the party of his day in court. He should not, in such a case, be made to suffer upon the ground that ignorance of law does not excuse. He should not be held to know more than the law-making power. He has no voice in imposing the burden; he has no opportunity to be heard, and knows that if payment be refused his property will be summarily seized. In the absence, therefore, of any compromise, if he pays the tax under a belief that it is valid, and when it is being demanded and compulsory collection threatened, such payment is involuntary; and if the taxation be in fact void he may recover back his money. (City of Louisville v. Anderson, 79 Ky., 334.)

The question next arises, was the property of the appellants subject to municipal taxation? The taxes for 1880 to 1885, inclusive, are sought to be recovered back. The property upon which they were imposed appears to have been included within the city limits long before that period, but it is claimed that it is exempt because it is used for farming purposes only; derives no benefits from the city government, and that there is no city population on it or near it rendering it reasonable to extend its government over it.

From the intersection of Barrett avenue with Broadway it is 2,800 feet to where the avenue strikes what is known as Page street, but which latter so-called street is merely an opening and unimproved. Running parallel with Barrett avenue for this distance is Vine street, the two being about 500 feet apart. For the first 1,000 feet next to Broadway of this tract of land, 2,800 feet long and 500 feet in width, it is thickly settled, both upon Vine street and Barrett avenue. Then comes a portion of it belonging to John B. Hutchins; next that of the appellant, Caroline Huchins, of nearly four acres; next that of Samuel Hutchins; then Wm. E. Hutchins, of two acres; then Anna M. Cood, of about three acres, and lastly that of Susan E. Haggin, of about five acres.

The land of each of these parties extends from Vine street to Barrett avenue, or nearly so, and it is noticeable that the lots in each instance are comparatively small. There is a dwelling house upon that of Caroline Hutchins; also upon the lots of Mrs. Cood and Mrs. Haggin, and they are used for yard and garden purposes. The lot of Wm. E. Hutchins is used in an agricultural way only, as it has no house upon it.

Barrett avenue has a rock roadway from Broadway to Page street and curbing, but no sidewalks. Vine street has a like roadway going toward Page street until it nearly passes the lot of the appellant There are no gas lights upon either street, but the evidence shows that some gasoline lamps have been placed along them, but they do not appear to be now in use, or at least are not well kept up by the city. There is a fire cistern on Vine street opposite the lot of John B. Hutchins, and a sewer out Barrett avenue past the lot of the appellant, but which, when opposite the lot of Samuel Hutchins, turns eastward on Howard street. Several streets extend from Barrett avenue eastward, beginning opposite the lots of the parties above named, and these streets appear to lead to thickly settled localities of the city. Vine street is thicky settled upon the side opposite the lot of John B. Hutchins, that of the appellant, and that of Susan E. Haggin, which is the outer lot from the city of those we have attempted to describe. Indeed there are seventeen houses almost immediately connected with each other opposite this last-named lot and upon Vine street.

Barrett avenue, opposite the lots of Wm. E. and Samuel Hutchins, is quite thickly setled, and this is true of it at one

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point even beyond its intersection with Page street. This population around the lots we have described must be considered and are a part of that of the city of Louisville. They are, properly speaking, a town or city population; and even if they do not create a necessity that the city government should be extended over that territory, yet the fact that they are there makes it reasonable that it should do so.

The testimony tends to show that the lots above described can, by a proper division, be sold for over $2,000 an acre, which is certainly very high for merely agricultural lands, and shows that they are more valuable for city property than for any other use. There proximity to the city renders attendance at school easy; it enables the people living there, in case of need, as the testimony shows, to send for the city police, even if they are not stationed immediately upon the ground; their size does not entitle them to be considered "farms," and the testimony, when considered in its entirety, shows that they are not only capable of being used as city property, and possess a value based upon such adaptation, but are in fact so held with a view of bringing them upon the market as such when they reach a value commensurate with the views of the owners.

Undoubtedly land held for and adapted to agricultural purposes only can not be subjected to ordinary municial taxation merely because of proximity to a city, although this fact may afford extra facilities for reaching the city, and renders it more valuable; nor merely because of improvements constructed by the municipality. If so the area of the taxation would be made to depend merely upon municipal energy in extending improvements instead of the area in fact occupied by a town or city population.

Upon the other hand the owner of a lot in the heart of the city of Louisville would not be entitled to its exemption from municipal tax because he chooses to plant it in corn, when it is surrounded by a city population, and is adapted to city uses, and thence derives its value.

If the land is adapted to municipal uses; if it derives an increased value from the proximity of the municipality, and there is a town or city population on or near it creating a necessity for municipal government, or at least rendering the extension of it over it reasonable, then the owner must contribute his proper proportion of the public burden. This rule is necessary both to municipal existence and the proper protection of the property owner. To make the taxation of his property depend entirely upon the use he makes of it would enable him to escape proper taxation while receiving all the benefits of the city government; while upon the other hand, if the imposition of the tax were made to depend merely upon the energy and ability of the municipality in extending its improvements, without regard to the presence of a town or city population, to whom the ægis of city government should properly be extended, the property owner would often suffer wrong and injustice. (Courtney v. Louisville, 12 Bush, 419.)

Tested by the rule above indicated, the property of the appellant was liable to the tax imposed, and the judgment is affirmed.

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COMMONWEALTH v. GIBSON, &c.

(Filed May 28, 1887.)

Parol gift of land—Adverse possession—If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse, and a right of action at once accrues to the vendor or donor, and limitation runs from that date.

John Young Brown, Montgomery Merritt and A. T. Dudley for appellant.

Ball & Dorsey and Yeaman & Lockett for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

The testimony in this case shows that James W. Gibson, Sr., gave by parol to his son, Wiley Gibson, the 111 acres of land in contest in 1862; and that he in like manner gave to his daughter, the appellee, Martha, the Pritchett land, and when she married in January, 1864, told her to take possession of it. The son took possession of his land when it was thus given to him, and lived upon it from that time until December, 1865, when, at the instance and by the request of the father, the son and daughter verbally exchanged farms, Martha thus acquiring the land now in contest; and from the time she thus obtained it until this suit was brought in August, 1879, to subject it to the father's debt, and ever since, she has been in the actual possession of it, either in person or by tenant.

During the time the brother was in possession he claimed, used and occupied it as his own, and paid the taxes on it; and this is true of the appellee, Martha Robertson, ever since she acquired it of him. During all this time the father exercised no control over it in any way. The daughter has improved it to a very considerable extent.

It is urged that the father only expected or intended to give these lands to these children; and that as there is some testimony that the appellee, Martha Robertson, expected him to make a title to her to the land, therefore, her possession was amicable to him, and the plea of limitation by her unavailable.

It is manifest from the father's own testimony, who is a witness against her, that he made the gift, and this also clearly appears from her own and other evidence. It is equally certain that the possession, first, of the brother and then of the appellee, Martha, has been actual and uninterrupted from 1862 up to the bringing of this action in August, 1879, a period of more than fifteen years.

Unless, therefore, the law says that, under the state of case named, she can not rely upon the possession as adverse, she is invested with a possessory title, which prevents the land from being subjected to the judgment against her father.

It is true that the legal title to the land is yet vested in him, and that no writing evidenced the gift, but whether a holding is adverse or amicable depends upon the character of it in point of fact. In the celebrated case of Taylor v. Horde, 1 Burr., 60, Lord Mansfield laid down the broad rule that disseizin is a fact to be found by the jury; and it has been followed in this country.

Thus ordinarily the possession of one joint tenant is that of all; but if that one openly denies the right of his co-tenant, and is

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in possession of and claiming the entire property himself, it is so no longer, but adverse.

A tenant or quasi tenant may, by his act, not only terminate the relation of landlord and tenant, but render his possession adverse. (Morton v. Lawson, 1 B. M., 46.) The moment he disclaims to hold as tenant a right of action accrues against him. So, too, an entry, although under a parol contract, may be of such a character as to operate as a disseizin, and the possession ripen into a title. If one holds land as a purchaser, although under a parol contract, yet it is as his own, and not the land of the vendor. If the contract of purchase be executory, and the purchaser be holding as a quasi tenant, yet he may hold adversely in fact. (Moore v. Webb, 2 B. M., 282.) If one in fact enters under a purchase or a gift, although it may be verbal, and holds the land by actual, open possession, claiming it as his own, such possession is adverse, and a right of action at once accrues to the vendor or donor. The moment such possession begins the owner is disseized. It is immaterial whether the entry was by the owner's consent or not.

If, after entry, the new comer claims the land as his own, and the owner has notice of it, either actual or constructive, then there is a disseizin. Whether it has occurred is a question depending upon the circumstances; but if there is an exclusive occupancy by the new comer, with a use of the land as his own, in hostility to the right or title of the owner, then there is an actual ouster and a consequent disseizin. (Medlock, &c. v. Suter, &c., 80 Ky., 101.)

The cases of Speers, &c. v. Sewell, &c., 4 Bush, 239; Pragoff, Ex'or v. Flood, 7 Ky. Law Rep., 636, and Fite v. Orr's Assignee (opinion by this court October, 1886), [8 Ky. Law Rep. —, relied upon by the counsel for the appellant, are not in conflict with this view. They merely decide that a vendee or a donee under a parol contract, although in possession, can not use that contract and such possession as a defense to an action by the vendor or donor to recover the land. This is because the statute of frauds prevents him from so doing. There must be a written memorial of the contract, signed by the party to be charged, to enable the other contracting party to hold the land by virtue of the contract. But a different question is presented when a vendee or donee has taken possession of land under a verbal contract, saying to the vendor or donor and all the world, "this is my land and not yours," and has so held it for fifteen years or over. The moment the vendee or donee does this the vendor or donor has a right to sue for the land, and hence the adverse holding then begins, and if it continues for the statutory period, this possession ripens into a possessory title. The claimant recognizes no better title than his own, and it appears quo animo the possession is held.

The appellee, Martha Robertson, is not suing for the legal title, or seeking to enforce any parol contract, but is relying merely upon the adverse possession, which, as the testimony shows, has continued for so long a period as to bar a recovery by James W. Gibson, Sr., and hence his creditor can not subject it.

If one enters upon land by the owner's mere permission, expecting merely that he will give it to him, then such a possession is not a hostile holding; but where there is an unconditional parol gift of it, accompanied by an actual possession of fifteen years or over, with claim of ownership, the donor can not recover it, although the donee may have entered expecting that the donor would in futuro convey or devise the land to him.

Wood on Limitation of Actions, page 539, says:

"An entry under a parol gift of certain lands, the extent of

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which is definitely fixed, is adverse to the donor, and ripens into a title after the lapse of the requisite statutory period. There are cases in which a contrary doctrine is held, but the weight of authority, as well as common sense and the principles applicable to adverse possession, seem to support the rule as stated, because a person entering under such circumstances enters as owner, and occupies under a claim of ownership, and every attribute requisite to acquire a title by adverse possession exists."

The writer is supported by the cases of Steel v. Johnson, 4 Allen, 425, and Outcalt v. Ludlow, 32 N. J. L., 251; and in fact the very question now presented was passed upon by this court in the case of Chamberlain, &c. v. McKinney, decided November 1, 1884 [6 Ky. Law Rep., 365].

Judgment affirmed.

SHUFFITT, &c. v. SHUFFITT, &c.

(Filed May 28, 1887.)

Limitation—In this action to recover land inherited by the plaintiffs, the cause of action having accrued to the ancestor of the plaintiffs before his death, limitation continued to run after that event, and the fact that he left infant heirs did not have the effect to suspend it.

E. S. Wisdom for appellants.

Garnett & Dahoney for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Lewis.

The evidence in this case is conclusive that the defendants and those under whom they claim had the actual, continuous and adverse possession of the land in controversy, described by the deed from Gorin, the commissioner, for more than fifteen years before the commencement of this action.

It appears that a patent was issued for the land in 1836 to Frances Shufflitt, under whom the plaintiffs claim. But even if that patent had been valid and not, as the defendants contend, void because of the previous appropriation of the land, still he never took possession or claimed under that patent, and never resided on the land, except about one year in 1849, and it does not clearly appear that even for that short period of time he claimed and occupied it as the owner. On the other hand the evidence shows Thomas Shufflitt lived on and claimed the land from 1820 to 1848, when it was purchased as his property by Buckner, and afterwards, in 1852, was conveyed by Gorin, commissioner, to Thos. G. Shufflitt and Frances Shufflitt, who held the possession, claiming it as their own, until sold to satisfy a mortgage given by Thos. G. Shufflitt, and thereafter occupied by him as tenant of the purchaser at the sale to satisfy the mortgage.

The cause of action having accrued to the ancestor of the plaintiff before his death, limitation contined to run after that event, and the fact that he left infant heirs did not have the effect to suspend it.

The judgment is affirmed.

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JOHNSON v. HUGHART, &c.

(Filed May 28, 1887.)

1. Estoppel—A desiring to provide for B's wife and children, transferred to B some notes in consideration of B's agreement to convey to him a certain tract of land, A agreeing to convey the land to B's wife for her separate use for life, and at her death to her children. A, supposing the land had been conveyed to him pursuant to the agreement, executed to B's wife and children a conveyance therefor as agreed, B ratifying the conveyance after it was executed. In fact, however, B had not conveyed the land to A, and never did so. Thereafter B and wife executed to appellant a mortgage upon the land to secure a debt of B, the mortgage describing the land as that conveyed by A to B's wife. Held—That B is estopped to deny that the deed from A to his wife and children is binding upon him, and his vendees and privies are likewise bound by the estoppel. Therefore, the mortgage to appellant is invalid.

2. False recital in mortgage—Husband and wife united in a mortgage of the husband's land, the mortgage, however, describing the land as that of the wife. Held—That while the false recital in the mortgage renders it inoperative as against third persons without notice of the true state of the case, yet, like an unrecorded mortgage, it is good as between the parties, and also good as against third persons with notice of all the facts.

3. Liens—The mortgagor of a life estate in lands having acquired also the reversion, C, the mortgagee, asserted a lien upon the mortgagor's absolute estate, which was sold to satisfy the mortgagee's debt, the claim of a lien upon the fee not being resisted by the mortgagor. D, the holder of a mortgage upon the mortgagor's absolute estate in the same land, not having been made a party to C.'s action, now asserts his lien. D's mortgage, by reason of a false recital therein, was not good as against C who had no notice of the facts. Held—That while C had a lien only on the mortgagor's life estate, yet as his claim to a lien upon the fee was not resisted, and he could have purchased the reversion from the mortgagor, or could have had his execution issued and levied thereon, and acquired a good title as against D, the latter can not complain because the same thing has been accomplished in another way.

W. N. & J. J. Sweeney for appellant.

G. W. Williams & Son for appellees.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Bennett.

Edward Long, many years ago, died, owning a tract of land lying and being in Hancock county, Ky., and supposed to contain one hundred and ninety-eight acres.

Higdon and wife becoming the owners of two-thirds of said tract of land on the — day of December, 1865, sold to appellee, John W. Hughart, by deed, which was duly recorded said two-thirds.

Martha D. Long owned the remaining third interest in said tract of land, and Margaret E. Long, widow of Edward Long, owned an unallotted dower in said tract of land. Not long after John W. Hughart's purchase from Higdon and wife proceedings were instituted in the Hancock County Court for the purpose of having said land divided, and the allotment of dower therein. Said proceedings resulted in a division of the land and the allotment of dower, the apellee, John W. Hughart, receiving 138¾ acres, Martha D. Long 37½ acres, and Margaret E. Long 43½ acres as dower, the survey, it seems, having run out more than 198 acres.

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In 1871 the appellee, John W. Hughart, purchased from Margaret E. and Martha D. Long their respective parcels of land, and received a deed from them for the same on the 23d day of March, 1876. The deed recited the unpaid purchase money due by notes to each vendor, and retained a lien on the respective parcels for the payment of the same. The appelle, Jett, became the assignee for value of these notes.

On the 16th of April, 1881, Jett filed his petition in equity in the Hancock Circuit Court against the appellee, John W. Hughart, for the purpose of enforcing his lien on these parcels of land, and obtaining a sale thereof to satisfy the respective sums due thereon. The appellee, John W. Hughart, appeared, and asserted a right of homestead in said parcels of land. The circuit court denied his right to a homestead as against Jett's claim, but decreed the sale of both parcels of land as a whole, the same not being susceptible of advantageous division, for the purpose of satisfying said debt, interest and cost, and both parcels were sold by the court's commissioner on the 21st of June, 1881, for the sum of $347.40, the amount of the debt, interest and costs, and Jett became the purchaser. On the 9th of November, 1881, the sale was confirmed, and Jett received the commissioner's deed for the whole of said parcels of land.

On the 26th of September, 1876, the appellees, John W. Hughart and Armilda, his wife, executed to the appellant, Johnson, a mortgage, which was duly acknowledged and recorded, to secure the payment of a debt due the appellant by the appellee, John W. Hughart, on "a certain tract of land lying and being in Hancock county, and on the waters of Yellow creek, containing two hundred and thirteen acres, more or less, and conveyed to said Armilda Hughart by Harriet Miller, by deed duly recorded in the clerk's office of the Hancock County Court in deed book No. —, page —. Reference is to be had thereto for a more particular description of said tract of land."

The appellee, Armilda Hughart, resisted the appellant's right to subject this land to the payment of said debt upon the ground that by the deed of Harriett Miller, the person mentioned in the mortgage, she held said land to her sole and separate use, to the exclusion of her husband, the appellant, during her natural life, and at her death the same was to go to her living children, and, therefore, the mortgage was invalid.

In avoidance of this plea the appellant urged that Mrs. Hughart was really not the owner of said land; that Mrs. Harriett Miller, at the time of the pretended conveyance to Armilda, was not the owner of said land, but that the appellee, John W. Hughart, was the owner of the same.

The facts as established by the record are that Mrs. Miller, prior to April, 1872, as the representative of her deceased husband, held several notes on the appellee, John W. Hughart, for a considerable sum of money, and he being weak-minded and improvident, she desired to make some provision for Mrs. Hughart, who was her niece, and to that end she effected an arrangement through —— Tate, then a lawyer, now a minister of the gospel, with the appellee, John W. Hughart, by which she surrendered said notes to him, and in consideration thereof he was to deed to her the 138¾ acres of land, which he bought from Higdon and wife, and which was allotted to him in the division heretofore mentioned; and pursuant to this agreement Mrs. Miller, on the — day of April, 1872, conveyed by deed which was duly recorded, said 138¾ acres of land to the sole and separate use, and to the exclusion of her husband, of Mrs. Hughart during her natural life, and at her death to her living children. It is the recollection,

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of Mr. Tate that the appellee, John W. Hughart, conveyed said land to Mrs. Miller by deed. He says that he understood the necessity of his making a deed to Mrs. Miller, and intended to have him make it, and thinks that he did make it. Be this, however, as it may, it is certain that the arrangement above indicated was made. and Mrs. Miler, believing that the title was made to her, surrendered the notes and made the deed to Mrs. Hughart. It is also certain that Mr. Hughart received the notes, and in consideration thereof admitted the right of Mrs. Miller to convey said land to Mrs. Hughart, and ratified the act of conveyance after it was made. The mortgage to the appellant is conclusive evidence of these two latter facts.

It is an elementary equitable principle that if A devises property to B upon the condition that B must convey to C a certain piece of his property, and B accepts A's devise, he, by thus accepting, agrees to the condition imposed upon him, and C may compel him to convey the property according to the terms of the will.

Here Mr. Hughart agrees that in consideration of Mrs. Miller's surrendering certain notes to him she might convey 138¾ acres of his land to his wife and children. The notes are surrendered and the conveyance is made. Now by the same equitable principle the transaction is binding upon him, and estops him from calling it in question, and his vendees and privies are likewise bound by the estoppel.

We think the lower court did right in dismissing the appellant's action as to the 138¾ acres of land. But there was included in the mortgage, in addition to the 138¾ tract, the two parcels of land which Mr. Hughart purchased from Margaret E. and Martha D. Long.

Although the whole quantity mortgaged is described as the property of Mrs. Hughart, yet as to these two parcels it is clear that, as between the appellant and Mr. Hughart the mortgage, is valid because Mr. Hughart and his wife joined in mortgaging this land, which was his and not hers; and and while the misrecital in the mortgage rendered it inoperative as against third persons without notice of the true state of case, and as to them it would have no greater effect than an unrecorded mortgage, yet as between the parties it is as good as an unrecorded mortgage, and is also good as against third persons having notice of the true state of case.

The appellee, Jett, did not make the appellant a party to his suit for a sale of said parcels of land to satisfy his lien thereon. He had a lien on the whole of the 37½-acre parcel; also a lien on his assignor's life estate in the 43½-acre parcel; and his liens on each parcel being superior to that of the appellant to this extent, his proceeding to enforce them. had it been so limited, without making the appellant a party, would not ordinarily have been a sufficient error to set the judgment and sale aside. But, notwithstanding he did not have a lien upon the reversionary interest in the 43½-acre tract, he obtained a judgment for the sale of the whole estate. So the question is, can the appellant have the judgment and sale set aside for the error?

As before stated, the mortgage having described the land mortgaged as the property of Mrs. Hughart, and it being a legitimate presumption on the part of third persons, who knew not to the contrary, that the mortgage recited the truth, and such persons dealing in reference to any land belonging to Mr. Hughart, though included in the mortgage, would not be affected with constructive notice that such land was mortgaged.

It does not appear that Jett, at the time he obtained the decree and the sale of the land, had actual notice that said two parcels

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of land were included in the mortgage. And while he obtained a decree for the sale of the reversionary interest in the 43½-acre tract of land, on which he had no lien, yet it must be remembered that this interest, as well as the dower interest, on which Jett held a lien, belonged to Mr. Hughart, and that he owed the debt; that he appeared and claimed a homestead in the land, but never questioned Jett's asserted lien on the reversionary interest; that he could have sold the whole of said land to Jett to satisfy said debt, he not having actual notice that the land was included in the mortgage, which sale would have defeated the appellant's lien on same; that Jett could have obtained an execution on his judgment, and had the land sold to satisfy it, which would have passed the title as against appellant. Now instead of having the reversionary interest sold under execution, the commissioner of court sold it to satisfy the judgment, and by which the debt was discharged, and this was done with the consent of Mr. Hughart, and without Jett's having actual notice of the appellant's mortgage thereon. So Jett accomplished by this irregular proceeding the same thing that he had the right to accomplish in either of the two other ways. The same end was reached, and we can not see how appellant's right would be prejudiced any more by the one way than the other.

In addition to this, it appears that the appellant knew of the pendency of Jett's action to subject this land, and at one time thought of appearing therein and setting up his claim, which purpose, however, he abandoned, and concluded to bid on the land at the commissioner's sale. By some casualty he was prevented from doing this. So we see no error in the refusal of the lower court to disturb Jett's purchase.

The judgment of the lower court is affirmed.

BANE v. THE TRAVELERS INSURANCE CO.

(Filed June 2, 1887.)

Accident insurance—Appellee issued to appellant an accident insurance policy for the period of twelve months in consideration of the sum of $20, payable by installments, for which appellant gave appellee an order on a railroad company, in the employment of which he was, the policy providing that "the first, second, third and fourth installments specified in the aforesaid order shall apply only to the payment of premium for the first, second, third and fourth insurance periods of two, three and five months each, and in the order named. It is also agreed that there shall be no liability under this policy for any claim by reason of personal injuries as aforesaid, occurring in either of the said insurance periods for which the respective installments of premiums shall not have been actually paid." The order for $20 drawn by appellant on the railroad company provided for the payment of the first installment of $5 out of his wages for January, the second installment out of his wages for February, the third installment out of his wages for March, and the fourth installment out of his wages for April. Appellant worked during the months of January and February, and $5 was paid on the order out of the wages of each of these months. He failed to work in March and April, but resumed work May 1, and when he was injured in May the railroad company owed him more than $10. In an action on the policy, Held—First. The order on the railroad company was not an assignment of $20 to be paid out of any money that might become due to the insured, but only $5 out of his wages for each of four specified months, during two of which he earned nothing. Therefore, the drawee in the order had no right to pay the balance due upon the order out of the wages of any other

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month. Second. The insurance company was not obliged, in order to escape liability, to return to the insured the order and notify him that the contract of insurance was at an end, since by the express terms of the contract the insurance was to cease at the end of any period if the premium for the succeeding period was not paid. It was the duty of the insured, if he desired to continue the policy, to pay the installments, and his failure to do so terminated the liability of the company.

S. B. Toney and Brown, Humphrey & Davie for appellant.

Jas. S. Pirtle for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Holt.

The portions of the accident policy issued on the tenth day of January, 1883, by the appellee, the Travelers Insurance Company, upon the life of Patrick Bane, which are material to the consideration of this case, read thus:

"The Travelers Insurance Company, of Hartford, Conn., in consideration of the warranties made in the application for this policy, and of an order on the Texas Pacific Railway Company for the sum of $20, payable by installments in accordance with said order, does hereby insure Patrick Bane in the principal sum of $2,000 for the term of twelve months, commencing at 12 o'clock noon on the day and date of this policy, the said sum to be paid to Mark Bane, if surviving. * * *

"Provided, always, that in the event of any claim for injury to the insured before the actual payment of the first installment under the aforesaid order, then from any amount found to be justly due by reason of said injury may be deducted the sum of all the installments called for by said order, whereupon the order shall be cancelled, and the premiums for the full term of this policy receipted for as fully paid; but if the sum found to be due under said claim shall be less than the unpaid installments covered by said order, then the sum adjudged to be due to the insured shall be credited on account of the installments due, or to become due, under said order, it being expressly understod and agreed that the first, second, third and fourth installments specified in the aforesaid order shall apply only to the payment of premium for the first, second, third and fourth insurance periods of two, three and five months each, and in the order named. It is also agreed that there shall be no liability under this policy for any claim by reason of personal injuries as aforesaid occurring in either of the said insurance periods for which the respective installments of premiums shall not have been actually paid, except as herein provided for delay in payment of the first installment as the premium for the first insurance period. * * * If the company shall so elect, this policy may be cancelled at any time, by refunding to the insured the premium paid by him, less a pro rata part thereof for the time said policy has been in force."

This is the order referred to in the policy:

"PAYMASTER'S ORDER FOR $20.

"To the Texas Pacific Railway Company:

"Please pay to the Travelers Insurance Company, of Hartford, Conn., or its authorized agent, the sum of $20, by installments as follows:

"First installment. Five dollars to be paid and deducted from my wages for the month of January, 1883.

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"Second intallment. Five dollars to be paid and deducted from my wages for the month of February, 1883.

"Third installment. Five dollars to be paid and deducted from my wages for the month of March, 1883.

"Fourth installment. Five dollars to be paid and deducted from my wages for the month of April, 1883.

"The first installment being the premium for two months, the first insurance period under a policy of insurance issued to me by said company, and bearing even date and number herewith; the second installment being the premium for two months, the second insurance period under said policy; the third installment being the premium for three months, the third insurance period under said policy; and the fourth installment being the premium for five months, the fourth insurance period under said policy, all in accordance with the provisions and conditions of said policy and my application for the same.

(Signed) "PATRICK BANE."

The policy was delivered to the insured, and the order to the insurance company. The insured worked for the railway company during January and February, 1883, but not during March and April following. He resumed work for it on May 1st, and was killed on May 28, 1883. The order was never accepted by the railway company, but was left with it by the insurance company. The installments from the January and February wages were paid to the appellee by the railway company, but those for March and April were not paid, as the insured earned nothing during those months. On the 10th day of May, however, there was more than $10 due him from the railway company, and at his death the sum of $47.70, all earned during the month of May, 1883. The insurance company never demanded payment of the balance of the order of the railway company, and never notified the insured of its nonpayment or that the contract of insurance was at an end, and never returned the order to him or offered to do so.

The insurance company contends that by the terms of the contract the several payments were to pay for insurance in several periods; thus the first payment for two months, or from January 10th to March 10th; the second payment for two months, or from the last named date to May 10th; but that if the third payment was not in fact made then the insurance ceased at the end of the second period. In short, that the insurance was on the installment plan, and that the failure to pay the installment ipso facto worked an end of the contract.

The beneficiary under the policy says, however, that by a fair construction of the contract the period of insurance was twelve months; that in consideration of it the insured gave the order for $20; that the provision in it as to how it was to be paid was merely directory, and but an indication to the drawee as to how he was to reimburse himself, and that it was an executed contract of insurance for a year. Moreover, if the order was not a bill of exchange by reason of being payable out of a particular fund, that yet it was binding on the drawer as a common law order, because prima facie it imported an indebtedness by him to the insurance company; and as it neither returned the order to him or notified him of its nonpayment, or that it elected, in consequence thereof, to consider the contract at an end, there was a waiver of any forfeiture, or right of forfeiture, upon the part of the company, even if under the contract it had this right.

In considering this question the character of accident insurance

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must be borne in mind, and that the policy is a peculiar one. Undoubtedly the rights of the parties should be reciprocal. The insurance company should not be allowed to occupy such a legal attitude that it can say, in case the insured lives, "you owe this order," but in case of his death that "the insurance has expired by reason of its nonpayment."

The manifest injustice of such an advantage has led to the adoption of the rule in this State that where an insurance company has taken the personal obligation of the insued to pay a premium at a particular time on pain of forfeiture, the right to rely upon a forfeiture is waived by retaining the obligation after maturity, without notice to the insured of an intention to consider the policy void.

Here, however, the policy and the order constitute one contract, and there is no conflict between them. The order was to be paid in installments by the employer out of the wages of the employe for specified months. They were not earned when the order was given, and the assignment could not operate until the insured was entitled to the money.

It was not an assignment of $20 to be paid out of any money that might become due to the insured, but only $5 out of his wages for each of four specified months, during two of which he earned nothing.

Undoubtedly the drawee in the order had no right to pay the balance due upon the order out of the May wages. The assignment did not embrace them, and such payment, if made, would have been at his peril. If made, and it had subsequently appeared that the insured had assigned his May wages to another party, such party could have compelled payment from the employer because the transfer to the insurance company was of specific wages. It, therefore, makes no difference that when the second period of insurance expired the insured had a sufficient amount of wages owing to him by the railway company for the month of May to have paid the balance of the premium, or that this continued to be the case until his death.

The only real question, it seems to us, is whether the insurance company was required to return to the insured the order and notify him that the contract of insurance was at an end, upon peril, if it did not do so, that it should operate as a continuation of the contract.

By the express terms of the contract the insurance was to cease at the end of the second period if the premium for the third period was not paid. It is evident that the parties to the contract looked alone to the wages that were expected to become due from the railway company for the payment of the premium. It is unreasonable to suppose that the credit would otherwise have been given by the insurance company. Railroad employes, as a general thing, are transitory persons, and it would be destructive of the accident insurance business as to them if, by the mere giving of an order to the insurer to be paid out of a fund to be earned by them in the future, they could compel the insurer to carry the insurance, although they should fail to work, because they might not be hunted up and the order returned.

In this instance the insured knew that he had not earned the wages which he had assigned in order to continue the policy. If he had lived, and the insurance company had attempted to collect the balance of the order out of his May wages, could he not have claimed successfully that he did not transfer them, and that he had chosen to let the policy lapse? He knew that the expected fund had not been earned; that by the express condition of the policy its continuation depended upon payment in that

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way. The right of election was with him, and not with the company under such circumstances. It was his duty, if he desired to continue the policy, to have paid the installments, and his failure to do so terminated the liability of the company.

It is really a misnomer to say that the policy in this instance was forfeited by the nonpayment of the premium. The insurance, by the express terms of the policy, ceased because of such nonpayment. The payment of the premium was a condition precedent to the continuation of the risk, and even a court of equity will not interfere to release one from the consequences of such a failure.

The order in this case, in view of the circumstances, did not bind the drawer personally, and with the cessation of the policy the entire contract was at an end.

The case of Lyon v. Travelers Insurance Company, 55 Mich. Rep., 141, differs from this one in the controlling circumstance that there the insured had earned the wages out of which the premium was to be paid, thus providing for its payment, and they were in fact owing by the employer, and subject to the control of the insured.

Judgment affirmed.

PETERS v. WALLACE.

(Filed June 2, 1887—Not to be reported.)

Bankruptcy—The mere fact that an assignee in bankruptcy declines to sue for the recovery of land constituting a part of the bankrupt's estate, or has verbally surrendered his right to the bankrupt, does not invest the latter with title, so as to enable him to maintain an action in ejectment.

C. H. Lee for appellant.

L. T. Applegate and John H. Barker for appellee.

Appeal from Pendleton Chancery Court.

Opinion of the court by Chief Justice Pryor.

It is not necessary to determine the nature or extent of the title acquired by the appellees, who were the purchasers of the land in controversy at the decretal sale had under the judgment of the Campbell Chancery Court. The appellant, Peters, who brings this ejectment, shows that he divested himself of title by his proceedings in bankruptcy, and is now attempting to maintain the action without any evidence whatever of title in himself. The mere fact that the assignee in bankruptcy declines to sue, or has verbally surrendered his right to the appellant, does not invest the latter with title.

The judgment below is, therefore, affirmed.

SMITH v. COMMONWEALTH.

(Filed June 2, 1887.)

1. Criminal evidence—Upon the trial of appellant for a homicide the court did not err in admitting evidence to the effect that the witness heard the defendant, at night, when drunk and alone, say, talking to himself, that he would kill the deceased. The fact that the witness did not hear all that was said did not render the evidence incompetent.

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2. Attorneys—Argument—While the attorney for the Commonwealth has the right in his argument to characterize the testimony of witnesses as false, it was improper for him to denounce the defendant as a vagrant and scoundrel; still, as no objection was made at the time, this court can not reverse the judgment on that ground.

3. Custody of jury—Pending the trial the jury was placed in the custody of the deputy sheriff, who was admonished and sworn as the law directs. When the court met again, Sunday having intervened, the jury appeared in open court in charge of the sheriff. It does not appear that the sheriff had been sworn and admonished as required by the Code. Held—That the presumption exists that the lower court did its duty, and that the principal sheriff, as well as his deputy, was, before taking charge of the jury, sworn according to law. But even if the court omitted this duty, there can be no reversal on this account, as no objection was made at the time, and it was not made a ground for a new trial.

4. Instructions—An instruction telling the jury that they were the sole judges of the weight of the evidence and credibility of the witnesses was unnecessary, but not prejudicial, as there was nothing in the instruction calling especial or invidious attention to any particular witness.

5. New trial—Whether a new trial should have been granted upon the ground of newly-discovered evidence was in the discretion of the court, and the decision thereon is not subject to revision by this court.

R. L. Ewell and Smith & Perkins for appellant.

P. W. Hardin for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

Premising that this court can reverse a judgment of conviction for a criminal offense only for errors of law occurring at the trial to the prejudice of the substantial rights of the defendant, and not because the verdict may, in our opinion, be not sustained by the evidence, we will consider the various grounds relied on of which we can take cognizance:

1st. One of the witnesses, on account of whose absence the continuance was applied for, was actually present at the trial. The evidence of the other would, if true, have shown a threat by the deceased, based upon a remote condition, the existence of which does not appear, and the evidence, even if admissible, would have been merely cumulative.

2d. The evidence of the witness, Sutton, was to the effect that he heard the defendant, at night, when drunk and alone, say, talking to himself, that he would kill the deceased, one A. R. Coon, and some one else.

We do not think the court erred in admitting the evidence, and permitting the jury to give such weight to it as they might think it deserved. It tended to show the state of the defendant's feelings towards the deceased, and as there was room for doubt as to how and by whom the fight was commenced that terminated in the homicide for which the defendant was being tried, the evidence was proper and pertinent. Moreover, threats and ill-feeling on the part of the defendant was proved by other witnesses.

The witness, Sutton, it is true, states he did not hear all the defendant was saying. But he testifies distinctly that defendant was threatening to kill the deceased.

3d. It does not appear that at the time the attorney for the Commonwealth used the alleged improper language in his argument

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to the jury any objection was made, or that the court was asked to stop him.

When an attorney for the Commonwealth, in his argument to the jury, says or does what is unauthorized, improper, and to the prejudice of the rights of the defendant on trial for a criminal offense, it is the duty of the court, and the presumption is it will, if appealed to, put a stop to and direct the jury to disregard it in making up their verdict. The attorney for the Commonwealth has the right to endeavor to show, and in his argument to characterize, the testimony of witnesses as false. And while it was improper for him to denounce the defendant as a vagrant and scoundrel, still as no objection was made at the time and the attention of the lower court was not called to the breach of propriety, we can not reverse the judgment on that ground.

4th. The record shows that on the 18th of the month, while the trial was pending, the jury was placed in the custody of a deputy sheriff, who was admonished and sworn as the law directs. But on the 20th, Sunday having intervened, the jury appeared in open court in charge of the sheriff. And counsel contends, as it does not appear that the latter officer was sworn to keep the jury together, and to suffer no person to speak to or communicate with them on any subject connected with the trial, and not to do so himself, as provided by section 245, Criminal Code, that the judgment should be reversed.

The presumption exists, and nothing to the contrary appearing, we must conclude that, although it does not appear from the record, the lower court did its duty, and that the principal sheriff, as well as his deputy, before taking charge of the jury, was in fact sworn according to law in such cases. Moreover, even if there was the omission of duty by the court and sheriff now complained of, no objection was made at the time, nor was it made a ground for a new trial.

5th. After a careful consideration of the instructions given by the court we are able to perceive no error in any of them.

The two offenses of murder and manslaughter are accurately and fully defined, and the law of self-defense and apparent necessity is set forth in such language as to enable the jury to readily and clearly understand the grounds upon which they were authorized and required to acquit the defendant. The jury must know, without being told, that they are the sole judges of the weight of the evidence and credibility of the witnesses, and it was, therefore, unnecessary to instruct them in regard thereto, as was done in instruction No. 5. But we perceive nothing in that instruction that calls especial or invidious attention to any particular witness, or that would justify the jury in believing the court gave more or less weight to one than the other witnesses who testified.

The refusal of the two instructions asked for the defendant did not prejudice him because the whole law applicable to the case had been embodied in the instructions already given by the court.

6th. Whether a new trial should have been granted upon the ground of newly-discovered evidence was in the discretion of the lower court, and the decision thereon is not, as has been heretofore decided, subject to revision by this court.

Perceiving no error of law to the prejudice of the substantial rights of appellant, it is our duty to affirm the judgment, as is now done.

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COMMONWEALTH v. SHERMAN.

(Filed June 4, 1887.)

1. Process on amended petition—An action to recover a fine having been instituted in the name of the "State of Kentucky," process upon an amended petition substituting the "Commonwealth of Kentucky" as plaintiff was not necessary.
2. The Jefferson Court of Common Pleas has jurisdiction of an action in the name of the Commonwealth to recover a penalty.
3. Constitutional law—Although a statute imposing a penalty be open to constitutional objection because of unlimited discretion in the court as to imprisonment in case of the nonpayment of the fine, that is no obstacle to an action for the penalty, the clause of the statute relating to imprisonment being severable from the remaining part of the statute, which is complete within itself.
4. Penalties—Repeal of statute—By the common law a penalty can not be inflicted unless the law imposing the penalty is in force at the time of the trial, but this rule has been changed by statute in Kentucky, and although a statute imposing a penalty may have been repealed, the penalty may still be enforced as to offenses committed prior to the repeal.

Helm & Bruce and P. W. Hardin for appellant.

W. P. D. Bush for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Holt.

The act of the legislature, entitled "An act for the incorporation and regulation of life insurance companies," approved March 12, 1870, provides:

"Section 42. Every person who shall transact any business as an agent of any life insurance company, without first procuring the license required in this act, or who knowingly procures payment or any obligation for the payment of any premium for insurance, by fraudulent representations, or after revocation of his license, shall be punished by fine not exceeding $1,000.

"Section 48. Every fine, penalty or forfeiture, for any neglect of duty or violation of the provisions of this act, shall be sued for in the name of the State of Kentucky, by the attorney general or prosecuting attorney of the district or county in which the company or agents so violating shall be situated, when no other provision is made by this act; and one-half of such penalty, when recovered, shall be paid into the treasury of the Commonwealth and one-half to the informer of such violation, other than an officer whose duty it is to enforce the law; and in case of the nonpayment of such penalty, fine or forfeiture the officer or agent of any company so offending, and guilty of neglect or malfeasance, shall be liable to imprisonment for a period not less than six months, in the discretion of the court having cognizance thereof."

This action was instituted by the attorney general June 1, 1883, in the Jefferson Court of Common Pleas, in the name of the State of Kentucky, and against the appellee, Ward B. Sherman, to recover a judgment for $1,000 for an alleged violation of this law.

A demurrer to the petition was presented upon the ground, first, that the court had no jurisdiction; and, second, that the plaintiff had no legal capacity to sue. It was sustained upon the last named ground, and the appellant then amended by inserting the

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Commonwealth of Kentucky as the name of the plaintiff. Thereupon the court sustained the demurrer upon the first ground, and dismissed the petition.

Authority was expressly given by the section last cited to sue in the name of the "State of Kentucky." It is said, however, that this was repealed by section 11 of the Criminal Code, which took effect January 1, 1877, and which is as follows:

"A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions."

The Constitution provides that the style of all process shall be "The Commonwealth of Kentucky." By the amendment, however, the plaintiff was so styled; and this was but a correction of what was at most but a mistake in the name of the party. It was not the substitution of a new and different person as plaintiff, but merely gave the formal statutory name of the party as prescribed by the Code. The words "State" and "Commonwealth" are used interchangeably by the legislature and the judiciary; and admitting that it was neccessary, yet it did nothing more than give truly the name of the person intended to be stated.

Process on the amendment was, therefore, unnecessary. Moreover, the court, after it was filed, acted, as must be presumed, by the consent of the appellee, upon the demurrer to the jurisdiction of the court; and it results that, although the suit was brought in the name of the State, yet as the correction related merely to the name of the party, the Commonwealth can now question the judgment below by this appeal.

It is earnestly urged, however, that the court of common pleas had no jurisdiction upon the ground that this is a penal action.

Section 48 supra merely provides that the fine may be "sued for," without naming the court in which it may be done; and the argument against the jurisdiction is based upon the third subsection of section 13 of the Criminal Code, which says:

"The circuit courts shall have general jurisdiciton for the trial of all prosecutions and penal actions, unless exclusive jurisdiction be given to other courts."

Presumably the lower court sustained the demurrer to the jurisdiction upon the idea that the action was in the nature of a criminal proceeding, being for a fine, and that a court having only civil jurisdiction could not entertain it. Section 63 of the Civil Code provides, however, that an action may be brought in the county where the cause, or some part thereof, arose "for the recovery of a fine, penalty or forfeiture, imposed by a statute." * * *

These two provisions of the Code were substantially contained in the old Code; and yet this court, in 1879 upon a cause of action arising in 1875, and in the case of the Commonwealth v. Avery, 14 Bush, 625, which was an appeal from the Jefferson Common Pleas Court in an action to recover a forfeiture, sustained its jurisdiction.

Undoubtedly the legislature may authorize a civil action to be maintained for a forfeiture. It has, in this instance, said that it may be "sued for in the name of the State of Kentucky."

Moreover, as we understand the law, the jurisdiction of the Jefferson Circuit Court is confined by special statute to indictable offenses, save cases may be transferred to it by the common pleas court.

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If the act of 1870 be open to constitutional objection, because of unlimited discretion in the court as to imprisonment in case of the nonpayment of the fine, yet that question is not now presented because this is a qui tam action for the penalty merely, and the clause of the statute relating to imprisonment is severable from the balance of the section, the latter being complete within itself, and capable of execution in accordance with the legislative intent.

It does not appear, nor is it admitted, that the appellee, Sherman, is the agent of a company furnishing life insurance upon the assessment plan; and as the act of April 19, 1884, was confined to companies of such character, it can not be called to his aid, as this record is presented, as repealing the act of March 12, 1870.

An amendment to the latter act was, however, passed by the legislature on April 19, 1886, providing that the penalty for its violation should be a fine of "not less than $50 nor more than $100, and shall be imprisoned until such fine shall be paid or replevied; and jurisdiction is hereby given and conferred upon justices of the peace, police, city and county court judges for the trial of said misdemeanors, and the enforcement of the penalty herein imposed: Provided, That no one convicted under this act shall be imprisoned longer than fifty days in default of payment of the fine, that all laws and parts of laws inconsistent with the provisions of this act are hereby repealed."

It is charged that the alleged violation of the law by the appellee, Sherman, occurred in 1883.

By the common law a person is not liable to the infliction of a penalty unless the offense is unlawful, or the law imposing the penalty is in force at the time of the trial as well as at the time of the commission of the unlawful act.

If the statute under which the proceeding was instituted has been repealed then no judgment can be had enforcing the penalty. The repeal of the law is itself a remission, and Judge Cooley says:

"And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered." (Cooley's Constitutional Limitations, 477.)

This rule has, however, been changed by statute in this State.

Section 23, chapter 21 of the General Statutes, the title of which is "Construction of Statutes," provides:

"No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment be mitigated by any provision of the new law such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." (Acree & Kinman v. Commonwealth, 13 Bush, 353.)

This rule of construction must be considered as a part of every law repealing a former law, by which a penalty was imposed; and it results that a law still remains to be vindicated as to offenses committed prior to the repeal by the subsequent act of the legislature.

It must be considered as having had in view this statutory rule

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of construction when it passed the act of April 19, 1886; and there is no provision in it indicating that the repeal provided by it was to affect any prosecution then pending under the former law, or that offenses theretofore committed should not be punished by it. The repealing act can have no further effect as to offenses previously committed, save in case of guilt, to mitigate the punishment by the consent of the accused, and only repeals all former laws inconsistent with it as to offenses subsequently committed.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

HOBBS & CO. v. McMAKIN.

(Filed June 4, 1887—Not to be reported.)

1. A judgment against a personal representative is not evidence of the liability of the decedent as against the vendee where a conveyance by the decedent is sought to be set aside by one claiming to be a creditor, although the conveyance was merely voluntary.

In this case a conveyance by husband to wife is sought to be set aside by one claiming to be a creditor of the deceased husband as constructively fraudulent, the only evidence of the liability of the decedent being a judgment against his personal representative. Held—That the liability of the decedent should be established as if no judgment had been rendered against his personal representative.

2. Heirs—At most a judgment against a personal representative can, as against the heir, be regarded as only prima facie evidence of the liability of the decedent.

3. Husband and wife—The husband is not liable as a partner by reason of his wife's interest in a partnership.

Geo. S. Fulton for appellants.

Wm. Johnson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

James B. Hays and others instituted an action in the Washington Circuit Court against John T. Shields, as the administrator of Alex. McMakin, deceased, and others for the settlement of an alleged partnership, and the payment by the partners of the losses, if any, sustained by the firm. The members of a certain Grange undertook to run a store, in which certificates of stock were issued as evidence of membership. It was adjudged in the action that Alex. McMakin, deceased, was a partner, and indebted to the firm in the sum of $223. An execution issued on the judgment against his administrator, John Shields, and was returned no property found. The surviving members of the firm filed the present suit in equity against the appellee, Martha McMakin, the widow of Alex. McMakin, and others, seeking to vacate or set aside a conveyance made by the deceased to his wife and others of a valuable tract of land, and subject it to the payment of the judgment against McMakin's administrator. The widow filed an answer in which she denies any indebtedness by her husband to the firm, and further denying that she ever was a member or stockholder in the organization. She says that she was a stockholder by reason of the payment out of her own

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means for the stock, and had received dividends on her stock, but that her husband was at no time a member of the firm.

There is proof conducing to show that the decedent was a member by those who saw him at the meetings connected with the business of the firm, and by one or more witnesses that he paid for his stock, but there is no evidence that he ever held a certificate of stock, or received any dividends; and in addition other testimony by members that the decedent was not a member.

It is plain, we think, that the money paid for the stock to Hobbs was paid by the wife or by the husband for her benefit, and that McMakin was not in fact a member. Those testifying for the firm have no recollection that the widow or wife of the decedent was ever a member or paid anything for stock. She was not a party to the proceeding to wind up the firm, and in which the judgment was rendered against the personal representative of her husband, while it is evident that she was a stockholder, as she produces her certificate as to dividends, and such other proof as leaves no doubt on the subject.

It was the widow who was the stockholder and not the deceased husband, and her right to question the justice of the debt, although a judgment has been rendered against the administrator of her deceased husband, can not be questioned. The conveyance to the wife was no doubt voluntary, still, as against the alienee from the husband, a judgment against his personal representative is not conclusive as to the husband's liability when seeking to subject land to which she has title from her husband, although the conveyance has no other consideration than that of love and affection. It devolves on the party seeking to enforce such a judgment to show the liability of the debtor by averment and proof, and at most as against the heirs it can only be regarded as prima facie evidence of the liability of the decedent. While a judgment against the debtor himself would be conclusive as to his heirs and personal representative, when the liability is evidenced only by a judgment against the personal representative, and the real estate once owned by the debtor is sought to be subjected in the hands of his vendee, the evidence of the liability must be shown as if no judgment had been rendered against the personal representative.

The judgment, as was said in the case of Alexander, &c. v. Quigley's Ex'or, 2 Duvall, 399, is only evidence to establish the fact that an unsuccessful effort had been made to make the debt out of the personal representative. In this case the widow (appellee) was not a party to the action in which the judgment was obtained. There is no privity between her and the representatives of her deceased husband, and the judgment against the personal representative is no evidence as against her of the liability of her husband. The facts of this record demonstrate that no liability ever existed, and, therefore, the petition was properly dismissed. (Nourse, Ex'or v. Ramsey, 2 Bibb, 547; Richards, Adm'r v. Porter's Heirs, &c., 6 Monroe, 1; Litsey v. Smith's Adm'r, 10 B. M., 74; Ewing's Heirs v. Handley's Ex'ors, 4 Littell, 346.) There in no such state of pleading in this actions or in the original actions against the personal representative as would have made the husband liable by reason of the stock taken in the organization by his wife.

Judgment affirmed.

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BERRY v. BRISLAN, &c.

(Filed June 7, 1887.)

Imprisonment for cost—Offenders against the penal by-laws and ordinances of a city may be imprisoned for the costs of a prosecution, as well as for the fine, where such imprisonment is authorized by the city charter.

W. H. Julian and H. S. Julian for appellant.

J. B. Lindsey and Wm. Cromwell for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was fined in the police court of the city of Frankfort $1 and costs on a charge of drunkenness and disorderly conduct. The costs amounted to $5.25.

Capias pro fine issued against the appellant for said fine and costs, and was placed in the hands of the appellee, Brislan, the marshal of the city of Frankfort, who arrested the appellant, by virtue of said capias, and delivered him to the keeper of the city workhouse, and the keeper of the workhouse confined him at labor until he discharged the fine and costs at the rate of fifty cents per day.

The appellant, after his arrest by appellee, tendered to him $1, the amount of the fine, and demanded his release. But the appellee refused to accept the $1 and release the appellant. After the appellant's release from service in the workhouse he sued the appellee on his official bond for false imprisonment. The petition and answer agreeing as to the foregoing facts the lower court dismissed the petition. The appellant has appealed to this court.

Section 2 of chapter 26, General Statutes, provides that "the laws of costs are not penal." And it is provided by section 287 of the Criminal Code that "if the punishment of an offense be a fine the judgment may direct that the defendant be imprisoned until the fine be paid, specifying, however, the extent of imprisonment, which shall not exceed one day for each $2 of the fine."

The provision of the statute supra has reference to the costs in Commonwealth cases, and declares that such costs are not penal. The provision of the Criminal Code supra has reference to fines imposed by the Commonwealth.

This court, in the case of the Commonwealth v. Wilson, 3 Ky. Law Rep., 777, construed the provision of the statute and Code supra as denying the right to imprison a defendant for costs on a capias pro fine which issued for a fine imposed by the Commonwealth. When we remember that the costs in Commonwealth cases are not by the statute a part of the penalty or fine, but are only incidental expenses incurred in the way of officers' and witnesses fees, the conclusion reached in the case supra could not be avoided. On the other hand, if the costs were by statute made a part of the penalty, no one would doubt that the defendant might be imprisoned for the nonpayment of the costs.

Sections 18 and 23 of the charter of the city of Frankfort, and the amendment thereto, provide in substance that the police court of the city may require all offenders against the by-laws and ordinances of the city, who fail to pay or replevy their fines and all fees and costs, to discharge the same by labor in the city workhouse, or on the streets, at the rate of fifty cents per day.

The ordinance of the city, which was passed in pursuance of

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the provisions of the charter and the amendment thereto, provides in substance that in case an offender against the by-laws and ordinances of the city should fail to immediately pay or replevy his fine and costs a capias pro fine shall be issued against him for the fine and costs, directed to the marshal of the city, who shall deliver such offender to the keeper of the city workhouse, and he shall safely keep such offender until he shall have discharged said fine and costs by labor in said workhouse, or on the streets and alleys of the city, at the rate of fifty cents per day.

So, by the city charter the costs incurred in prosecuting offenders against the penal by-laws and ordinances of the city is made a part of the punishment or penalty. And it is well settled that an offense against the by-laws and ordinances of a city and the State are quite distinguishable, and the prosecution at the suit of each proceeds upon different grounds. The one proceeds upon the ground of preserving the peace and good order of the city; the other proceeds upon the ground of preserving the peace, good order and dignity of the State. And the punishment for violating the peace and good order of the city may be different from that prescribed by the State for the punishment of the same acts. In other words, an act may be a penal offense under the laws of the State, and further penalties, under legislative authority, may be imposed for the commission of the same act by the city by-laws, and the enforcement of the one would not preclude the enforcement of the other. (Kemper v. Commonwealth, 8 Ky. Law Rep., 763.)

We conclude, therefore, that the provision of the General Statutes and the provision of the Criminal Code supra have reference to fines and penalties imposed under the laws of the State, and have no reference to fines and penalties imposed by cities, under authority of law, against those who offend against their by-laws and ordnances. And where the charter of cities, as in this case, authorize the confinement of offenders against their by-laws and ordinances until their fines and costs are discharged, by labor or otherwise, such by-laws and ordinances make the costs a part of the punishment or penalty, and are not in conflict with either provision of the statute or Code supra. And that such by-laws and ordinances are not in conflict with either the State or Federal Constitution is too plain for argument.

The judgment of the lower court is affirmed.

BATES v. BATES, &c.

(Filed June 9, 1887—Not to be reported.)

A voluntary fraudulent conveyance does not affect subsequent purchasers in good faith, even with actual notice.

J. assigned to his brother L. a bond for title to land, and L., pursuant to agreement, executed to H., as trustee for J.'s wife and children, a bond for title to the same land. A few years thereafter J. procured L. to execute to appellee, another brother, a bond for title to the same land. Appellee was placed in possession, and, without his right being questioned, retained the possession until several years after the death of J., which occurred more than twenty years after he was placed in possession, when the widow and children of J., their trustee having died, instituted this action to recover the land, claiming that appellee had held the land all these years merely as tenant.

Held—That all the circumstances show that appellee was a purchaser for a valuable consideration, and that the conveyance to H., as trustee, which

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was voluntary, was executed to prevent the creditors of J. from making their debts, therefore, although appellee had notice of that conveyance when he purchased, it is not good as against him. Moreover, the possession of appellee having ripened into a perfect title prior to the death of J., this action is barred by limitation.

John W. Rodman and Willoughby Rodman for appellant.

Geo. C. Drane and J. A. Donaldson for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Pryor.

Lewis Sanders held bonds for title to five hundred acres of land lying in the county of Gallatin. One of the bonds was executed to him in the year 1827 by Boulden J. Prentiss for for four hundred acres of the tract, and for the remaining one hundred acres he held the bond of Willis Roberts, dated in April, 1836. The land mentioned in the two bonds is the land in controversy. Lewis Sanders, by his title bond and by an assignment of the bonds on his vendors, sold this land in November, 1839, to Lewis B. Bates, who entered into the possession under his purchase, and so continued in possession until the year 1844, at which time he sold the land to his brother, John C. Bates, and assigned him the bond on Lewis Sanders, and also transferred and delivered to him the bonds of the vendors to Sanders. John C. Bates then entered into the possession as owner, and shortly after, desiring for some reason to have the title vested in his (John's) wife and children, surrendered to his brother, Lewis, the bond he held for title or the bonds assigned to him, and Lewis then executed to John C. Herndon, in trust for the benefit of his wife and children, a writing by which they were invested, or Herndon, as trustee for them, with the equitable title to the land. This writing is dated on the 30th of March, 1852, so at that date Herndon, as trustee, held the entire land for John's wife and children. John C. Bates continued in the possession, and neither Herndon nor the wife and children of John C. Bates ever took the control or the possession in fact of the land. It must be assumed, however, that John Bates held the possession for the purposes of the trust, and not adverse to their claim.

In December, 1854, John C. Bates, who had passed the entire equity to Herndon for the benefit of his (John's) family, sold the tract of land to his brother, T. W. Bates, and placed him in possession, and obtained from Lewis Bates, the brother who originally purchased of Sanders, an assignment of the Sanders' bond. The assignments, both to Herndon as trustee and to T. W. Bates by Lewis, were made on separate instruments, and not by endorsement on the bonds. The trustee, John C. Herndon, died in the year 1856, some four years after the execution of the trust.

John C. Bates died in the year 1876, twenty-four years after the creation of the trust, and about twenty-two years after the sale to his brother, T. W. Bates. So at John Bates' death his wife and children held Lewis Bates' bond for title executed to Herndon in 1852 for this land, and T. W. Bates held his (Lewis') bond for title, dated in December, 1855. John Bates, who had originally purchased from Lewis, made the sales, both to the trustee and to the appellee, Lewis, executing such writings as John required.

This action was instituted in the year 1882 in the Gallatin Circuit Court by the heirs at law of John C. Herndon, the trustee,

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and the widow and heirs of John C. Bates against T. W. Bates to recover the five hundred acres of land.

They allege that T. W. Bates is their tenant and refused to deliver the possession, and that if not tenant, he purchased from his brother, John C. Bates, with full notice of their equity, and should be compelled to surrender the land. The tenancy is denied, and the purchase and possession of T. W. Bates under it are further relied on by him as a defense to the action, further denying any notice of the sale to Herndon as trustee, and alleging or insisting that if a sale was made to the latter, it was voluntary, and for the purpose of defrauding his (John Bates') creditors, and, therefore, his rights as a bona fide purchaser can not be affected by the fraudulent transfer to Herndon.

Many interesting legal questions have been presented and discussed by counsel, that, although pertinent to the issue, will not require consideration, as we understand the facts of this record. It is manifest from the testimony that no possession of this land or any part of it was had by either the father of these beneficiaries or their trustee from the date of the sale to T. W. Bates in the year 1854 up to the death of John C. Bates in 1875 or in 1876. The farm at the date of the sale to T. W. Bates, although in bad repair, was worth from $600 to $800 rent for each year, and no claim for rent was asserted against him by either the trustee or his brother John, and so far as this proof demonstrates no benefit whatever was derived from the land by either John C. Bates or his family for the period of near twenty-two years, the time intervening between the sale by John to Theodore, and the death of John, that took place in the year 1875 or 1876.

The one brother and his family, from their own statements, were in a destitute condition, while the other, Theodore, was a thrifty, prosperous business man, and yet this record discloses the fact, if the theory of counsel for the appellant is to be adopted, that T. W. Bates, whose means were ample, was permitted to use and cultivate this farm for near twenty-two years without accounting to John or his family for rents, and no claim of ownership by John and his family or their trustee, or even a claim for rent asserted during this long period. The rent of the farm at that day would have been ample for the support and maintenance of John Bates' family, and to hold that T. W. Bates was the tenant of his brother, or trustee, during that period, with no obligation to pay rent, and none in fact paid, would be entirely inconsistent with the manner in which the ordinary business affairs of life are conducted, even between brothers.

It is claimed by the appellant that the appellee, T. W. Bates, entered upon this land as the tenant of John Bates in the year 1851, under a written lease, by the terms of which the appellee was to hold the possession of the land for five years, to indemnify him as the surety of John to Fellows & Co., of Louisville, for near $1,200. This lease was recorded in the Gallatin County Court clerk's office, and is certainly conclusive that it was executed by John Bates.

T. W. Bates denies that he ever knew of such a lease until this action was instituted in 1882, and claims that he had no control over the land in any manner from the year 1851 up to the date of the purchase made by him in 1854. While the testimony conduces to show that Claxon was the tenant of John Bates, and on the land from 1851 until 1854, it is doubtless true that this lease was executed with the knowledge of the appellee, and the lapse

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of time may account for his want of recollection with reference to business transactions had near thirty years prior to the time at which he was called to testify.

Discrepancies in statements made as to what transpired in the business affairs of life by those who were parties to the transaction after the lapse of more than a quarter of a century must necessarily exist, and conduce more to sustain the good faith as to the statements than to impress the mind with the belief that the witness is swearing at random.

It is plain, however, from the proof that T. W. Bates was not the tenant of his brother John from 1851 until 1854, and if he was the tenant and had purchased in 1854, we can not well see how this would affect his manner of holding. That John C. Bates did sell him the land is evident from the writings entered into between the brothers. The writing in 1854 is consistent with the lease of 1851. He may have entered as tenant and then become the owner by purchase, but, as before stated, the decided weight of the testimony shows that he never entered under the lease. Having considered the facts with reference to the conduct of John C. Bates and his family, their mode or means of living, and acquiescence in the possession by the appellee for so many years, as evidence of the want of title in them or their trustee, it is proper to notice the acts and conduct of the appellee, with reference to this land, in order to determine the manner of his holding.

The writing under which he entered in 1854 evidences the sale. He then took the actual possession of the farm through his tenant, Gullion, and has been in the continued possession from that day until this action was brought in the year 1882, a period of more than twenty-eight years. He listed the farm during the entire period as his property; paid the taxes upon it, and asserted and exercised the entire control of the premises. He erected upon the land several dwellings, dug two or three wells, built some six hundred rods of stone fence, cut and opened ditches to reclaim the wet land, ceased to cultivate the land, or much of it, from the date of his purchase, putting it in grass, and gradually improving the land from year to year. Its management was that of the careful and prudent owner, and not that of the tenant who, by cultivation, must obtain from the soil at least the amount of rent to be paid for the privilege of cultivating it. This conduct and claim of ownership, with the actual possession with the parties who are now claiming it, and those directly interested in them in the neighborhood of the land, without an assertion of title or right, at least during the life of John C. Bates, is conclusive of this case. The acts of all the parties repel the idea that the appellee was only a tenant and not a purchaser. Besides, those who lived near the land learned from John C. Bates that he had sold it to his brother, and in running the present short-line railroad through the land the damages were awarded the appellee, as the real owner, and not one word of complaint was heard as to his right to the money.

John C. Bates became insolvent as early as 1847. His creditors were attempting to make their debts by coercive measures. Executions were returned no property found, and his embarrassed condition and scarcity of means reduced his family to almost absolute want. There is some evidence of an improved pecuniary condition about the time this sale was made, and whether so or not the testimony of the appellee is that he paid the money, and in this statement he is sustained by Gullion. There is a discrepancy between the statements of the appellee and Gullion as to the amount paid at particular times, but this is not remarkable after the lapse of so many years. Their recollections must

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necessarily vary both as to dates and amounts, and the fact exists, undisputed by every one, that the appelle was able to pay for this land during the period he held it; and that his brother should have permitted him to hold it for twenty years and more without making payment, with his great need of money, is incredible and inconsistent with any rational view to be taken of the facts presented in this record.

It results, therefore, that the appellee either purchased the land without notice of the prior sale to the trustee, or that the trustee was invested with title to prevent the creditors of John C. Bates from making their debts, and that all the parties regarded the transfer as in nowise preventing him from making a sale of the land. The latter theory, it seems to us, is the proper solution of the questions involved, while the witnesses, who have been examined for the purpose of establishing notice on the part of the appellee, attempt to detail conversations with him that took place many years prior to their testifying. It may be assumed that the appellee knew of the transfer, but at the same time it is evident that the object in view was to hinder and delay the creditors of the vendor; and the appellee occupying the position of a purchaser for value, must hold as against the voluntary transfer made by the debtor to his wife and children without considertion.

The presumption against this gift must be conclusive, where there has been a sale for value and a possession under it for near twenty-eight years. The transfer to Herndon, the trustee, was for the use and benefit of Elizabeth M. Bates and her children, and whether this created a life estate in the wife, with remainder to the children, or created a joint estate, is immaterial. The bond was executed by Lewis Bates at the instance of John Bates, and John's bond for title surrendered to him.

After this, in 1855, Lewis, at the instance of John Bates, executed to the appellee a bond for title, transferring to him the Sanders bond that was then on file in a suit involving the purchase money due by Sanders, the appellee agreeing to take the same with all encumbrances in regard to the title without any recourse on Lewis Bates. The encumbrances indirectly referred to the lien existing, and not to the sale made by Lewis at the instance of his brother, to Herndon. The appellee agreed to pay John Bates the full value of the land, $10,000, and the presumption of payment must necessarily arise after such a long period; and when this presumption is aided by the testimony of the appellee, corroborated by two or more witnesses who testify to facts within their own knowledge as to the payment of the money, there is but little room for doubt on the subject. Although the bonds were executed in such instance by Lewis Bates, they were in fact sales made by John Bates. The right of the trustee, who was invested with the title to sue the appellee, who was in possession, existed for several years prior to the death of the trustee. The statute of limitation then began to run, and the possession by the appellee ripened into a perfect title prior to the death of John Bates, whether the sale was made by him or by his brother Lewis.

Without, however, waiving the right of the appellee upon the issue as to limitation, we are disposed to adjudge that all the parties, Lewis, John and the trustee, regarded the transfer to the trustee as inoperative, and this accounts for the sale to the appellee and an acquiescence in his claim and possession from 1854 until John's death in 1876, and even after that period, as this action was not brought until the year 1882. It is well settled that a voluntary fraudulent conveyance does not affect subsequent purchasers in good faith even with actual notice. (Mason v.

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Baker, 1 A. K. Mar., 208; Lewis v. Love's Heirs, 2 B. M., 345; Enders v. Williams, 1 Met., 346.) We might well affirm this judgment upon the want of notice, on the part of T. W. Bates, of the sale to Herndon, but as the testimony is conflicting we have assumed that he knew of that transfer, and that the object in view in making that transfer being well understood by the parties to it, no importance was attached to its legal effect when John undertook to sell to others.

It is certainly unreasonable to suppose that any one possessed of the most ordinary business capacity would enter upon, improve and care for such a farm as the one in controversy, for such a period as embraced the energy and enterprise of his manhood, without being the owner or otherwise interested than to hold at the mere sufferance of those who, at their will and pleasure, could demand the right to enjoy the fruits of his labor.

The judgment below is affirmed.

BERNHEIM BROTHERS & URI v. DAVITT.

(Filed June 11, 1887—Not to be reported.)

If a debtor insures his homestead and it is burned the insurance money, not exceeding $1,000, is exempt from the claims of creditors just as the homestead was exempt.

W. D. Greer for appellants.

Josiah Harris for appellee.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

The appellants, as creditors of the appellee, are attempting to subject the money collected on an insurance policy to the payment of their debt. The defense is that the insurance was on appellee's homestead, and that being exempt from execution the insurance money can not be reached by creditors.

The appellant insists that there is nothing in the homestead law exempting the insurance money from the debts of the owner, and the homestead being merely the privilege of occupancy, with no other right or title as against creditors when it ceases to be such, either by the destruction by fire or otherwise, and the money received in lieu of it, the proceeds, may be subjected.

This view is contrary to the decision of this court on the subject and also to the legislative intent. The debtor is entitled to something more than the mere right to occupy the homestead as against his creditors. If of less value than $1,000 he may sell and dispose of it; or if of greater value, he has the right to retain the proceeds that he may invest in another homestead. It is true that he may convert the homestead into other property not exempt from execution and the creditor can reach it, or he may so use the the money arising from the sale as to show an intention to abandon his right to invest it, but the facts of this record present no such state of case. The property, however, was of less value than $1,000, or if of greater value he obtained but a small sum from the insurance company, and the proceeds he is en-

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titled to as against his creditors to enable him to rebuild or to purchase him another home. There is no proof that he has rebuilt except a small building to be used as a storehouse, and this cost but a small sum of money. He has the right to rebuild, and to use the insurance money for that purpose. There is no reason why the debtor should not be allowed to insure his homestead. The creditor can not reach it, nor is it a fraud upon the creditor when the debtor uses his means for the purpose of effecting his insurance. (Houghton v. Lee, 50 Cal., 101; Thompson on Homestead Exemptions, 749, 750, 784.)

Judgment affirmed.

McDONALD v. COMMONWEALTH.

(Filed June 9, 1887.)

1. The burning of a church edifice is punishable by confinement in the penitentiary under section 3 of article 7, chapter 29, General Statutes.
2. Impeachment of defendant's character - Where the defendant in a criminal case is introduced as a witness for himself his general character for truth and veracity may be impeached as that of any other witness.

H. T. Kendall and Lewis & Fairleigh for appellant.

P. W. Hardin for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Chief Justice Pryor.

The apellant, McDonald, was tried and convicted in the Meade Circuit Court of the crime of housebreaking, it being alleged in the indictment that the accused willfully and unlawfully set fire to and burned the Cedar Grove Church, the property of and belonging to the Methodist Episcopal Church, South, etc., contrary to the form of the statute in such cases made and provided. The statute provides: "That if any person shall willfully and unlawfully burn a powder house, warehouse, storehouse, stable, barn or any house or place where wheat, corn or other grain, grass, fodder, hemp, cotton, wool, fruit, ice, hay or wheat is usually kept, or any other house whatever, or any stack, rick or shock of hay, fodder * * * or grain, or pile of lumber, planks, rails, posts, hoop poles, shingles," and other property specifically mentioned, "he shall be confined in the penitentiary not less than one nor more than six years." (General Statutes, chapter 27, article 7, section 3.)

The unlawful and willful burning of a church was not arson in the offender by the rule of the common law. He was liable to fine and imprisonment only under an indictment for malicious mischief, and it is, therefore, urged that the burning of a church building, not being specially mentioned, is not embraced by the statute. That after the enumeration of the various subjects of the offense, such as powder house, warehouse, barn, stable, structures, or place where grain, hemp and cotton are kept, the words or any other house whatever, such general words are restricted in meaning to buildings or objects of a like kind, and such is ordinarily the rule of construction in interpreting the meaning of a statute. The legislature, in the list of offenses enumerated by this statute, and for which punishment is inflicted, seems to have omitted churches, schoolhouses, etc., but evidently intended by the general language used to embrace all

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kinds of buildings, and while church edifices and schoolhouses should have been more prominent in the minds of the legislators and, therefore, specially mentioned, than a barn or stable or pile of lumber, at the same time it is unreasonable to suppose that the willful and unlawful burning of a stable or pile of lumber should be made an offense, the punishment of which is confinement in the State prison at hard labor, while the burning of a house of public worship is only to be considered a misdemeanor, and the offender punished only by fine and imprisonment in the county jail.

This court, in the case of Wallace v. Young, 5 Monroe, 155, held, under a similar statute, that the burning of a schoolhouse was embraced by the words, or any other house whatever. The construction, as there said, should be as broad as the words naturally import. The legislative intention must control, and where there is no provision of the statute punishing the burning of church property as a distinct offense, the words or any other house whatever should be held to embrace a church building, and the law-making power evidently intended, in using such comprehensive language, to make it apply to all houses, the destruction of which is not made the subject of punishment by several other statutes. The demurrer to the indictment was, therefore, properly overruled.

The appellant offered himself as a witness, and being examined, his general character for truth and veracity was impeached by the State. The undoubted and general rule in criminal practice is that the State can not place the character of the accused in issue unless the latter shall have first attempted to establish his character by proof. This rule is founded in sound policy, and prevents the conviction of those charged with crime from being punished because of their bad character rather than on the testimony adduced as to their guilt of the particular offense charged; nor has this rule been repealed, expressly or by implication, by reason of the statute permitting the accused to testify in his own behalf.

When he comes before the jury as a witness, although charged with the offense, he subjects himself to that character of examination that can be made of any other witness, and his inclination to tell the truth or to swear falsely may be shown by the Commonwealth in the usual modes of impeaching the general character of a witness for truth and veracity. In this case the examination as to the character of the witness (who was the accused) was confined to his general character for truth, and we see no reason for placing this witness in such a position before the jury as could preclude all investigation by the State on the subject. The object of the jury is to arrive at the truth or falsity of the statement made. If the accused, by reason of his bad character for truth, is not to be believed on oath, the jury ought to know, and the privilege given the accused to testify will not shield his character from such an investigation. Wharton in his work on Criminal Evidence, page 435, says that his character for truth and veracity may be impeached, in fact his credit like that of all witnesses is for the jury.

In the case of the Commonwealth v. Kiernan, 97 Mass., 589, where the accused could testify by reason of the statute, it was held that by availing himself of the privilege he subjected himself to the liabilities incident to that position. The statute does not exempt him from cross-examination as a witness, or his impeachment.

In the case of Connors v. The State of New York, 5 New York, 240, where the accused appeared himself as a witness and was ex-

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amined, it was held that he thereby subjected himself to the same rules and tests applicable to other witnesses.

In this case the instructions given the jury embraced the whole law of the case, and are unobjectionable. No incompetent testimony was admitted, or any error to the prejudice of the accused in impeaching his character for truth. The question was as to the veracity of the witness. The inquiry in the examination made by the attorney for the Commonwealth was directed to that particular point; those where his character was known seemed to think he was not worthy of credit, their opinions based upon what was said about him in that regard by his neighbors.

Judgment below is affirmed.

HEWITT, AUDITOR, &c. v. CRAIG.

RODMAN'S EX'TX v. CRAIG.

(Filed June 11, 1887.)

1. Arbitration and award—An act directed by law to be done by three or more persons may be done by a majority of them concurring, unless by express words or by implication a contrary intention appears.

Matters in dispute between appellee and the State, growing out of business transactions, were, by a special act of the legislature, referred to three commissioners for settlement, the act providing that if their settlement, a majority of them concurring therein, showed that the State was indebted to appellee, it should be certified by the members concurring therien to the auditor, as their award, and that the auditor should draw his warrant on the treasury of the State for the amount thereof. The arbitration was made by only two of the commissioners appointed, the third commissioner declining to participate in the arbitration. Held—That the award was valid, although only two of the commissioners participated in the arbitrat on.

2. Constitutional law—The act was not, in the constitutional sense, an appropriation of money or the creation of a debt, and, therefore, was valid although not passed by a majority of the members of the legislature, and although the ayes and noes were not entered in the journal.

3. The award of the commission is final as to the matters within the scope of their authority.

4. In a proceeding for a mandamus to compel the auditor to draw his warrant on the treasury of the State the court can not permit a third person to come in and litigate his claim with the plaintiff upon the ground that he has a lien upon the debt which the State owes the plaintiff.

P. W. Hardin, J. W. Rodman and D. W. Lindsey for appellants.

O'Neal and Jackson & Phelps for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

The legislature of this State, at its last session, passed an act for the benefit of the appellee. The preamble to the act sets out in substance that certain settlements had been made, and suits determined between the State and the appellee, growing out of the claims of the latter as agent of the State and keeper of the penitentiary; and that in said settlements, which were made through commissioners appointed by the State, certain mistakes were alleged by the appellee to have been made against him, in giving the State improper credits, and in failing to allow him certain claims to which he was entitled. And in order to make a final adjustment of said matters upon principles of equity and

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justice, it was enacted that a commission be appointed, consisting of three persons—one to be named by the governor of the State, one by the appellee, and the third by the two thus named —who were authorized and empowered to take into consideration all of the reports of former commissioners, and the late report of governor, and all other documents connected with said matter, and make a full and final settlement of the same according to the evidence and equity of the case. And if their settlement, a majorty of them concurring therein, showed that the appellee was entitled to any further compensation from the State, the same was to be assigned by them, or by a majority of the members concurring therein, as their award which they were to certify to the auditor of the State, who was directed to draw his warrant on the treasury of the State in favor of the appellee for the amount of the award.

Three commissioners were appointed, as directed by the act. They all accepted the appointment.

The arbitration of said matters was made by only two of said commissioners, the third one declining to participate in the arbitration. The two commissioners awarded to the appellee the sum of $3,847.83, with interest thereon from January 1, 1856, until the 1st of December, 1886. The award was signed by them and certified to the auditor. He refused to draw his warrant on the treasury for the amount, and the appellee entered this action against him in the Franklin Circuit Court, praying for a mandamus. The mandamus was granted, and the auditor has appealed to this court.

The appellant contends, first, that the act supra required all three of the commissioners to participate in the arbitration; and then any two of them might agree in making an award; but as only two of the commissioners participated in the arbitration, the whole proceeding was void.

Secton 3, chapter 21 of the General Statutes, on "Construction of Statutes," provides that "words purporting to give authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons."

And section 679 of the Civil Code provides that "an authority conferred by law upon three or more persons may be exercised by a majority of them concurring; and an act directed by law to be done by three or more persons may be done by a majority of them concurring."

The legislative rule of construction, adopted in the General Statutes, was several years thereafter incorporated in the Civil Code. And we see no reason why the same rule of construction should not be applied to any subsequent legislative act, though of a special nature, which confers authority upon three or more persons to do certain things, unless the language of the act by express words or by clear implication, or the nature of the authority given, shows a contrary intention. And we are of the opinion that neither the language of the act under consideration, nor the nature of the services to be performed by the commissioners, shows an intention on the part of the legislature to require all three of the commissioners to participate in the arbitration preparatory to the right of any two of them to make a valid award. In aid of this construction is the case of Green v. Miller, 6 Johnsons' Reports, 29, where the arbitrament was confided to four persons, and the award was to be made and delivered in writing, under the hands and seals of the four, or any three of them; and only three of them participated in the arbitration, and made the award in writing, the fourth declining to act. It was contended that as the arbitrative authority was given to all

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four, and not to the three, the arbitration by a less number than the four was void, and the words authorizing any three of them to make and sign the award did not alter the authority. But it was held that, although the words at the first were to the four jointly, yet by the subsequent provision the authority was disjoined, so as to make the submission to the four, or any three of them; that the subsequent provision was not a distinctive provision, but explanatory of the intention of the parties.

In the case of Crofoot v. Allen, 2 Wend., 496, the same principle is announced. And many cases might be quoted to the same effect.

The fact is alleged in the answer and not denied that the act was not passed by a majority of the members then elected. The second contention, therefore, is that the act is in contravention of section 40 of article 2 of the State Constitution, which declares that the General Assembly shall have no power to pass any act or resolution for the appropriation of any money, or the creation of any debt, exceeding the sum of $100, at any one time, unless the same, on its final passage, shall be voted for by a majority of all the members then elected to each branch of the general assembly, and the ayes and nays thereon entered on the journal.

The act under consideration is not in the constitutional sense an appropriation of money, or the creation of a debt, because the matters which were submitted to arbitration by the act grew out of business transactions that the State had with the appellee many years before, which transactions were doubtless authorized by law, and out of which differences sprang in repeated attempts to settle. So the act did not attempt to make an appropriation or to create a debt, but to adjust and settle, by arbitration, any legal or equitable liability that the State was under, growing out of these business transactions with the appellee, which had been authorized by law. And if the arbitrators found that the State was legally or equitably indebted to the appellee, growing out of these transactions, they were to certify the same to the auditor, who was to draw his warrant on the treasury for the amount, not in payment of an appropriation or debt created by the act, but in payment of a liability previously created by law, the amount of which was definitely ascertained by the arbitrators, therefore, we conclude that the act is constitutional.

The appellee, by his answer, attempted to reopen and litigate the matters of difference between the State and the appellee, which the commissioners were authorized to settle, and did settle. This the appellee could not do, for the reason that the commission was constituted a court of arbitration and award, with power to make a full, complete and final settlement between the State and the appellee, and the award was to be a final judgment, irrevocably binding the State and the appellee. And the award was res adjudicata as to all matters falling within the scope of the authority of the commission; and these matters could no be relitigated in any other court.

The appellant, H. V. Rodman, as the executrix of John Rodman, deceased, sought by her petition and amended petition to be made a party to the action in the court below, for the purpose of asserting a claim of $2,000 against the appellee, which she alleged the appellee owed her intestate as an attorney's fee for services rendered in aiding the appellee, before legislative committees, etc., to get the act under consideration passed, as well as preceding acts looking to the same end, and for other services appertaining to the appellee's claim. She also asserted an attorney's lien on the sum awarded to the appellee. She also sought

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to have the court to direct the auditor to issue his warrant to her for said sum. The court dismissed her petition and amended petition without prejudice. She has appealed to this court.

A mandamus porceeding, as defined by section 477 of the Civil Code, "is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law."

The appellee by his petition was not seeking to recover judgment for any money or property. His right to the money was not legally involved; that matter had already been adjudicated, and his right established by a competent tribunal. He was merely asking the aid of the court to compel a ministerial officer to perform an act enjoined by law. The duty of that officer was to issue the warrant directly to the appellee, and the court's jurisdiction was limited to directing the officer to issue the warrant to the appellee without any conditions or qualifications whatever. And for the court to permit a third party to come in and litigate his claim with the appellee upon the ground that he had some sort of a lien upon the debt, which the State owed the appellee, would open up a system of practice inconsistent with this character of proceedings.

Suppose the appellee had recovered a common law judgment in a circuit court against an individual, and upon the refusal of the clerk to issue execution upon the judgment he had sought the aid of the court to compel the clerk to issue the execution, would it be contended that his attorney could interplead and litigate and establish his right to his fee, and have the same endorsed on the execution for his benefit? Surely not. The cases are similar.

The judgment of the lower court as to both cases is affirmed.

TRABUE v. REYNOLDS.

(Filed April 23, 1887—Not to be reported.)

Action not premature—Appellant being entitled to an interest in a trust fund held by his father, transferred that interest to the extent of $3,000 to appellee for a tract of land, appellee delivering to appellant the possession of the land. It was agreed that if the interest of appellant in the trust fund did not amount to $3,000, then, and in that event, appellant bound himself to make up the deficit, or whatever it may lack, of being $3,000. In an action by appellee against the trustee to recover the interest therein assigned him by appellant it was adjudged that the trustee had a life estate in the fund, and that no part of it could be recovered until his death. It was also clearly ascertained that appellant's interest in the fund was only about $1,300, leaving a deficit of $1,700. Appellee having retained a lien on the land for any deficit there might be, instituted this action to enforce that lien. Appellant insists that the deficit is not payable until the death of the life tenant, and that it can not be ascertained until that event. Held—That the deficit having been clearly ascertained, there is no reason why its recovery should be postponed.

J. B. Leslie and H. B. Trabue for appellant.

W. P. D. Bush and T. M. Dickey for appellee.

Appeal from Barren Circuit Court.

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Opinion of the court by Chief Justice Pryor.

H. B. Trabue, being entitled to an interest in a trust fund held by his father, B. F. Trabue, transferred that interest to the extent of $3,000 to the appellee, Reynolds, for a tract of 155 acres of land in the county of Barren, the crop on the farm, farming utensils, mules, horses, etc., Reynolds delivering to Trabue the possession.

It was further agreed that if the interest of H. B. Trabue in the trust fund did not amount to $3,000, then, and in that event, H. B. Trabue bound himself to make up the deficit, or whatever it may lack of being $3,000.

The parties subsequently agreed that if the appellee, Reynolds, failed to get the money from the trustee he was to charge the appellant no interest, but reserved the right to make the trustee liable for the interest as well as the principal.

After the appellant obtained the possession of the land, and the contract had been fully performed by the appellee, the latter instituted an action in equity against the trustee for the recovery of the trust fund assigned him and the interest.

The trustee, who was the father of the appellant, claimed in that action that he was entitled to a life estate in the fund, and that neither his son nor his assignee could recover any part of it until the termination of his life estate.

The trust was created by the will of G. W. Trabue, the grandfather of the appellant, and in the litigation between Reynolds and the trustee for the recovery of the fund it was adjudged by this court that appellant's father (the trustee) had a life estate in the fund, and was entitled to the interest so long as he lived.

In that action it was clearly shown that the interest of H. B. Trabue in the fund was much less than $3,000, and that there was a deficit of about $1,700. The appellee having retained a lien on the land to secure the deficit, brought the present action to enforce that lien, and obtained a judgment directing a sale of the land to pay it. From that judgment H. B. Trabue appeals, insisting that the deficit is not payable until the death of his father, the life tenant, and that the deficit can not be ascertained until that event happens. The fact of the deficit, or the extent of appellant's interest in the trust fund, had been clearly established in the first action by Reynolds against the trustee, and that fact is not controverted in the present proceeding. The amount of the trust fund payable to the appellant, and assigned by him to Reynolds, Reynolds is compelled to accept by the terms of his contract, and can obtain no interest thereon from the trustee, as the latter has a life estate in it, and is entitled to the income, nor can he recover interest from the appellant because, by his contract, he has agreed not to look to the appellant for interest, but as to the deficit we see no reason why the appellee is not entitled to recover the amount, with interest from the date of the judgment. The deficit has been ascertained, and by an express provision of the agreement that deficit was to be made good by the appellant. It is argued that the deficit can only appear when the life estate of the trustee ends. The trust fund itself, to the extent of $3,000, was transferred, and when the appellee seeks to recover it he finds a deficit of $1,700. If the trust fund had amounted to $3,000 the appellee would have been required to take it, although it was encumbered with a life estate, and could have charged no interest because such was the agreement, but, on the other hand, if there was not that much of the fund belonging to

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apellant, he, the appellant, agreed to pay whatever was lacking. There was no agreement that appellee was to wait until the termination of the life estate before he could enforce his lien for the deficit, if any. In fact it plainly appears that both of the contracting parties supposed the appellant was entitled at once to the fund, and the trustee had already paid to the appellant, before the transfer to Reynolds, $500 of the trust money. The construction of the will of the grandfather, however, showed that the payment of the money was postponed until the death of the trustee, and that left the land, crops, mules, horses, etc., that appellant had obtained from the appellee, in the appellant's possession, for which the transfer of the fund was only a fair equivalent, and the appellee compelled, as is insisted, to wait for the deficit until the death of the trustee, who was then only fifty-four years of age.

Such we think is not a just or proper construction of the agreement. If the trust fund had been ample to pay for the land, the appellee could have looked to that alone, because he had bound himself to do so, but as it was not sufficient when the deficit was ascertained the right to enforce the lien existed.

The judgment of the court below is, therefore, affirmed. The question of fraud was litigated and determined in the first action.

Judge Lewis not sitting.

KENTUCKY SUPERIOR COURT.

CURD & HALEFIELD v. RIDGWAY.

(Filed June 15, 1887.)

In partnership, where labor is contributed on one side and money on the other, if the partner from whom the money comes contributes only the use of it and still keeps his property in the principal so that the joint stock is to be considered as made up of the labor of one partner and the use of the other's money, and the money is lost, the partner who was to contribute only his labor can not be obliged to make good any part of the loss. But if the partner from whom the money comes contributes the property of his money, then the partner who labors has a claim upon the principal money itself, and if the principal is lost he must share the loss.

Appellants and appellee, with a view to profit to be shared between them, agreed to purchase $2,300 worth of bacon in St. Louis and sell the same in Mayfield, Ky. The capital was furnished by appellee, and appellants did the buying and selling. A loss of $991 having been sustained in the adventure appellee seeks to recover of appellants one-half that amount.

Held—That all the circumstances show that the parties intended to be, and were, partners in the money advanced by appellee, and consequently the losses as well as the profits were intended to be shared.

D. G. Parks for appellants.

Robertson Smith & Robbins for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barbour.

This controversy grows out of a verbal agreement between the appellee and appellants, under which they, with a view to profit

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to be shared between them, agreed to purchase $2,300 worth of bacon in St. Louis and sell the same in Mayfield, Ky.

In pursuance of the agreement the capital for the adventure was furnished by the appellee, and the appellants did the buying and selling. On account of the decline in bacon a loss of $991.95 was sustained in the adventure, half of which the appellee claims the appellants are responsible to him for.

At the outset the parties differ as to the extent of the agreement.

The appellee contends that, by the terms of the agreement, after the bacon was sold and expenses paid and he paid the amount advanced, they were to share the profits equally—he to receive half and the appellants half. If, on the other hand, the adventure resulted in loss, they were to share the loss in the same proportion. The appellants insist that, by the agreement, they were to have half the profits of the adventure, if any, but were not to be responsible for the loss of the money advanced by the appellee. As the agreement was verbal and there was no witnesses to it, and the parties conflict in their testimony upon the material point, we will endeavor to arrive at their intention by considering their conduct in regard to the subject-matter of the contract, and their admissions, as proved by the various witnesses. But first as to the law of the case. If the agreement was that the appellee should advance the money as his part of the capital, and the appellants were to render their services and experience in the buying and selling as their part of the capital, nothing else appearing, in the event of a loss each would lose of his own capital—the appellee his money and the appellants their labor—and the one would not be responsible to the other.

But if, under the agreement, the parties embarked in the adventure with a capital of $2,300, which the appellee advanced to the firm, and the appellants were to do the buying and selling, it would seem that the appellants as well as the appellee have a claim to the principal money, and the firm would, therefore, be in debt to the appellee therefor, and in the event of the loss of the money—the capital—the loss would fall equally upon the appellee and the appellants. Mr. Rutherford, in his Institutes, thus clearly states the rule: "In partnership, where work is contributed on one side and money on the other, the partner from whom the money comes may contribute either the use only of the money, or the property of it. If he contributes only the use of it, and still keeps his property in the principal, so that the joint stock is to be considered as made up of the labor of one partner, and of the use of the other's money, it is plain that, supposing the principal to be safe, it belongs to him, and that, supposing it to be lost, he alone is to bear the loss. The other partner, who contributes work, since, as the case is put, he had no claim to the principal money, or to any part of it, can not be obliged to make good any part of the loss, or to bear any share in it. But if he contributes the property of his money, so that the joint stock, upon which each of them has a common claim, is made up of his principal money, and of the other's labor, then the partner who labors has a claim upon the principal money itself; and consequently whenever the partnership is dissolved, if the principal money or any part of it is safe, he ought to have a share in it; and if the principal is lost he is a sufferer by losing such share."

In the case of Heran v. Hall, 1 Ben Mon., 159, Heran sued Hall for half the loss of capital advanced by the former for corn, bought by the latter and shipped under a contract between them, stipulating that Heran should furnish the (money) capital, and Hall should purchase and ship the corn, and that the profit of

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the adventure should be equally divided between them. The court in that case, after saying that they were not perfectly satisfied that the parties did not intend to be partners in the capital, the corn, and the losses as well as the profits, but were inclined to sustain the chancellor's deduction, from the evidence that Hall was not a joint owner of the corn, nor liable for any portion of the loss of the capital, said: "It is a general rule, applicable especially to such a singular adventure as these parties engaged in, that where the capital of one party is money, and that of the other is labor or other personal service, they are not partners inter se in the technical sense merely, because they had a mutual interest in the profits, and that nothing else appearing, even considering them partners in the stock, he whose capital was labor would not be liable to him whose capital was money for contribution for any loss of capital in the adventure, for in such a case each will have sustained a correspondent loss of his capital, and neither of them would, therefore, be liable to the other for contribution."

These authorities are cited by counsel for the appellant in his able brief, in which it is insisted that they are conclusive of this case for his client. We can not think so.

They fix the relative rights of the parties under agreements, where the contract is silent, as to the sharing of losses. But persons entering into an adventure of the kind the parties to this action engaged in can, provided it is not unlawful, make any agreement between themselves they may choose in regard to the profits or losses. And after a careful consideration of all the evidence we are of the opinion that there was an express agreement to share the losses as well as the profits. But even in the absence of such agreement upon the law, as laid down in the authorities cited, we are of opinion that the conduct of the parties, in connection with the adventure, is such as to show that they intended to be, and were, partners in the capital (the money), and consequently the losses as well as the profits were intended to be shared between them.

The appellee was a banker; he was to borrow the money in his own name, but the appellants were to be charged with no part of the interest. The appellants were grocerymen; their business was not so large that it would suffer on account of the labor they would bestow in selling the bacon. Their business house was roomy, and it would be no inconvenience to store the bacon in it. The handling of bacon was in their line of business, and the handling of the bacon in question would be calculated to be of advantage to their business. Appellee approached them several times before they would consent to join with him in the purchase; their hesitancy was produced, it would seem, by the fear of some greater loss than the mere loss of their labor. If appellants were not to be interested in the money—if it was not the capital of the firm—why require appellee to agree not to charge interest?

Appellants consulted daily the papers as to the market quotations of bacon. They were anxious to sell before the great decline, but appellee advised the holding of the bacon until later in the season. After the decline had reached such a point that they could not expect to sell for profit, appellants incurred the expense of going to Memphis in their efforts to sell, when they were under no obligation to do so, as they say the bacon was bought for the home market.

Appellee urged upon the appellants that they allow Ezell to take the bacon South and sell it there; the appellants would not consent, saying that they could sell it themselves; all this occurred after the decline. Halefield said to Mr. Hall that he was

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anxious to see bacon advance, as he was limited in money and not able to bear a loss; and to several others he said that if the decline continued it would ruin him. These circumstances tend strongly to corroborate appellee's version of the contract and Stanfield's statement that Halefield told him, shortly after the contract was made, that he and Curd had agreed with appellee to enter into a co-partnership to buy a car load of bacon, and that apppellee was to furnish the money, and they (appellants) were to buy the bacon and store it in their store until the summer or fall, when they were to sell it, and after paying all expenses were to pay appellee back his money, and that they were to be equal partners with him in the profits and losses.

Counsel for appellee insists that the judgment below was prejudicial to him in that it allowed the appellants $100 for storage expenses, etc. We have examined the record and fail to find any order granting the appellee a cross appeal, and we can not, therefore, consider his objection.

The judgment is affirmed, with damages.

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SUPERIOR COURT ABSTRACTS.

WOODS, TRUSTEE v. JONES & BRO.

Filed May 25, 1887. Appeal from Hart Circuit Court. Opinion of the court by Judge Ward, reversing.

Exemptions—Pleading—Debtors made an assignment of all their property for the benefit of their creditors, reserving the property which was by law exempt from execution for debt. Having none of the property specifically exempt by the statute, they instituted this suit against the assignee to compel him to pay over to them in money the value of specific property, as provided by an act approved April 22, 1884. That act did not apply as against any debt contracted prior to June 1, 1884, and prior to that act the substitution of one kind of property for another, such as is sought in this case, was not allowed. The plaintiffs allege that the debts against which the exemptions are claimed were contracted since the 22d day of April, 1884. Held—That this allegation must be construed against the pleader, and be taken to mean that the debts were contracted prior to June 1, 1884. The exemptions can not, therefore, be allowed, but the plaintiffs should be allowed to amend their petition if they desire to do so.

H. C. Martin for appellant; Lewis McQuown for appellees.

JOHNSON, &c. v. THOMAS.

Filed May 25, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Descent and distribution—Appellee as executor made a settlement with the county court, in which, after being charged with a note on J., one of the devisees, as part of the assets, he was credited by the same note as insolvent and uncollectible. By the settlement the executor fell in debt to the estate in a large amount. J. having assigned his interest in the estate, he and his assignee brought this action against the executor to recover J.'s interest. For defense the executor set up the note of J. to his testator, which, after crediting J. by his share of the estate, would still leave him in debt to the estate. J. and his assignee replied that in the executor's settlement, which was full and final, he had been credited by the note against J., and had upon the basis of that settlement paid off the other devisees, retaining enough to pay off the claim of J.; that the other devisees agreed that the distribution might be made on this basis, and that the note against J. might not be collected. A demurrer to the reply was sustained and the petition dismissed. Held—That the judgment was proper. The effect of the executor's settlement was to exclude J. from any part of the estate, leaving the amount for distribution to be divided among the remaining devisees. It can not be inferred from the reply that the other devisees had agreed to relinquish any part of their shares in the estate and give to J. any interest with them in the fund for distribution.

2. Same—The executor's liability does not terminate because he has made a settlement, in which he charges himself with all the assets, and, after taking credit by disbursements, falls in debt to the estate a stated sum, which is in his hands for distribution. As executor, and upon his official bond, he is liable until the full sum is properly distributed.

E. E. Settle for appellants; Montgomery, Lindsay & Botts for appellee.

MESSER v. ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO.

Filed May 25, 1887. Appeal from Carter Circuit Court. Opinion of the court by Judge Barbour, reversing.

Railroads—Killing of stock—While in an action against a railroad com-

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pany for the killing of stock the uncontradicted or unimpeached testimony of the employes of the company, showing that there was no negligence, rebuts the statutory presumption, it can not be said that the defendant has shown that there was no negligence when it fails to prove many of the material facts and circumstances attending the injury or killing of the stock, peculiarly within the knowledge of its employes, and from which the jury might be able to draw a conclusion as to whether the injury or killing was the result of negligence or was unavoidable, such, for instance, as the rate of speed at which the train was running, the speed at which the stock was going as compared with that of the train, etc.

In this case the court is of opinion that, upon the whole evidence, the question should have been submitted to the jury as to whether or not the defendant was negligent.

W. H. Julian, J. D. Jones and Wm. Bowling for appellant; Breckinridge & Shelby for appellee.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO. v. JACKSON.

Filed May 25, 1887. Appeal from Boyd Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Roads—The owner of land abutting on a county road has no interest in the highway that can prevent the county court from discontinuing the road and restoring full control to the owner of the soil.

Breckinridge & Shelby for appellant; R. C. Burns for appellee.

MYERS v. GRIFFIN.

Filed May 25, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Bowden, affirming.

Liens—Pledge—Possession of a mill and lumber having been delivered by the owner to a creditor, with the intention of giving him a lien, the pledge was complete without a writing, the possession of the pledgee being notice of his right, and the fact that a mortgage was subsequently executed to him to secure the same debt can not be regarded as depriving him of the lien acquired by his possession.

Bacon & Stites and F. P. Straus for appellant; J. W. Crean for appellee.

SCHNEIDER, ADM'R v. HESSE, &c.

Filed May 25, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Bowden, affirming as delay case.

1. Husband and wife—The fact that a married woman can not trade for her own benefit is no reason why her separate property should be taken for her husband's debt, it not appearing that any part of the property consists of profits

2. An administrator, plaintiff in an execution, is personally liable for procuring the sale of the property of another than the execution defendant.

Kohn & Barker for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. COLEMAN'S ADM'R.

Filed May 25, 1887. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

Railroads—Duty to trespassers—The only duty which those in charge of a railroad train owe to a trespasser on the track in front of the train is to use such means, after they discover his peril, as they, as reasonably prudent men, have a right to believe will be sufficient to prevent the injury. They are not obliged to stop the train, but may use such other means at their command as they believe, and as reasonably prudent men have a right to believe, will be sufficient for the protection of the trespasser.

The conductor in charge of a detached flat car in motion on a side track, seeing a man enter upon the track in front of the car and continue to walk upon the ends of the ties, instead of applying the brake, ran to the other end of the car and called to the man in a loud voice to get out of the way,

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but the man failing to obey the warning was struck and killed before the conductor could get back to the brake and stop the car.

Held—That the conductor, when he saw the decedent step off the side track in front of the moving car, had the right to presume that he would step to a place of safety, and the company can not be held liable unless, after the conductor saw that the man was not going to leave the track, he intentionally or wantonly failed to use means as he, as a reasonably prudent man, had the right to believe would be sufficient to prevent the injury.

Mitchell & DuBose, H. W. Bruce and William Lindsay for appellant; P. F. Edwards and Wright & McElroy for appellee.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO. v. WALTON.

Filed June 1, 1887. Appeal from Boyd Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Use of streets and alleys—The right reserved to the proprietors in the orignal plat of a town to grant the right of way over any of the streets of the town to any railroad company was simply a general proposition or offer to any railroad company, which might in the future desire to pass through the city, that the right of way would be given it. It was a right that could be revoked at any time before the railroad company had accepted and entered upon the right of way.

2. Same—The right of the authorities of a city, with legislative warrant, to permit the construction and operation through its streets of railroads is limited only to the extent that the appropriation must not be incompatible with the ends for which the street was established. It must not deprive the persons living on the street of its reasonable use as a passway for foot passengers, horsemen and the vehicles in ordinary and general use. The right to such use is a right of which the owners of the contiguous property can not be deprived without compensation.

3. Same—In this action by appellee to recover of appellant damages alleged to have been caused to his property by the construction and operation of appellant's road over an alley upon which his property abuts, the jury were properly instructed that in fixing the damages they should ascertain what the value of the property was just before it become generally known that the appellant's road was to be located in front of it, and then determine what proportion of that value was taken from his property by the obstruction of the street by appellant's road.

4. Same—An instruction telling the jury that the owners of lots have an interest in the streets appurtenant thereto, and that such right is as much their property as the lots themselves, was abstract, but could not have misled the jury in this case.

5. Same—Appellee's petition states that his lot was situated on Railroad alley, and that he had for many years before the obstructions made by appellant used such alleys as an easement for ingress to his place of business, etc. Held—That from such allegations it should be presumed that the alley was one of the ways of the city dedicated to public use.

Breckinridge & Shelby, L. T. Moore and E. D. Warfield for appellant; W. C. Ireland for appellee.

LOUISVILLE & NASHVILLE R R. CO. v. RIDENOR.

Filed June 1, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Failure to make crossings as agreed—In this action by appellee to recover of appellant damages for its failure to make crossings and cattle guards as agreed, the petition was defective in failing to allege that the plaintiff had selected the place and requested the defendant to build the crossings, but the defect was cured by the answer, which alleged that the defendant had never selected a place for his crossings, and had never requested the defendant to make the same.

2. Same—The fact that appellee made a crossing himself, which he used a

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short time, and which the company tore up, was sufficient notice to the company of his selection of a place and desire for a crossing.

3. Same—As the answer makes an issue as to whether the plainitff ever selected a place, and requested the defendant to make the crossing, the court erred in instructing the jury peremptorily to find for the plaintiff such damages as he sustained on account of the inconvenience, etc., growing out of defendant's failure to make the crossing.

4. Same—As the plaintiff does not charge in his petition any loss or damage to his crop at any time, but merely alleges that his crops were exposed, and he was put to great trouble and expense in making additional fences to protect them, the damages are measured by the cost of the additional fences which he made, and which were necessary to protect his crop, and it was error in the court to instruct the jury that, in estimating the damages, they should take into consideration the value of the crop lost.

5. Evidence—Testimony to the effect that the cattle guards built for appellee were like those built for other persons was incompetent.

Wm. Lindsay for appellant; J. R. Sampson for appellee.

SHELBYVILLE & EMINENCE T. P. R. CO. v. COMMONWEALTH.

Filed June 1, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Failure to keep turnpike in repair—Appellant's charter provides that, upon the road being found by two justices of the peace to have been out of repair for the space of ten days, they may order that no toll shall be collected over the part of the road so out of repair until it is repaired.

Held—That it was not intended by this provision to exempt appellant from the punishment imposed by the General Statutes upon a turnpike company which permits its road to become and remain unfit for public travel for four days.

2. Indictment—All participants in a misdemeanor are severally liable, the same as if each had committed the offense alone, and all or any number of them may be charged together in one count of one indictment, or each may be indicted separately at the election of the Commonwealth.

3. Same—As surplusage does not vitiate an indictment, a charge of guilt upon a defendant not in fact guilty does not render the indictment ill as to a guilty defendant.

4. Same—Several turnpike companies being jointly indicted for failing to keep a bridge in repair, the court could not assume that the several companies could not have a joint ownership or know judicially that the route of any one of the companies did not go over the bridge.

5. Failure to keep bridge in repair—Whether the turnpike companies acquired the right to the control and use of the bridge by a valid contract or not, if they assumed to own or control the bridge they were as much bound to keep it in repair as if they had acquired the ownership by a valid contract.

6. Same—The fact that persons paying toll on appellant's road were accustomed to crossing over and using a bridge on another road, which was out of repair, did not render appellant liable under the statute for charging toll on its road when it was unfit for travel.

Bullock & Beckham for appellant; P. W. Hardin for appellee.

FALLEN v. MONTEREY AND CEDAR CREEK T. P. R. CO.

Filed June 1, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Ward. affirming.

New trial—Time—In computing the time within which a motion for new trial must be made, both the day on which the verdict or decision is rendered and the day on which the motion is made must be counted.

Thomas R. Gordon for appellant; T. J. Hardin for appellee.

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KENTUCKY COURT OF APPEALS.

McHARRY v. IRVINE'S EX'OR, &c.

(Filed March 8, 1887.)

1. Contracts between principal and agent should be jealously scrutinized, and slight circumstances of inequality, surprise and hardship may be sufficient to vacate them, even sometimes without proof of fraud.
2. Inadequacy of consideration is not of itself generally sufficient to avoid an executed conveyance, though it should always induce close scrutiny of the circumstances attending the transaction.
3. Where a family agreement or compromise is entered into in ignorance by one party of material facts which it is the duty of the other side to disclose, it will be set aside at the instance of the party who entered into it in ignorance of the facts.

In this case conveyances from a widow to her son in-law, who, as her agent, had charge of the entire estate of her deceased husband, and in whom she had unbounded confidence, are set aside for fraud, the grantor being ignorant of the nature of her title, and the deeds, which contain false recitals, being procured by the grantee for an inadequate consideration, as part of a long cherished plan to obtain possession of the entire estate of his father-in-law.

4. One may testify for himself concerning a transaction with a decedent where a representative of the decedent or one interested in his estate has testified in reference thereto.
5. The statute of limitation has no application to an action by a principal to recover of his agent property entrusted to him, the agency never having been abandoned by the agent or revoked by the principal.

Goodloe & Roberts and Edward J. McDermott for appellant.

A. P. Humphrey, Geo. M. Davie and Muir & Heyman for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

In February, 1857, Francis McHarry died, resident of the city of Louisville, intestate, leaving appellant, then about 48 years of age, his widow, and Amelia, Frances A. and Florence his only children and heirs at law, the first named of the three having just arrived at age and the other two being infants.

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In due time appellant was appointed administratrix of the estate and guardian of the infants, but in about five months after the death of her father, Amelia became the wife of James F. Irvin, then between 45 and 50 years old, and the entire estate was immediately turned over to him to manage and control as the agent of appellant, which he did continuously and without hindrance by her unitl December 16, 1882, when a tri parte deed between appellant of the first, James F. Irwin of the second, and J. H. Lidenberger of the third part, that is the principal subject of controversy in this action, was executed.

James F. Irvin died in March, 1883, testate, leaving Florence Irvin his widow, Guy Irvin, his infant and only child, and Lindenberger, Brown and Dowling, executors of his will, all of whom are appellees.

This action was instituted by appellant in September, 1883, to set aside the deed mentioned upon the ground of fraud by James F. Irvin, actual and constructive, and mistake by her as to the nature of her title to some of the property conveyed thereby, and as to the extent of her interest in the estate of her deceased husband.

In that deed are contained substantially the following recitals:

1st. That appellant is entitled to dower and distributable share in her husband's estate; has, since the death of her husband, resided in the family of the second party, and her business has, at her request, been conducted by him in all respects to her satisfaction

2d. That at the request of the second party, and in view of his impaired health, "there has been, between the first and second parties, a full, complete and final settlement of all and every, the accounts, business and transactions of every kind and character between them up to and including the date hereof, and by said settlement of all accounts as aforesaid there has been and is found to be the sum of $50,000 belonging to the first party in the possession, custody and control of the second party, as her agent, which said sum of $50,000 is now, by the first and second parties, distinctly and conclusively agreed to be in full of all demands, claims, estate, principal, interest, income, avails, accretions, dower, rights of distribution, and all other rights of the first party."

3d. That the first party is desirous of settling the said sum to the use and on the trusts thereinafter set forth, and the second party is desirous to secure the first party an ample income for life, and in like manner to her sister, Mrs. Isbell.

And thereupon the first party, by the terms of the deed for the recited "consideration of the sum of $50,000, paid over as representing the ascertained balance as aforesaid, by the second party to the first party, * * * doth * * * sell and convey unto the third party all said sum of $50,000, ascertained as aforesaid, and all the rights of dower and distribution of every kind, * * * and all her estate, real, personal and mixed, wherever situated," to be held in trust and upon the condition that at the death of the first party all the property and accumulations thereof are to be delivered and paid over to the second party, and belong to him in fee simple, or to such persons and upon such conditions as he, the second party, may, by his will, appoint, in case he dies before the first party.

It is further agreed that there shall be paid out of the trust fund and property, annually during her life, to the first party $2,000, and a comfortable residence furnished to her, and to Mrs. Isbell, annually during her life, and upon condition she remains with the first party, $1,500.

In their answer appellees file and rely on as a defense to the

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action a writing dated May 12, 1880, but appellant denies it is binding or valid, and asks that it be held for naught upon the ground of fraud, and because, as she specifically pleads, it is not her act and deed.

In that writing, which is signed by appellant alone, though called an agreement between her and James F. Irvin, it is recited that a full settlement and final accounting had that day been had between the parties, embracing every account, transaction, claim and demand, and said Irvin had paid over to appellant all money and property of every kind in his hands belonging to her, and she thereby acknowledged the receipt of the same, and discharged him from all claims against him and his wife, Florence Irvin, and in the language of the instrument "for the purpose of more effectually carrying out the intention of the parties, the said Emily McHarry, in consideration of the premises, * * * hereby sells * * * and transfers to the said Florence Irvin every account, claim and demand due, or to become due, * * * from James F. Irvin."

As pertinent to the question of the validity and force of these two papers we will first ascertain, as far as practicable and necessary, the character, value and condition of the estate of Francis McHarry at the time Irvin took control and management of it as the agent of the appellant, and the amount she was entitled to recover from him December 16, 1882, but in the absence of a commissioner's report, which the judgment of the lower court dismissing the action precluded, it would be premature, even if practicable, to determine the exact value or amount of either what Irvin received or what appellant was entitled to at the date mentioned.

It, however, satisfactorily appears that Francis McHarry left, at his death, a large and productive estate, consisting of more than 2,000 acres of land in Indiana, besides several houses and lots in New Albany, a farm of 100 acres in Kentucky, one-half the franchise and property of the Louisville & New Albany ferry, a cement mill and 60 acres of land in Shippingsport, near Louisville, and interest in a warehouse in the same city, besides a large amount of personal property.

The indebtedness of the estate was but little over $10,000, besides a balance of the purchase price of the ferry, payable in cement, all of which indebtedness was discharged in a short time with the income from the estate.

The precise amount of receipts and disbursements by Irvin while he was acting as the agent of appellant never can be arrived at, for, so far as this record shows, no books were kept by him subsequent to December 31, 1867, but from evidence of joint owners, who have accounts of the net profits of the ferry, it appears that the share thereof belonging to the McHarry estate, annually paid over to Irvin, amounted, from March, 1858, to February, 1864, to $39,950, and from the latter date to December 16, 1882, to about $150,000, making the whole amount received by him near $190,000.

The exact amount received by him from other sources between 1857 and 1865 can not be arrived at, though it was a very large sum, for it appears that money loaned on real estate security, and used by him in the purchase of real estate between the years 1858 and 1865, amounted to upwards of $90,000, and on the — day of ———, 1865, the cement mill and land on which it was situated was sold for $150,000 in gold, all of which was received and thereafter used by him. Though a tract of land, the title of which was in Irvin, was sold at the same time, and estimated at $30,000, and the appellees contend should be deducted from the purchase price, leaving $120,000 belonging to the McHarry estate. With-

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out taking into account rents of land, or of the warehouse, or profits of the cement mill from 1857 to 1865, or interest on the amounts received and used by him, he was idebted to the estate, and as agent of appellant, December 16, 1882, when the deed in question was executed, at least the sum of $310,000.

Without making a minute calculation, which is not necessary to a decision of the question before us, it may be, therefore, safely assumed that when that deed was made Irvin's indebtedness to appellant was more than double the sum of $50,000, stated in it as the ascertained balance. In addition to his indebtedness, she was, under the law of Indiana, entitled absolutely to one-third of the real property in that State left by her husband, which was worth between $20,000 and $25,000, that likewise passed by that deed.

It is claimed in the pleadings and contended by counsel that Irvin had, at the time of his marriage in 1857, a considerable estate of his own, which was used in extricating the McHarry estate from indebtedness, but there is no competent evidence before us that he had any property or money besides a farm in the southern part of this State, worth perhaps $2,500. On the contrary, the books kept by his direction show but a single credit to his account, and it does not satisfactorily appear that even that sum, which was about $6,000, was actually advanced or paid out of his own means.

The evidence shows that the appellant is a plain, economical woman, of simple and unosentatious wants and habits, and that throughout the entire period her expenditures were small.

It seems to us clear that the consideration for the conveyance of December 16, 1888, regarding it is a contract of sale and purchase, was grossly inadequate.

But inadequacy of consideration of itself is not generally sufficient to avoid an executed conveyance, though it should always induce close scrutiny of the circumstances attending the transaction. It, therefore, becomes necessary, in order to properly determine the issues of fraud and mistake involved, to review the conduct of Irvin, the immediate beneficiary of that conveyance, in respect to the estate placed in his hands as agent, and toward those to whom it belonged.

The first notable event that occurred after he assumed control was in 1858, when the only son of appellant became estranged from her, and never afterwards was sheltered under the same roof with her.

September 14, 1859, Irvin procured a conveyance by his wife, Amelia, of her interest in the estate to appellant, who immediately reconveyed it to him.

September 20, 1859, he purchased from Francis A. McHarry, the son, his interest in the estate at the price of $28,000, which was far from its full value, and though he took the title to himself, the evidence satisfactorily shows the consideration was paid with the proceeds of the estate.

In January, 1869, Amelia Irvin died, leaving no children, and in January, 1874, after a tour together of about fifteen months in Europe, he and Florence, the second daughter, were married, he being upwards of sixty and she about twenty-six years of age.

There is no evidence that the son of appellant, either before or after the estrangement, treated her disrespectfully. He was somewhat dissipated, and the sale of his interest in the estate to Irvin shows he was improvident, but he never gave her any offense, except that in her language "he married a woman I did not like," nor, on the other hand, does it appear she was actually implacable, harsh or wanting in maternal affection.

It does not appear that Irvin openly used his influence to keep

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mother and son apart, except that when absent in Europe he directed his agent to loan money to the son upon his promise to stay away from Louisville, nor is there evidence that he, at any time, made the slightest effort to reconcile them.

In her own language: "I had every confidence in the world in Irvin. I did not think he would do anything wrong. I thought he was perfection. I had more confidence in him than I had in myself, because I thought he understood things better than I did. My confidence in him was perfect and complete, and I thought everything he did was right, and I did whatever he asked me to do, and this continued to his death."

On the other hand, one witness describes Irvin as secretive, and another testifies that "Capt. Irvin was looked up to by the family as an authority on all subjects, and what Captain said was law."

We thus have, in the blind confidence of this plain, uneducated woman, and the dominating will of this man, an explanation of the unnatural estrangement of mother and son for twenty-five years; her ready acquiescence and aid in the conveyance by her elder daughter of her interest in the estate; her submission to a sale by the son of his interest at a price which she might, by inquiry, have learned was at a great sacrifice, and paid for out of the estate, and her consent to the marriage of the second daughter, all done for the benefit of Irvin, and all, as we think the record shows, in furtherance of his design to possess the entire estate.

Such being the relation and attitude of appellant and Irvin at the date of the two papers of May 12 and December 16, 1880, there is no reason to discredit her statement that she did not understand the effect of either of them, but signed both in ignorance of her rights and interests at his request and because she trusted him.

As to the paper of May 12 we think very little need be said. Appellant alleges in her pleading that she signed it without reading it or hearing it read, and no witness to it testifies in this case that she read or understood it. On the contrary one of them states facts which make it evident she did not understand it.

In one clause she is made to acknowledge a full settlement between her and Irvin had been made, and all the money and property she was entitled to had been paid over to her, and in the other clause she conveys and transfers to Florence Irvin her claims and demands on James F. Irvin. It is impossible to reconcile the two clauses of that paper with each other, or the latter with the deed of December 16, 1882, for if she had already, by the paper of May 12, 1880, conveyed and transferred to Florence Irvin her claims and demands against him she could not, by the deed of December 16, transfer such claims and demands, then called "an ascertained balance of $50,000," to Lindenberger, trustee.

Neither Dowling, one of the executors of the will, who, as an attorney, wrote the paper of May 12, nor Florence Irvin, testify in this case in regard to it.

For the reasons stated, and others to be stated, alike applicable to the deed of December 16, we think the paper of May 12 should be held void, and that even Irvin regarded it of no effect is shown by his failure to inform Brown, his executor and lawyer, of its existence before the deed was written and executed.

In that deed it is stated with precision, and in terms that fully and distinctly convey the idea, that a settlement and accounting had taken place between Irvin and appellant, yet the evidence in this case places it beyond dispute that no settlement had ever taken place between them.

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We are thus at the beginning confronted with a false, and, as we think, must be regarded a fraudulent, statement, made not as mere form, but made in such manner as to bind appellant, as well as to deceive her, for, when we consider the relation of the two parties, her confidence in him and her ignorance of the actual condition of the business of the estate, and inability to make such settlement, we are forced to the conclusion that she accepted that statement as a declaration on the part of Irvin that $50,000 was the balance due her, and believed it.

If the object was not to deceive and overreach her, why was the false statement made?

Both Brown, who wrote the deed, and Lindenberger testify the deed was explained to her, and give it as their opinion she understood it, but she just as positively swears she did not understand it or give particular attention to it, trusting in Irvin and willing to do what he directed because she believed he would do right.

No doubt Brown in good faith attempted to explain the nature and effect of the deed, but in at least two respects it can not be explained in such manner as to relieve it of the character of an unconscientious bargain and fraudulent device on the part of Irvin to deprive her of what he justly owed her, and of property belonging to her:

1st. As already in effect stated, no satisfactory explanation can be made in regard to the false statement that a settlement had been made, and a balance of $50,000 ascertained.

2d. She owned absolutely one-third of the Indiana land, worth not less than $20,000, yet, although Brown swears that he was, at the time he wrote the deed, ignorant of her right to the land under the Indiana law, the deed is so written as to pass her title thereto, and it is now claimed and held by Irvin's executors or by Lindenberger under that deed.

The doctrine is too well settled to need a reference to authorities that "contracts between principal and agent should be jealously scrutinized, and slight circumstances of inequality, surprise and hardship may be sufficient to vacate them, even sometimes without proof of fraud."

In this case we have not merely concealment by the agent of the amount due his principal, which he knew and she did not nor could inform herself, but a false statement, or what we think had the same effect as a direct false statement, as to the balance due, for as already said she actually conveyed by that deed more than double in value of what it purports to convey, and what she was induced to believe it conveyed.

We think it satisfactorily appears from the circumstances of this case, independent of her own statement as a witness, that at the date of the deed she was ignorant of the nature of her title to the Indiana lands, and it is equally well established that Irvin did, at the time, know she had a fee simple title thereto, and knowing it was his duty to inform her of the fact, and his failure to do so must be held as fraudulent and sufficient to vacate the deed.

But it is relied on as a defense to this action that appellant was fully informed of the fact that the execution of the deed was intended as part of the plan of a family settlement, which included with the deed a subsequent deed by Florence to James F. Irvin of all her interest, and his will devising all his estate to Florence and Guy Irvin, the son, and as appellant intended and desired that all her estate should go to her daughter and grandson, she was not defrauded by the deed made to carry out that plan.

But we do not understand this to be a family settlement in the

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sense of a compromise of doubtful or disputed claims, but a sale to James F. Irvin, and even if it was a family agreement or compromise the circumstances attending the transaction make it a case of at least constructive fraud, for in such cases an agreement made in ignorance by one party of material facts, which it is the duty of the other side to disclose, would render the agreement invalid. (Story's Equity Jurisprudence, volume 1, section 217.)

The fact that appellant, situated as she was, and under the influence of Irvin, as she had been for years, did, at the date of the deed, desire to leave her property to her daughter and grandson, ignoring the existence of her own son and his children, does not preclude her from now having that unjust and fraudulent conveyance set aside, for it may be, if fully and truly informed at the time of the actual amount of her wealth, she might have found a warm place for the discarded son, but be that as it may we think she was induced to make that deed not merely through mistake and ignorace of the kind and value of her estate, which it was the duty of Irvin to disclose to her, but that she was then, as she had been for years, under the irresistible influence of her son-in-law, who caused that deed to be made as part of a long cherished and partly executed plan to possess himself of the entire estate of Francis McHarry, which was fully accomplished by the deed from his second wife made December 19, 1882.

In conclusion it is proper to say there is nothing in this record reflecting upon the personal or professional integrity of Brown, who prepared the deed, as he was informed it was a settlement made according to the wish of appellant, and was ignorant of the actual amount due to her and of her title to the land.

Wherefore, the judgment is reversed and cause remanded, with directions to cancel the paper of May 12, 1880, and the deed of December 16, 1882, and for further proceedings consistent with this opinion.

To a petition for rehearing Judge Lewis delivered the following response:

We did not base our opinion upon testimony of appellant that was incompetent.

The value and amount of the McHarry estate that went into the hands of Irvin as agent, and his disposition of it, so far as shown, his purpose to possess himself of the whole of it, the means resorted to in order to accomplish that purpose, and his consequent liability to appellant, all satisfactorily appear independent of her evidence.

Her evidence was not relied on, nor necessary to convince us that the paper of May 12, 1880, by which, without reason or equivalent, she gave up all her interest in the estate, and became entirely dependent, was procured by the undue influene of Irvin, and signed by her without understanding its nature and effect.

Brown, the attorney and executor of the will of Irvin, and Lindenberger, one of the parties to the deed of December 16, 1882, and also executor, both testify to what took place in regard to it, before and after, as well as at the time it was executed, and the inference intended by appellees to be drawn, and which must necessarily be drawn from their testimony, left unexplained is that appellant executed the deed freely, voluntarily and with full knowledge of its contents, purpose and effect, and consequently is bound by it.

It was, therefore, clearly competent for her, under subsection 2, section 606, Civil Code, to testify concerning the same transaction, and in connection therewith to state she executed the deed because Irvin requested her to do so, and did not understand, or

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attempt to understand it, because she had confidence in him, and believed he would ask her to do only what was right.

We can not understand why so much space is occupied in the petition for rehearing to prove that appellant's testimony as a witness, that she had confidence in and trusted Irvin, is incompetent, or how, even if it was so, appellees have been prejudiced thereby, when the same fact is plainly and conclusively shown by other evidence in the record, substantially admitted in the pleadings, appellant is made to say it in the sixth clause of the deed, and counsel concede it in a subsequent part of the petition for rehearing.

It seems to us clear that the deed in question is one of bargain and sale, for it is expressly stated therein that for the consideration of an annuity of $3,500 to be paid during her life she grants, bargains, sells and conveys unto Lindenberger all the ascertained balance of $50,000, her right of dower, and all accumulations thereof, rents, issues, profits and avails of every kind, and all her estate, real, personal and mixed, wherever situated, to be paid over and delivered at her death to, and held and enjoyed by, Irvin, in fee simple, subject to his unconditional power of appointment by will in case he dies before her.

But let it be conceded that the transaction was mixed with motives of bounty, still Irvin, the beneficiary, was not absolved from the duties imposed upon him as her agent.

The relation of parent and child is of course to be always considered in determining, as question of fact, whether a gift or bounty from one to the other has been unfairly obtained. for the same implication or presumption of undue influence or fraud does not arise in such case, as when the parties are strangers, and the relation of principal and agent exists, but there is no reason for a rule, nor is there a rule, which will enable a son-in-law, who is her agent, to profit by a gift or purchase obtained from his mother-in-law by undue influence or fraud, or exempt him from the consequences thereof if the fact be established by proof.

The lower court dismissed this action without passing upon the question of limitation, and we did not, therefore, refer to it in the original opinion except incidentally, but as the question is made in the pleadings and litigation, and expense will perhaps be saved by determining it now, we will do so.

There is no question made, nor is there any room for any, as to either the fact or nature of the agency, but it appears that soon after the marriage of Irvin to the eldest daughter the entire estate was by appellant placed in his hands as her agent for an indefinite time, and that the agency never was abandoned by him nor revoked by her, nor was a settlement made between them, but it continued until December, 1882, when the deed in question was made.

It seems to be well settled that the confidential relation of principal and agent being thus established and continuing, the statute of limitation has no application, the reason being, as aptly stated, that "while the relation continues there is a priority between the parties, and there is nothing to set the statute of limitation in operation."

In our opinion, therefore, the statute constitutes no bar to the recovery by appellant in this action of what she may be entitled to from Irvin as her agent.

It was not intended by anything said in the opinion to prevent necessary investigation and proof, in the discretion of the lower court, of the true amount to which appellant may be entitled.

The opinion was rendered in this case after a thorough investigation of the evidence and consideration of all the questions of

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law, and we perceive no reason suggested in the petition for rehearing sufficient to require a change of it.

Petition overruled.

MARCUM v. COMMONWEALTH.

(Filed June 2, 1887—Not to be reported.)

Self-defense—Upon the trial of appellant for murder the court instructed the jury that if, at the time of the killing, appellant had reasonable grounds to believe, and did believe, that the deceased had sought him for the purpose of killing him, or doing him great bodily harm, and was at the time of killing manifesting an intention to commence an attack upon him, then he was not bound to retreat, but had the right to stand his ground and defend himself, even to the extent of taking the life of the deceased. Held—That appellant has no grounds to complain of this instruction, as it is quite as favorable to him as the law justifies.

G. W. Castle for appellant.

P. W. Hardin for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Bennett.

The appellant having been indicted in the Lawrence Circuit Court for the murder of Elisha Ferguson, and having been tried in said court for said crime, and having been convicted and sentenced to serve in the State penitentiary for the term of fourteen years, and the court having overruled his motion for a new trial, he has appealed to this court.

There are no exceptions to the court's refusing the instructions offered by the appellant. The lower court gave seven instructions to the jury, which fully embody the law of the case. The appellant excepted to none of these instructions except No. 3. The first part of that instruction correctly defined the law of self-defense; the second part told the jury in substance that if appellant, at the time he killed Ferguson, had reasonable ground to believe, and did believe, that Ferguson had sought him for the purpose of killing him, or doing him great bodily harm, and was, at the time of the killing, manifesting an intention to commence an attack upon him, then he was not bound to retreat, but had the right to stand his ground and defend himself, even to the extent of taking Ferguson's life.

Certainly the appellant has no grounds to complain of this instruction, as it was quite as favorable to him as the law justified.

It was in proof before the jury that Ferguson and the appellant were enemies; that each had made threats against the other, and they, previous to the killing, had had a fight, in which Ferguson was seriously wounded with a knife; that on the day of the killing Ferguson and his wife were passing along a footway that lead by Mrs. Marcum's yard, Ferguson having his gun; that a young man, at the request of appellant, called in appellant's dog, which was outside of the yard fence; that Ferguson said let him, meaning the dog, come on and I will kill him; that appellant asked Ferguson if he meant him. Ferguson replied that he meant any one that come out, and at the same time presented his gun. Appellant, who was sitting on the porch, got up and went in the house and got his gun; that Ferguson's wife pushed his gun aside, and also pushed him along the path a considerable distance; that the appellant went through the house and

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into the back yard and rested his gun upon a post, and took deliberate aim at Ferguson and fired upon him and killed him; that at the time Ferguson was killed he was talking to a brother of the appellant and looking in a different direction from appellant, and probably did not see him nor know that he was in harm's way. This proof, in some particulars, was contradicted by appellant's witnesses, but the jurors were the sole judges of the credibility of the witnesses, and if we had the right to review their finding, which we have not, we would not hesitate to say that their verdict was mild enough.

The judgment is affirmed.

JENKINS v. COMMONWEALTH.

(Filed June 11, 1887—Not to be reported.)

Impaneling jury—In the trial of a criminal prosecution each party is entitled to a full panel of jurors, found, upon examination, qualified to try the case, before being required to exercise the right of peremptory challenge to the individual juror, and whenever the number is lessened by either party the panel must be again filled before being passed on, and so on until the jury is completed.

Jas. Andrew Scott and Major & Johnson for appellant.

P. W. Hardin and John L. Scott for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

In the case of Mundy v. Commonwealth, 81 Ky., 233, it was decided that under the Criminal Code each party in the trial of a criminal prosecution is entitled to a full panel of jurors, found, upon examination, qualified to try the case, before being required to exercise the right of challenge—that is, peremptory challenge, to the individual juror; and whenever the number is lessened by challenge of either party the panel must be again filled before being passed on, and so on until the jury is completed.

In that case the lower court seems to have observed the above rule in the formation of the trial jury, and the question presented on the appeal of the defendant was whether, after having failed to accept or peremptorily challenge a particular juror found, after examination, qualified, and duly presented for the acceptance or challenge of both the Commonwealth and the defendant, he had the right thereafter to do so, and it was held he had not.

In the case of Edrington v. Commonwealth, decided November 24, 1885, MS. opinion [7 Ky. Law Rep., 377], the rule laid down in Mundy v. Commonwealth was adhered to, the following language being used: "A full panel of twelve jurors found, upon examination, qualified to try the case, should have been first presented to the Commonwealth for its acceptance or challenge, and all not then challenged should have been regarded as accepted, then the full panel should have been presented to the accused for his acceptance or challenge, and all not then challenged should have been regarded as accepted by him, and not subject to be again passed on by either party; but in case of the chal-

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lenge of one or more by either party, the vacancies should have been filled from time to time, so as to present to each party, for acceptance or challenge, twelve qualified jurors, including those already accepted."

By the term qualified jurors, used in the connection it was, it could not well be understood otherwise than jurors found qualified, after examination, to sit in that particular case.

The mode described in the two opinions referred to, and which this court decided was the proper one in the formation of the jury, was disregarded and violated by the lower court in this case, and the judgment is, therefore, reversed and cause remanded for a new trial consistent with this opinion.

SHORT v. COMMONWEALTH.

(Filed June 11, 1887—Not to be reported.)

1. Self-defense—Upon the trial of appellant for manslaughter the court properly instructed the jury that in order to acquit upon the ground of self defense they must believe that the defendant believed, and had reasonable grounds to believe, that he was then in danger of death or great bodily harm at the hands of the deceased. The danger of slight or trifling bodily harm does not justify the taking of life.

2. Evidence—A witness was properly allowed to detail a conversation which took place between other persons, although he did not see the parties, and did not recognize their voices, the accused and the deceased being in the room where the conversation took place, and the language used tending to show that they were the persons engaged in the conversation.

P. B. Thompson, Sr., and Ben. Lee Hardin for appellant.

P. W. Hardin for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Holt.

The testimony in this case, as is usual in those of this character, is conflicting as to who began the difficulty which ended in the death of Carey Jones at the hands of the appellant, John Short.

The jury, however, not only saw and heard the witnesses, but probably knew them, and it is sufficient to say that there is evidence to support the conviction of manslaughter.

A reversal is asked upon the ground that the court misinstructed the jury, and admitted incompetent testimony.

The complaint is made that the right of the accused to be excused for the killing was made to depend upon whether he believed, and had reasonable grounds to believe, that he was then in danger of death or great bodily harm at the hands of the deceased, and it is urged that the right of self-defense should not be made to rest upon whether the impending bodily harm is great. The objection is to the use of the word "great," and it is said that the words "bodily harm" should be used in an instruction without the adjective; that no more is required.

The right of self-defense, however, is based upon the law of nature, and arises from necessity. This being so, the law, out of a sacred regard for human life, does not permit it to be imperiled upon slight occasion, and to prevent the danger of some slight or

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trifling bodily harm. Therefore, the expression "great bodily harm" has been in use from the earliest period of the law, and the very danger now urged by counsel, to wit, that the use of the word "great" is misleading to the jury, would arise in case of its nonuse.

The killing occurred in the courthouse yard. Shortly before it took place the deceased and the accused, together with at least three other persons, were in the back room of the clerk's office drinking whisky. A witness, who, at this time, was in the front room, was permitted, over the appellant's objection, to testify that he heard some one say: "Carey, you know Doc. shot me for nothing." The reply was: "Yes, he did." That the first speaker then said: "You are a gentleman for acknowledging it, but you acted," * * * applying a vile epithet. The answer was: "I did not do any such thing; and I will cut your guts out."

This witness says that when this conversation was taking place he could not see any of the parties, nor did he recognize the voices, but that the deceased and the accused were, with other parties, then in the back room, and soon after passed through the room where he was out into the courthouse yard, Jones going first, and the appellant, together with the others who were in the back room, soon following.

When the deceased first got out into the yard, and when Short was not present, he asked another witness for a knife and was told that he was drunk, and in response to this he said that "they wanted to run over him over there," pointing to the clerk's office. This evidence was also allowed to go to the jury over the objection of the accused.

Waiving the question whether it was not one continued quarrel from the time of the conversation in the back room of the clerk's office, where it evidently began, until the deceased was stabbed, and whether, in view of the situation of the parties, all that was said during that time could not properly be proven as a part of the transaction, yet the evidence of the last-named witness was more favorable than prejudicial to the accused, as by it the fact was brought out that the deceased was, at the immediate time of the quarrel, endeavoring to get a knife.

It is at least questionable whether this is not also true of the testimony as to the conversation in the clerk's office. The threat, "I will cut your guts out," then made, evidently did not come from the appellant, but from the person addressed as "Carey," and when, cosidered in connection with the fact that the deceased just afterward was trying to borrow a knife, it seems to us that the evidence favored the accused and not the State. It was, however, competent in our opinion.

If the witness had not only failed to see those engaged in the conversation, or to recognize them by their voices, but had also been unable to state that the accused was present, or even if present, to testify to any circumstance connecting him with the conversation, or showing that he was a party to or approving of what was then being said, and of the quarrel then in progress, then the evidence would not have been competent. The witness stated, however, that both the accused and the deceased were then in the room where the conversation was occurring. One of the parties engaged in it was addressed as "Carey," which was the Christian name of the deceased, and the witness says that as the accused passed out of the room where the conversation had been in progress he remarked, "By God, I will stand by you," thus showing that he was a party to the quarrel.

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Upon this state of case we think the testimony was admissible. Judgment affirmed.

TAYLOR v. COMMONWEALTH.

(Filed June 16, 1887—Not to be reported.)

1. Willful and malicious cutting—The defendant having been indicted under the statute for willfully and maliciously cutting another with intent to kill, it was error to instruct the jury that they might convict if they believed the killing was done "willfully and intentionally." The statute makes malice a necessary element of the offense.

2. Same—Arrest—The person cut by the accused being an officer, who was, at the time arresting him, the jury should have been instructed that if the officer believed, in good faith, that the accused had feloniously killed a man, he had the right to make the arrest without a warrant, although he had not witnessed the act, and to use such force as was necessary to do so, and to summon others to aid him in so doing, if necessary; and if the arrest was not a mere pretext to get the accused in his power to do him violence or to enable others to do so, that then it was the duty of the accused to submit, and if, instead of doing so, he willfully and maliciously cut the officer while arresting him or in his custody, that then he was guilty as charged; but if done in sudden heat and passion, and without malice, that then he was liable to fine and imprisonment as provided in section 1, article 17, chapter 29 of the General Statutes.

Thos E. Moss for appellant.

P. W. Hardin for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Holt.

This is an indictment under section 2, article 6, chapter 29 of the General Statutes, which provides:

"If any person * * * shall willfully and maliciously cut, strike or stab another with a knife, sword or other deadly weapon, with intention to kill, if the person so stabbed, cut or bruised die not thereby, * * * he shall be confined in the penitentiary not less than one nor more than five years." * * * The instructions given in this case authorized the jury to convict the accused if the cutting was done "willully and intentionally." This was error. These words are not equivalent to "willfully and maliciously."

The offense defined is a statutory one, and the substance of the statute must be regarded. One acting in self-defense may cut another "willfully and intentionally," and yet not do it "maliciously."

The statute makes malice a necessary element of the offense. If not done with malice, but in sudden passion, then the offender is punishable under another statutory provision with fine and imprisonment in the county jail, one or both.

It was as essential to a conviction under the statute above cited that the jury should find that the cutting was done maliciously as it was that they should find that the accused did the act. This being so they should have been so told. They were not trying an indictment for murder, but one based upon a statute defining the offense.

The instructions given to the jury were so numerous that they were calculated to confuse them.

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They should have been told by instructions properly worded that if the officer who arrested the accused believed in good faith that he had feloniously killed a man, that then he had the right to arrest him without a warrant, and although he had not witnessed the act, and to use such force as was necessary to do so, and to summon others to aid him in so doing if necessary; and if the arrest was not a mere pretext to get the accused in his power to do him violence or to enable others to do so, that then it was the duty of the accused to submit, and if, instead of doing so, he willfully and maliciously cut the officer while arresting him or in his custody, that then he was guilty under the section of the statute first above named; but if done in sudden heat and passion and without malice, that then he was liable to fine and imprisonment as provided in section 1, article 17, chapter 29 of the General Statutes.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

TERRELL v. ROWLAND, &c.

(Filed June 18, 1887.)

1. Personal representatives—Verification of claims—In a suit by the heir or distributee against the personal representative for a settlement and distribution of the assets in his hands, the personal representative is entitled to credit by claims against the estate which he has paid, although they were not verified and proved as required by the statute, provided it appears that the demands were just.

2. Surviving partners—While a surviving partner can not settle a claim against the firm, and bind the other partner or his individual estate, he may make a settlement by way of ascertaining what is owing to a creditor.

3. Same—Compensation—The surviving partner who collects the debts, adjusts the accounts, and winds up the concern is not entitled to compensation for trouble or services unless it is so stipulated, the same rule applying as if the partnership had continued. And while exceptions to this general rule may and do arise, there is no reason for departing from it in this case.

4. Pleading—Surcharge of settlement—One seeking to surcharge and falsify the settlement of a fiduciary with the county court must, by pleading, specifically aver what items are incorrect, and state why they are so. The pleadings in this case aver as to each item of credit that it is not verified or proved, and is unjust, and that the settlement was fraudulent. No objection was made to the pleadings, and upon the issue as presented by them the parties went to trial. Held—That the court will, even if it be a matter of doubt, consider the question, as fully made by the pleadings, whether appellant, the executor, was entitled to credit by the vouchers which the judgment appealed from rejected.

5. Appellate practice—Partial transcript—Since the repeal of the law requiring errors to be assigned the appellant in a chancery case may bring up as much of the record as he deems necessary to the determination of the questions involved, but he does this at his peril, since if, upon the hearing, it appears that portions of either the pleadings or the evidence bearing upon the questions involved on the appeal have been omitted, the judgment below will be affirmed, as in an ordinary action when all of the evidence is not before the court.

J. M. Bigger for appellant.

T. E. Moss and J. W. Bloomfield for appellees.

Appeal from McCracken Common Pleas Court.

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Opinion of the court by Judge Holt.

Isaac Clark died testate in November, 1858, leaving his widow, Juliana Clark, and his five children, Fannie, who married the appellee, Reuben Rowland, Ora, Luella, Luther H. and Anna Clark, as his devisees. The last named died intestate and without heirs in 1860.

The testator at the time of his death owned a large estate, consisting of lands in Illinois and some two or three counties in this State, town lots in the city of Paducah, and considerable personalty, but embracing no money. His indebtedness at that time was also considerable.

He appointed the appellant, T. F. Terrell, in whom he appears to have had great confidence, his executor, giving him, by the terms of the will, much discretionary power in the conduct of the estate.

Thus he authorized him to sell the Illinois lands "at such time and on such terms as he may think proper for the interest of my estate;" sell certain portions of his estate in Kentucky when his youngest child should become of age, "at such time and on such terms as he may deem proper;" improve such of certain town lots as he might deem best; rent out the property, save that devised to the widow; compromise any debts due the testator, if, in the opinion of the executor, the interest of the estate required it; provide for and superintend the support and education of his children, the will expressly providing that by reason of this last provision no guardian should be appointed for them.

In short, the executor was given the entire management of the estate, and the control of the greater portion of the property, with large discretionary powers, it providing, however, that the children were to come into possession of certain portions of it, which were not to be sold at the periods named in the will, while the executor was authorized to sell other portions of it at any time in his discretion, and other portions at such time after the youngest child became of age as he might deem best.

The will also provided that the executor should not be required to settle his accounts in the county court as often as required by the general law, "but that he do so as soon after my death as practicable, say within three months, and at least once every five years thereafter," and in speaking of his compensation it says: "It is my desire and wish that my executor shall receive a full, ample and liberal compensation for his services in the discharge of his duties in the management of my estate. It is not my wish to confine his compensation merely to what the law would allow him, as in many cases his services to my estate would be worth much more than the law allows."

The appellee, Terrell, at once assumed the execution of the responsible and arduous trust thus confided to him; returned an inventory of the estate to the proper court, but made no settlement until October 8, 1868, when he did so, and it was confirmed by the county court.

It embraced a great many items of debit and credit, and a balance was found due the executor of $3,037.13, leaving in his hands, however, unpaid notes belonging to the estate amounting to $14,400.59.

In this settlement the executor was allowed for his services $3,464.54, being the 5 per cent. allowed by the statute upon the amount disbursed, and also $5,000 or $500 per year for the period from his qualification to the date of the settlement. He was also allowed as credits what in that settlement is known as voucher

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No. 309, for $6,699.30, being an execution debt in favor of the Commercial Bank of Kentucky against the firm of Clark, Terrell & Co., and voucher No. 310, for $113, being the sheriff's half commission upon said debt, and both of which sums were paid by the appellant.

In 1871 the appellees, Rowland and wife, brought an action against the appellant to compel a settlement of the estate, but abandoned it, expressing regret that they had instituted it, and a belief that the management of the estate by the appellant was the best possible under the circumstances.

Thus matters continued until February 18, 1882, when Rowland and wife brought this action, seeking to review and surcharge the county court settlement of 1868; to compel a settlement of the estate by the appellant, and a division of any assets in his hands and to procure a partition of the unsold lands.

The widow and other devisees were made defendants, and they, by cross pleadings against the appellant, sought the same relief.

Upon the one side gross mismanagement and fraud is charged, while upon the other this is denied in toto, and it is asserted that the estate has been so managed that but for it its indebtedness would have consumed it, leaving the widow and children paupers, whereas they now have an estate equal or exceeding in value all the property owned by the testator at his death, and free of debt.

After a careful reading of the entire and voluminous record we are satisfied that the charges of bad faith and fraud upon the part of the executor are unfounded.

The case was referred to a commissioner, before whom the appellant appeard with a full statement in writing of his receipts and expenditures, and its correctness is supported by his testimony.

In addition to the compensation allowed him in the settlement of 1868 he claimed $7,092, of which $3,026 is for 5 per cent. upon the disbursements by him since 1868, and $4,066 is for extra services for that period, or at the rate of $300 a year.

Among the credits claimed by the executor is one represented by voucher No. 119. A brief history is necessary to a correct understanding of it.

In 1856 the firm of Terrell, Clark & Co. was formed for the purpose of engaging in the rolling mill business. It purchased at a heavy expense a rolling mill in Paducah, Ky., and operated it for a short time. The firm was composed of the appellant, Terrell, who owned one-sixth interest, J. H. Terrell, who represented a like interest, D. Watts and D. A. Given, of the firm of Watts, Given & Co., owning one-third interest, and the testator, Isaac Clark, who had a like interest.

The enterprise proved a disastrous one pecuniarily, and in the midst of it Clark died. At this time the business was in such condition that it could not be settled as between the partners. The war come on; the military took possession of and used the mill, and it was finally sold by the surviving partners at a heavy loss. While it was operated by the firm their accounts were kept upon the books of the banking firm of Watts, Given & Co. All of the members of this firm were not members of the firm of Terrell, Clark & Co., and the latter became largely indebted to the former firm. Some of this indebtedness, according to the testimony of the appellant, Terrell, accrued before and some of it after the death of Clark, but it is not shown what portion was in existence before his death, or what accrued after, and indeed the items of it are not shown at all. The appellant, Terrell, attended mainly to winding up the business of the firm, and he testifies that he, as one of the survivors, and as the executor of

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Clark, together with the other surviving members of the firm, made a settlement with the survivors of Watts, Given & Co., after an examination of the books of the latter firm in 1868, and it was then ascertained and agreed between them that Terrell, Clark & Co. were indebted to Watts, Given & Co. in the sum of $34,549.77, of which Clark's portion was one-third, or $11,515.59.

Watts, Given & Co., by written assignment, transferred $8,000 of this last-named sum to one Britt, and when Terrell, as executor, paid it off it amounted to $8,840.

They also gave an order on him, as executor of Clark, to one J. H. Terrell for the balance, and when paid it amounted to $3.663.11.

The appellant presented to the commissioner an account of what he had paid out for Terrell, Clark & Co., not including, however, the sums paid to Britt and J. H. Terrell, credited by what he had received of firm assets, leaving a balance in his favor of $2,795.02, of which Isaac Clark's portion would be the one-third, or $931.67.

He also filed an account against his testator's estate in his favor, and as growing out of the firm matters of Terrell, Clark & Co., for the sums thus paid Britt and J. H. Terrell, and the $931.67, crediting it by vouchers No. 309, for $6,699.30, and No. 310, for $113, of the county court settlement of 1868, leaving a balance due him of $6.622.48, for which he claims credit with the estate of his testator, and this claim is known in this record as "voucher No. 119."

The commissioner allowed the credits for vouchers Nos. 309 and 310 as given in the settlement of 1868 to stand; allowed to the appellant the balance of $6,622.48 as per voucher 119, and remitted the question of the executor's compensation to the court. It reduced the claim of $7,092 for services to $5,000; charged the executor with the amount of vouchers Nos. 309 and 310 of the county court settlement, and rejected voucher No. 119, thus refusing to allow him the sums paid by him to the Commercial Bank, Britt and J. H. Terrell, and the $931.67 aforesaid.

Of this he now complains, and this action of the lower court, as this record stands, is alone to be considered.

The charges against the executor. that he improperly compromised the Boone & Larman debt; that he negligently failed to sell the rolling mill at a fair price, and when he could have done so, or the Illinois land, and with the proceeds of the latter have improved the Paducah lots, and that he negligently failed to rent them out for a term of years. and have them improved in payment of the rent, are, in our opinion, unsustained by the record.

In any event we can not review them, as there is no cross appeal. It is urged that the judgment below must be affirmed because the entire record has not been brought up by the appellant. The appeal was granted by the lower court before the repeal of the law requiring the filing of an assignment of errors, and as it is a suit to settle the estate of a decedent the appellant presented his assignment of errors to the trial judge, and he directed what parts of the record should be copied for the appeal. This, however, was done after the legislature had, by the act of April 4, 1884, repealed the law requiring errors to be assigned.

Since its repeal, however, and now, an appellant in a chancery cause may bring up so much of a record as he deems necessary to the determination of a question involved. He does this at his peril, however, because if, upon the hearing, it appears that portions of either the pleadings or the evidence bearing upon the question have been omitted, the judgment below will be affirmed

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as an ordinary action when all the evidence is not before this court. (Brockle v. Brockle, 7 Ky. Law Rep., 760.)

This does not, however, appear in this case. The record shows that this estate was so complicated, and the duties growing out of the trust so numerous, that much labor was not only necessarily imposed upon the executor, but was in point of fact performed by him. He was, however, allowed for services in the county court settlement $88,464.54. The judgment appealed from makes him a further allowance of $5,000 and in addition to this he is allowed a considerable sum as against the widow and three of the children for attending to business for them which did not fall within his duties as executor, but which it is probable he could attend to the more easily by reason of being such personal representative. It is evident that the lower court carefully examined the case, and the conclusion arrived at in this respect will not be disturbed.

It is contended that the pleadings of the appellees do not support an attack upon the settlement of 1868. Prima facie the law presumes it to be correct. One seeking to surcharge and falsify a county court settlement of this character must, by pleading specifically, aver what items are correct and state why they are so. In fact this rule applies to a settlement of any character. For instance, in the case of a settled account between partners, the complaining party must distinctly specify the fraud or errors in his bill. (Adams Equity, page 452.)

This rule of pleading has been applied in surcharging the settlements of fiduciaries, although persons under disability may be interested.

The averments of the pleadings in this case in this respect are quite general. Briefly stated, they aver as to each item of credit that it is not verified or proven and is unjust, and that the settlement was fraudulent. No objection, however, was made to the pleadings. The issue as presented by them was formed, and upon it the parties went to trial.

Moreover, the qusetion of the appellant's right to a credit for the vouchers, 309 and 310, was again presented in this suit by the appellant himself by his crediting the amount of them in voucher 119 as heretofore stated.

We will, therefore, even if it be a matter of doubt, consider the question, as fully made by pleading, whether the appellant was entitled to credit by the vouchers which the judgment now in question rejected.

It should be borne in mind that when the county court settlement was made in 1868 that two of the children of the testator were of age, and the credits for vouchers Nos. 309 and 310 were of record, and remained unchallenged by them or the widow until this suit was brought, a period of over thirteen years.

Under such circumstances it should be presumed that the credit is correct, and even if it appear that it should not, at the time, have been allowed, yet if it is shown that the estate has not been injured, it should not now be disturbed. The judgment in favor of the Commercial Bank against Terrell, Clark & Co. was against the appellant as an individual as well as executor of Clark. This being so, it should be presumed, at least after this lapse of time, that an affidavit as to the claim was made before the rendition of the judgment as required by the statute relating to claims against decedents. If there were assets of the firm of Terrell, Clark & Co. sufficient to pay it or the debt owing to Watts, Given & Co., then these claims should have been paid out of them, and no part of them charged to Clark's estate. It is manifest, however, that this was not so, and that the firm as

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such was insolvent. The judgment being against the appellant individually, the creditor had the right to compel him to pay it all. If this had been done, then, as Clark's estate owed one-third of it, certainly any court would, in settling with Terrell as executor, have permitted him to retain what he had paid as such third, and which had thus become his claim against the estate, provided it was made to appear that it was just as against Clark, although the original creditor had never made the statutory affidavit to the claim.

It appears that the appellant, as executor, paid the entire claim because he knew that the estate of his testator had not paid its proportion of the indebtedness of the firm. Conceding, however, that Clark's estate should only have been charged with one-third of it, and that the appellant should have been credited by only this much in the settlement of 1868, yet if the claim of the appellant, represented by voucher, No. 119, is correct, then Clark's estate is therein credited by the full amount of vouchers 309 and 310, it results that the credit given for them in the county court settlement should stand because the estate has not been injured.

It is contended that the appellant is not entitled to credit for the sums paid by him to Britt and J. H. Terrell in discharge of Clark's portion of the indebtedness of Terrell, Clark & Co. to Watts, Given & Co., first, because it is not shown that any such indebtedness existed, and no itemized account of it is presented; and, second, because the statutory affidavit as to the claim was never made by Watts, Given & Co., nor was the claim proven.

Sections 35 and 39 of article 2, chapter 39 of the General Statutes provide: "All demands against the estate of a decedent shall be verified by the written affidavit of the claimant, or, in his absence from the State, by his agent, or if dead by his personal representative, stating that the demand is just, and has never, to his knowledge or belief, been paid, and that there is no offset or discount against the same or any usury therein. * * * No demand against a decedent's estate shall be paid by his personal representative or allowed as a credit by any commissioner or court which is not verified by affidavit as required herein."

Manifestly this statute was intended to furnish to the personal representative something to guide him in the settlement of claims against the decedent, and as to which he would, in the great majority of cases, have no knowledge. This being the reason for its existence, it should not be held to be an inexorable rule in courts of equity when suits are brought by the heir or devisee against the personal representative for a settlement and distribution of the assets in his hands after the payment of the debts.

The spirit of the statute should be looked to for a construction and as a guidance in its application. A personal representative may not know whether a claim is just or contains usury, or whether there is any set-off or discount against it, and, therefore, the law requires it to be verified and proven.

Suppose A presents a claim to B, the administrator of C, and demands its payment. B says, "you must prove it." A replies, "you know all about it; I will prove it by you." B thereupon pays it, without proof of it, since he does know all about it. Can it be said that a court of equity, in a controversy between him and the heir or devisee, can not give him credit by it when it is shown to the court that it was a just claim? We think not. If so, then justice is defeated instead of promoted.

It is clear that the claims of the Commercial Bank and of Watts, Given & Co. had a real existence, and that they were

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just demands. When this is shown in a contest between the personal representative and the distributee, is the latter to be allowed to gainsay their payment in a court of equity under the letter of a statute which was enacted to compel a showing of their justness in order that they might be paid?

When the claims were held by the bank and by Watts, Given & Co., the appellant was himself a competent witness to prove them, and could have been required to do so by the claimants. His deposition in this case, subjected, as he was, to a cross-examination, is more satisfactory than an ex parte affidavit would have been. It operates nunc pro tunc, and authorizes the chancellor to allow the claims.

The appellant testifies that the accounts of Terrell, Clark & Co. upon the books of Watts, Given & Co. were open at all times to the inspection of the members of the firm; that he was at the time familiar with them, and knows that they were correct; that the surviving members of the two firms got together in 1868 and made a settlement, and while he can not now give the items he knows that a balance of $34,549.77 was found due to Watts, Given & Co., and that it was correct.

There is no one else left to testify as to it. The appellee, Juliana Clark, testifying in March, 1883, says that the other members of the two firms are dead. As an evidence of the good faith in the matter the appellant, as an individual and member of the firm of Terrell, Clark & Co., paid his one-sixth of the indebtedness thus found due, and indeed it appears that all the members of the firm have paid their proper share of it.

The appellant was a party to the settlement, both as a surviving partner and as the executor of Clark.

It is true that the law in this State, as laid down in numerous decisions of this court, does not permit one partner, after the dissolution of the firm, or a surviving partner, to settle a claim against the firm, and bind the other partner or his individual estate. (Montague v. Reakert, 6 Bush, 393; Merrit v. Pollys, 16 B. M., 355; Bacon, &c. v. Hutchings, &c., 5 Bush, 597.)

A surviving partner may, however, make a settlement by way of ascertaining what is owing to a creditor.

In this case, however, the executor was individually liable for the entire debt due to Watts, Given & Co. They could have compelled him to pay all of it. If he had done so will it be contended that he could not have retained enough of the funds of the estate in his hands as executor to reimburse himself as to the portion which was in fact owing by his testator?

When he paid the portion of his testator, as he unquestionably did, it became a debt in his favor against the estate of his testator, and as he now shows it to be a just claim it should have been allowed.

The above views are in harmony with those expressed in the cases of Overly's Ex'or v. Overly's Devisees, 1 Met., 117; Lucking's Adm'r v. Gegg, 12 Bush, 298; Berry, &c. v. Graddy, 1 Met., 553, and Hoyt v. Sprague, 8 Ky. Law Rep., 616, and seem to us to accord with the equitable rule laid down in Perry on Trusts, section 485: "That the cestui que trust ought to save the trustee harmless when the trustee has honestly, fairly, and without the possibility of gain to himself, paid out money for the cestui que trust."

The account presented by the appellant, which shows a balance owing to him from Clark, Terrell & Co. of $2,792.05, and with one-third of which, or $931.67, he charges the estate of his testator, contains an item of credit in his favor of $5,000 for winding up the business of the firm. It is true it appears that he mainly attended to it, but the business of the firm was not car-

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ried on after Clark's death, and the appellant was the executor of Clark, and in the absence of any agreement authorizing it it is the general rule that a surviving partner is not entitled to compensation for such services.

It is said in 3 Kent, 64, note b: "The surviving partner or partners who collect the debts, adjust accounts and wind up the concern, have no compensation for trouble or services unless the same be stipulated. The same rule applies as if the original partnership had continued."

The same rule is laid down in Collyer on Partnership, sections 199, note 1, and 328, and especially if the survivor be the executor of the deceased partner.

Exceptions to this general rule may, and do, under modern decisions, arise, but we see no reason for departing from it in this instance. The item for pay for these services should be disallowed, and it results that instead of there being a balance in appellant's favor on this account presented by him of $2.792.05, that he is indebted to the firm in the sum of $2.207.95, and that Clark's estate should be credited with one-third of it, or $735.98, as against the appellant.

The item of credit in his favor in voucher, No. 119 of $931.67, should, therefore, be expunged, and instead thereof the estate should be credited by $735.98, but subject to this correction this voucher should be allowed. It is manifest that the executor paid the debts to the bank, Britt and J. H. Terrell. This was done for the benefit of the estate, and it is now shown that they were just, and in this contest between the executor, who has acted in good faith, and the devisee, it would be inequitable not to allow him credit for them.

Judgment reversed and cause remanded for a judgment and further proceedings in conformity to this opinion.

JACKSON v. COMMONWEALTH.

(Filed June 7, 1887.)

To constitute the offense of obtaining property under false pretense, denounced by section 2 of article 13, chapter 29, General Statutes, it is not necessary that the thing obtained should be of as great value as $10, the amount necessary to constitute grand larceny. One may be punished under that statute, however small the value of the thing obtained.

Thos E. Ward for appellant.

P. W. Hardin for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

This appeal involves the construction of section 2, article 13, chapter 29 of the General Statutes, which provides:

"If any person, by any false petense, statement or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, or if he obtains, by any false pretense, statement or token, with like intention, the signature of another to writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

By our statute all offenses are either felonies or misdemeanors.

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Such as are punished with death or confinement in the penitentiary are felonies, while all others, whether so at common law or made so by statute, are misdemeanors.

The larceny of goods and chattels of the value of $10 or more under the statute constitutes grand larceny, and is punishable by confinement in the penitentiary for not less than one nor more than five years, but if worth less than $10 then it is petit larceny, and the offender guilty of a misdemeanor only.

The appellant, Frank Jackson, was indicted under the section of the statute above cited for obtaining $8 by false pretenses. His demurrer to the indictment having been overruled, he pleaded guilty as charged, and his punishment was fixed at one year in the penitentiary.

He now contends that the word "larceny," as used in the statute, must be held to mean grand larceny, and that the legislature, in enacting the law, intended it should be so restricted. It at once occurs to the mind that if this be so, then the offender, who, with evil and fraudulent intention, obtains property by false pretenses, goes free if it be worth less than $10. It strikes one at first blush that such could not have been the legislative intention.

A further consideration and examination of this provision of the statute confirms this view. Its object is not to prevent mere larceny, either grand or petit. Another section provides for their punishment, but to punish the fraud.

One may be sent to the penitentiary for fraudulently signing another's name to a note for less than $10. In such a case it is the fraud that constitutes the offense. If the amount of it were to govern, then its forgery could not be punished by penitentiary confinement unless it represented as much as $10. It is not the amount thus fraudulently obtained or the theft itself, but the fraud practiced, which makes forgery for small sums a penitentiary offense.

Likewise the statute now under consideration was not intended to punish the mere larceny, or, more properly speaking, the fraudulent appropriation of a certain amount of property, but if obtained by "false pretense, statement or token, with intention to commit a fraud," then, if it might be the subject of larceny, but without regard to the amount of value, it constitutes a penitentiary offense, just as the signing of another's name to a check, without his consent, and with an intention to steal or appropriate it, constitutes forgery, although it may be for less than $10.

It is manifest that this is the correct interpretation of the section in view of the latter part of it: "Or if he obtain, by any false pretense, statement or token, with like intention, the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

The section provides the same punishment for obtaining, by false pretense, statement or token, with intent to commit a fraud, anything which may be the subject of larceny, as is provided in case the signature of another is likewise obtained, and for a like purpose, and the false making of which would be forgery.

If the word "larceny" in the first part of the section is restricted to grand larceny, then it results that one who obtains property by a false pretense can not be punished unless it amounts to $10 in value, but that, under the same section, an offender who thus obtains a signature may be sent to the penitentiary without regard to the sum involved.

The latter part of the section explains the whole of it. It so allies the offenses denounced by the entire section to forgery

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that the rules and reasons applicable to one apply to both. It is the false pretense and fraud which distinguish them from mere larceny.

Judgment affirmed.

THOMSON'S ADM'R v. WILLIAMS, RECEIVER.

THOMSON'S ASS'EE v. SAME.

(Filed June 11, 1887.)

1. Revivor—Under the provisions of the Code for the revivor of actions it is not essential that the action be actually revived within twelve months from the time the revivor could have been had. The order to revive must be made within the twelve months, and a copy served as a summons. When served the case stands revived unless valid objections are interposed. If, however, the order to revive is entered within the proper period, and no copy is issued and placed in the hands of some one authorized by law to serve it within twelve months, there is such laches as should compel the plaintiff to pursue his remedy by action, but the plaintiff is not barred of his summary remedy merely by the neglect of the officer to serve the order within twelve months or by the temporary absence of the representative of the decedent from the jurisdiction. In this case an order of revivor, although made within twelve months, did not revive the action as it was not served for seven years.

2. Same—An order to revive, made within six months from the notification of the personal representative, is a nullity unless made by consent or unless the representative afterwards enters his appearance.

3. Same—A personal representative, by making a motion to dismiss an appeal which is sustained, does not enter his appearance to the action so as to dispense with the necessity of the service of an order of revivor in the lower court.

W. M. Beckner, H. L. Stone and G. B. Nelson for appellant.

Chas. Eginton and B. F. Buckner for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Pryor.

The present litigation should have a final termination. In an action in equity, pending between Williams, Receiver, the present appellee, and Thomson's Adm'r, the case was decided adversely to the receiver, and he has appealed to this court. There were other appellees on the appeal besides Thomson's Adm'r. When the case reached this court Thompson's Adm'r moved to dismiss the appeal as to him because he was not a party to the proceedings below. Thomson, who was a party, died before judgment, and an order of revivor was entered, but never issued or was served on his administrator, and in this condition the judgment below was rendered. When the administrator made his motion to dismiss the appeal as to him for want of revivor, an affidavit was filed by the appellant, or those representing him, to the effect that the order of revivor was in fact a consent order reviving the case, and the clerk had omitted to so state when entering the order below. This court then continued the case in order that the present appellee might have the mistake corrected in the court below, and then making it a part of the record in this court. He made no effort, so far as this record shows, to have the order of revivor corrected so as it might be made a part of the proceedings on the appeal then in this court, and his appeal was dismissed.

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The receiver, however (the appellee now), filed his petition in equity to vacate and set aside the judgment from which the appeal had been taken, alleging that by mistake the order of revivor, showing the consent, had not been entered, and that the administrator of Thomson had appeared in this court and fraudulently caused the appeal to be dismissed on the ground that there was no revivor. A demurrer was sustained to the petition in this proceeding, and on an appeal the judgment was affirmed and the case reported in 80 Ky., 328, this court holding that no effort had been made to supply the record in this court on the original appeal that was dismissed, and the appellant (now appellee) had been guilty of such laches in failing to have that record amended as constituted a bar to the proceeding to vacate the judgment. This, in our opinion, ended the litigation, but if not it was too late to revive the action in the summary manner provided by the Code.

While the appeal in the case of Williams, Receiver v. Thompson was pending in this court, in which the motion to dismiss for want of revivor was entered, viz., on the 22d of October, 1879, the present appellee had an order of revivor that seems to have been made at the May term, 1872, reviving the action against Thomson's Adm'r, served on the administrator, and having the case redocketed (the same having been filed away), proceeded to litigate the question between him and Thomson's Adm'r. It was seven years before the action was revived against the administrator, and that revivor was had while an appeal was pending in this court about the same matter, and time given the appellant to show that the order of revivor had in fact been entered and served or revived by consent.

The order of revivor having been made within six months from the qualification of the administrator, was a nullity unless by consent, or the representative had afterwards made defense or entered his appearance.

Seven years had elapsed before this order was served, therefore, no revivor could be had.

By section 501, Civil Code, the order of revivor may be made on the motion of either party, or of his representative or successor.

By section 507, "if the order be made by consent of the parties, the action shall stand forthwith revived, and if not made by consent the order shall be served in the same manner as a summons upon the party adverse to the one making the motion."

By section 502 it is provided: "An order to revive an action against the personal representative of a defendant, or against him and the real representative of the defendant, can not be made unless by consent within six months after the qualification of the personal representative."

Section 508 provides: "An order to revive an action against the representative or succesor of a defendant shall not be made without his consent unless within one year after the time in which it could have been first made."

Section 509 provides: "An order to revive an action in the name of the representative of the plaintiff may be made forthwith, but shall not be made without consent of the defendant after the expiration of one year from the time the order might have been first made, except that if the defendant shall have also died, or his powers have ceased in the meantime, the order of revivor on both sides may be made in the period limited in the last section."

The ancient mode of revivor was by bill setting up the facts constituting the original cause of action, and that had to be filed

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within a reasonable time, and that time was fixed at one year from the time the revivor could have been first had.

The question presented in this case is, can the order to revive be made on motion of the plaintiff within six months from the qualification of the personal representative or successor of the defendant, and if made after six months from the qualification and so entered of record, if there is no service of the order of revivor for twelve months from the time of qualification or from the time the order could have been made, it is a bar to the right to revive, and the plaintiff required to resort to his action against the personal representative? The Code is plain that no order to revive against the defendant's representative unless by consent shall be made within six months from the date of his qualification, and it is equally plain that time does not run against the order to revive until there is some one representing the original defendant against whom an order of revivor may be had. The order to revive is a summary mode of bringing the representatives and successors of the deceased party before the court, and is a substitute for the former bill of revivor, but this mode of revivor must be pursued as provided by the Code, and had within the period therein prescribed. There is a difference between an order reviving the action and an order to revive, and although when entered in either mode by consent, or when served, it amounts to a revivor, regardless of the mere form of the order, still it is plain, from sections 507 and 508 of the Code, that it is the order to revive that must be entered within the twelve months from the time the revivor could have been had, and not that the action must actually be revived within that period. The order to revive must be made within the twelve months, and when made a copy served as a summons, and when served the case stands revived unless valid objections are interposed.

Suppose, however, the order to revive is entered within the proper period, and no copy is issued and placed in the hands of some one authorized by law to serve it on the representatives of the decedent within twelve months, then by analogy to the ancient practice, and under a proper construction of the several provisions of the Code on the subject, it is such laches as should compel the plaintiff to pursue his remedy by action; but we are not inclined to adjudge that where the order is entered within the twelve months, and a copy issued and placed in the hands of an officer, who can serve the summons or order, that the plaintiff is barred of his summary remedy by reason of the neglect of the officer to serve it, or the absence of the representative of the decedent for the time being, although not purposely from the jurisdiction. Here was the lapse of seven years in this case before the order was served, and the motion to revive should have been overruled and the objections of the appellant sustained.

It is argued that there was no necessity for a revivor against Thomson's administrator for this reason: That his administrator having appeared in this court on the first appeal, and having it dismissed as to him, was an appearance to the action, and no summons or revivor was necessary, and the case of Bentley v. Gregory, 7 Monroe, 368, is relied on in support of the position. In that case Bentley filed a bill enforcing a judgment recovered against him by Pile as assignee of Gregory, and the case having been decided on its merits adversely to Bentley he appealed to this court. Before the judgment below was rendered Pile died, and an order of revivor was made but not served on Pile's administrator. The administrator, however, entered his appearance

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to the appeal in this court, and the judgment was reversed. The court, alluding to the irregularity of the proceding below in regard to the revivor, said that it would be unnecessary for a copy of the order to be served on the administrator after the return of the cause for the reason that he had made himself a party by appearing in this court. So the administrator in this case having entered his appearance here, by his motion to dismiss, if his motion had been overruled and the judgment reversed no service of the order of revivor would have been necessary because he had made himself a party by making the motion. He will not be allowed to move to dismiss, and when his motion is overruled then insist that he was only a party for the purpose alone of making the motion, but when his motion is sustained, and this court adjudges that he is not a party to the record, and, therefore, dismisses the appeal, it is difficult to perceive in what manner this made him a party or dispensed with the necessity of service in any future action, or in the same action when pending below.

The motion to dismiss because he was not a party was at his peril. If the court sustained the motion this ended the appeal as to him, but if overruled he is then a party to the action for all the purposes of the litigation.

Judgment reversed and remanded for proceedings consistent with this opinion.

Judge Holt not sitting.

CHAMBERLAIN, &c. v. YOUNG'S EX'OR, &c.

(Filed June 14, 1887—Not to be reported.)

In construing wills technical rules of construction will not be allowed to defeat the intention of the testator, which must always control. Therefore, while the rule in construing wills of favoring vested rather than contingent interests, and also the rule which treats future interests as vested when there is any present vested interest in the income of the property, are applicable to this case, they are not conclusive of the construction that should be given to the will in question because, if applied, they would defeat the manifest intention of the testator.

In this case it is held that under the peculiar provisions of the will construed the interest of a deceased grandchild of the testator passed to his mother and brothers and sisters under the will, and not to his father and mother under the laws of descent, the context showing that the testator intended that the father should never have any interest in, or control over, the fund or any part of it.

A. P. Humphrey and Bland Ballard for appellants.

Kinney & Kinney and John Stites for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

This action was instituted by the executor for a construction of the fifth clause of the will of Lawrence Young, deceased, which is as follows:

"Since the husband of my daughter has neither fitness nor taste for the life of a husbandman, I wish to make provision for my daughter in money, and to this end I hereby sell to my three sons, Benjamin, William W. and Richard Young, the ninety acres, more or less, lying between the lot of Richard Young and

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the lot deeded to William Young, of equal value with that hereby given to my other sons, for $10,000, which sum I give to my daughter, Virginia Chamberlain, and the children born of her body, to be paid in the following manner: Within one year from the time the parties get possession the first payment of $600 is to be made to my daughter for the support of herself and children, and a like amount every year after till her first child marries or becomes ———, in the happening of either of which events such child may demand and receive his or her equal share of the principal of $10,000, my daughter still to receive from my executors the interest yearly on the remainder at 6 per centum per annum, and her other children their shares as they marry or become of age, the principal of her own share to be paid by my executors after her death in such manner as she may desire."

It appears that the daughter, Virginia Chamberlain, had four children when the testator died, but one of them, Beverly Chamberlain, died in infancy without having been married, and the question submitted to and decided by the chancellor and presented by this appeal is whether the interest of the deceased grandchild was intended by the testator to be vested interest, and consequently, being personalty, to descend under the statute in equal portions to his father and mother, or to pass to his mother and surviving brother and two sisters under the will, or to revert to the estate of the testator.

It was held and adjudged by the lower court that the estate of the deceased, Beverly Chamberlain, was contingent upon his arrival at the age of twenty years or marrying, and as neither event ever occurred his mother, Virginia Chamberlain, and her three surviving children are entitled under the will, as though Beverly had not been born, each to the sum of $500, being one-fourth of the principal sum of $2,000, and from that judgment T. W. Chamberlain, the husband alluded to in the will, and Virignia Chamberlain, his wife, and daughter of the testator, have appealed.

It is contended for appellants:

1st. That the legacy of Beverly Chamberlain was a vested and not a contingent legacy.

2d. That Virginia Chamberlain, the daughter of the testator, is entitled to the interest on the legacy of Beverly until such time that, had he lived, he would have been twenty-one years of age.

While it is a general rule that the terms used in a will are to be understood according to the interpretation which such terms have received in judicial determinations on wills, no rule of construction can be rigidly applied alike in all cases, for technical rules must not defeat the intention of the testator, which always controls. Consequently terms used in a will drawn evidently by an unskilled man, as in the case here, for the will was written wholly by the testator, should be scanned by their popular rather than their technical meaning. (Harper v. Wilson, 2 Mar., 466.)

The rule in construing wills of favoring vested rather than contingent interests, as well as the one which treats future interests as vested when there is any present vested interest in the income of the property, are not conclusive of the construction that should be given to the will in question because we think they are repugnant to and, if applied, would defeat the manifest intention of the testator.

It is true the language of the will imports a gift to the children, the application of the interest on the fund to their support, and in terms provides that upon arriving at the age of twenty-one or marrying each child may demand and receive his or her

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equal share of the principal of $10,000, but the signification of these particular expressions is to be controlled by the intention which may be ascertained by considering the context, the obvious purpose and plan of the testator, and the motive that evidently influenced him.

It is apparent that he desired the tract of land, by the sale of which he provided for the fund to be raised, to be occupied and used by the husband to support the daughter and her children, for he gave a tract of about the same value to each of his three sons, but that cherished desire, and also any expectation he might have had of the husband supporting his wife and children on the land was defeated in his own language by the lack of fitness as well as taste of the son-in-law for the life of a husbandman. He, therefore, concluded not to depend upon the husband at all, nor permit him to have anything to do with either the land or the fund that was to be raised by a sale of it, and fell upon the plan of requiring his three sons to buy the land designed for his daughter, paying only the interest on the purchase money until the arrival at age or marrying of the children, and as to the share of his daughter left after the children had received theirs, he was careful to provide the principal of it should not be paid over to her, or even disposed of except by will.

It seems to us clear that he never intended the husband to have any interest in, or control over, the fund, or any part of it, but the object was to provide for his daughter and her children without desiring or intending that the husband should, in any event, take any interest in the fund, and we think the words "in the happening of either of which events" were used by him in the sense of "if" or "in case of," and were intended to make the enjoyment by each of his children of the fifth of the $10,000 contingent upon him or her arriving at full age or marrying, and for the share of such one as might not marry or arrive at full age to go to the mother or other children under the will.

If such be not the construction then upon the death of Beverly the husband became entitled to one-half his share and the mother to the other half absolutely, or at all events to the principal as well as interest theron from the date of his death until the time he would, if living, have been twenty-one years old, for being dead the pro rata share of the interest required for his support was no longer needed, and, therefore, belonged to those who were or would become entitled to the principal sum. We do not believe the testator contemplated or intended the husband, in any event, to take any part of the fund of $10,000, but, as decided by the lower court, upon the death of Beverly his share belonged to the mother and children, to be held under the will.

Judgment affirmed.

AGEE v. COMMONWEALTH.

(Filed June 16, 1887.)

Instructions—Self defense—In criminal prosecutions instructions applicable to every state of case deducible from the testimony or supported by it to any extent should be given to the jury.

In this case, however, the instructions given properly confined the right of self-defense to danger or apparent danger of death or great bodily harm at the hands of the deceased, the accused not being entitled to an instruction allowing the jury to consider the danger, if any, that he was in from the

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sister of the deceased, who, as the accused states, was attempting to present a gun at him.

Z. Gibbons for appellant.

P. W. Hardin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Holt.

There is no question of involuntary homicide in this case. The statement of the accused himself shows that the killing was intentional. He testifies that he "would do the same thing again under similar circumstances."

The only ground upon which to base a right to shoot the deceased was necessary, or apparently necessary, self-defense, and this question was submitted to the jury under proper instructions and determined against the accused.

The testimony is conflicting as to what transpired. Upon the day previous to the killing there had been a quarrel between the two men, and when, upon the succeeding day, it was renewed and the killing occurred the deceased, according to the statement of the accused, presented a pistol at him while the sister of the deceased was trying to also present a gun at him. In this testimony he is, however, unsustained by any other evidence, while upon the other hand the sister testifies that at the time of the killing her brother had no pistol and she had no gun. In this statement she is, to some extent, sustained by another witness, who says that he saw the deceased just a moment before he was shot, and also saw him as he staggered back after being shot, and that he had no pistol. This witness also says that he went immediately to him, and that he had none.

The instructions given confined the right of self-defense to danger or apparent danger of death or great bodily harm at the hands of the deceased. It is contended that this was error; that the accused was entitled to one allowing the jury to consider the danger, if any, that he was in from the sister of the deceased, and that, therefore, the whole law of the case was not given to the jury. Instructions applicable to every state of case deducible from the testimony or supported by it to any extent should be given to them.

According to his own statement, however, the accused was in no danger from her because, as he himself says, he had hold of the gun in her hands, and then intentionally shot her brother. Moreover, the danger from her, if any had existed, would not, under the state of case presented, have excused him in killing the deceased. His defense is that he was at the time, in danger of death or great bodily harm by reason of the deceased presenting a pistol at him. Upon this issue the jury, under proper instructions, found against him.

If, when holding the gun in the hands of the sister, he was in danger or apparent danger from the deceased, then he had the right to shoot him, and the instructions as given so told the jury. They considered the question, and, upon their oaths to do fairly by both the Commonwealth and the prisoner, determined it against him.

In view of the death penalty having been pronounced we have carefully considered this case. It is far from being a pleasant duty, but the lesson must be taught that while the right of self-defense must be sacredly protected, yet men can not, with impunity, violate the law in shedding human blood.

Judgment affirmed.

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WILSON v. COMMONWEALTH.

(Filed June 16, 1887—Not to be reported.)

Impaneling jury—In the trial of a criminal prosecution the defendant is entitled to a full panel of jurors, found upon examination qualified to try the case, before being required to exercise the right of peremptory challenge to the individual juror, and whenever the number is lessened by challenge of either party the panel must be again filled before being passed on, and so on until the jury is completed.

Wm. P. Thorne for appellant.

P. W. Hardin for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Lewis.

In the case of Mundy v. Commonwealth, 81 Ky., 233, it was decided that under the Criminal Code each party in the trial of a criminal prosecution is entitled to a full panel of jurors, found, upon examination, qualified to try the case, before being required to exercise the right of challenge, that is, peremptory challenge, to the individual juror, and whenever the number is lessened by challenge of either party the panel must be again filled before being passed on, and so on until the jury is completed.

In that case the lower court seems to have observed the above rule in the formation of the trial jury, and the question presented on the appeal of the defendant was whether, after having failed to accept or peremptorily challenge a particular juror, found, after examination, qualified, and only presented for the acceptance or challenge of both the Commonwealth and the defendant, he had the right thereafter to do so, and it was held he had not.

In the case of Edrington v. Commonwealth, 7 Ky. Law Rep., 377, the rule laid down in Mundy v. Commonwealth was adhered to, the following language being used: "A full panel of twelve jurors found, upon examination, qualified to try the case, should have been first presented to the Commonwealth for its acceptance or challenge, and all not then challenged should have been regarded as accepted, then the full panel should have been presented to the accused for his acceptance or challenge, and all not then challenged should have been regarded as accepted, and not subject to be again passed on by either party; but in case of the challenge of one or more by either party the vacancies should have been filled from time to time, so as to present to each party, for acceptance or challenge, twelve qualified jurors, including those already accepted."

By the term qualified jurors, used in the connection it was, it could not well be understood otherwise than jurors found qualified, after examination, to sit in that particular case.

The mode described in the two opinions referred to, and which this court decided was the proper one in the formation of the jury, was disregarded and violated by the lower court in this case, and the judgment is, therefore, reversed and cause remanded for a new trial consistent with this opinion. (Jenkins v. Commonwealth, June 11, 1887, ante, page 254.)

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WINGFIELD, &c. v. COTTON, &c.

(Filed June 16, 1887—Not to be reported.)

The motion to vacate a judgment because of its rendition before the action stood regularly for trial can not be made after the expiration of the first three days of the succeeding term.

James Montgomery and Lane & Burnett for appellants.

Bush & Robertson and J. L. Sprigg for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Pryor.

It is plain from the facts of this record that the appellants, although not served in time, failed to appear within the three first days of the succeeding term and move to vacate the judgment.

The Code provides, section 519: The motion to vacate a judgment because of its rendition before the action stood regularly for trial can not be made after the expiration of the first three days of the succeeding term. Besides, in this case the appellees were indulging the principal debtor and holding up a judgment they had a right to enforce. The appellants made no tender of any money into court or offer to do so, and if this had been done we see no equitable grounds for interfering with the sale. The land sold for near its value, and, besides, it is evident that these appellants knew of the sale, and could have protected themselves if they desired to bid more.

Judgment affirmed.

PARKS v. COMMONWEALTH.

(Filed June 16, 1887—Not to be reported.)

It was error to allow a witness to be impeached when no foundation had been laid for his impeachment, but the error was not prejudicial, as the verdict should have been the same under the evidence if the jury had believed the impeached witness.

J. M. Benton for appellant.

P. W. Hardin for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted in the Clark Circuit Court for feloniously breaking into the dwelling house of another, and stealing therefrom personal property.

His motion for a new trial having been overruled, he has appealed to this court. The evidence in the case fully justified the verdict of guilty.

The only ground urged here for a reversal is that the lower court permitted improper evidence to go to the jury, and refused to exclude it from the jury.

The evidence complained of is that of a witness who was called by the Commonwealth to impeach the general character of the appellant, who testified in his own behalf. The impeaching wit-

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ness stated that he knew the general moral character of the appellant, and that it was bad. He also stated, of his own accord, that he would not believe any of the set down there—referring to the Murrays, who had testified for the appellant, one of whom had been already impeached by other witnesses, but French Murray had not been impeached.

It is contended that as no foundation was laid for the testimony as to the Murrays it was error to allow the witness to include them in his opinion, and the refusal of the court to exclude that part of his evidence was prejudicial to the rights of the appellant, especially as Frank was not impeached by other evidence.

It is clear that the evidence in this particular ought to have been excluded, but it is equally clear, to our mind, that the error was not prejudicial to the rights of the appellant, for it may be conceded that all that Frank swore was true, and that the jury should have believed it, yet their verdict should have been the same under the evidence.

The judgment is affirmed.

DANIELS v. COMMONWEALTH.

(Filed June 16, 1887—Not to be reported.)

1. Burglary—The crime of burglary at common law consists in breaking and entering a mansion house in the night time, with intent to commit a burlgary; and the term mansion house includes all outbuildings which are parcel thereof, though they are not contiguous to it.

2. Same—Appellant was indicted for feloniously breaking into a millhouse in the night time, wherein wheat, corn, flour and meal were stored, with the intent to steal therefrom. The trial court instructed the jury that the minimum punishment was two years' confinement in the penitentiary. Held—That this was error. The facts charged do not constitute the crime of burglary, but the crime denounced by section 4 of article 6, chapter 29, General Statutes, the minimum punishment for which is confinement for one year in the penitentiary.

Wood & Day for appellant.

P. W. Hardin for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted in the Morgan Circuit Court for feloniously breaking into a mill-house in the night time, wherein corn, flour and meal were stored for sale, with the intent to steal therefrom. He was found guilty of the crime charged, and his punishment fixed at two years' confinement in the State penitentiary, and the court having overruled his motion for a new trial he has appealed to this court.

The trial court instructed the jury that the minimum punishment was two years, and the maximum punishment ten years. The appellant complains of this as error because, as he contends, the minimum punishment is one year and the maximum five years.

Article 5, chapter 29, section 1, General Statutes, fixes the punishment of the common law crime of burglary at confinement in the State penitentiary not less than two nor more than ten years.

The crime of burglary at common law consists in breaking and

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entering a mansion house in the night time, with intent to commit a felony, and the term mansion house includes all outbuildings which are parcel thereof, though they are not contiguous to it. All buildings within the same common fence and used by same family are considered as parcel of the mansion. If they are separated from the mansion house, and are not within the same common fence, though occupied by the same family as parcel thereof, then it is a question for the jury to determine from the evidence whether they are parcel of the mansion house.

It is clear that the facts charged in the indictment do not constitute the crime of burglary at common law. It is also clear that the facts charged do not constitute the crime mentioned in the fourth section of said article. The crime therein mentioned consists, among others mentioned, "in feloniously breaking any dwelling house, or any part thereof, or any outhouse belonging to, or used with, any dwelling house, and feloniously 'taking' away anything of value," etc.

But the crime charged does not fall within that class of crimes denounced by section 4, article 6, chapter 29, General Statutes, the punishment of which is fixed by confinement in the State penitentiary not less than one nor more than five years, at the discretion of the jury.

We think that the trial court should have instructed the jury under this section of the statute, and not under either section of the fifth article.

The judgment overruling the appellant's motion for a new trial is reversed and the case remanded, with directions to grant a new trial, and for further proceedings consistent with this opinion.

DARTER v. COMMONWEALTH.

(Filed June 16, 1887—Not to be reported.)

An indictment for breaking into a railroad car with intent to steal therefrom is not good, either under the statute or at common law, unless it states that the car was in the possession of or owned by another than the accused, giving his name, or stating that it is unknown to the grand jury, so as to negative the right of the accused to enter.

Botts & Cockrill for appellant.

P. W. Hardin for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Chief Justice Pryor.

The statute provides that "any person who shall forcibly break and enter into any railroad depot, car factory, station house, railroad car or express car, with intent to kill or rob any person therein, or to steal property, money or anything of value therefrom, shall be deemed guilty of felony, and punished by confinement in the penitentiary not less than two nor more than ten years."

The indictment against the appellant, following the language of the statute, charges the appellant with unlawfully, forcibly and feloniously breaking open and entering a railroad car, with the intention to steal therefrom, etc., on the Glasgow branch of the Louisville & Nashville road, at the depot near the town of Glasgow, contrary to the statute in such cases made and provided.

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A conviction was had under this indictment, and a motion made in arrest of judgment, the counsel for the appellant insisting that the statements contained in it constitute no offense under the statute or at common law, and this is the only question presented. It seems to us the indictment is fatally defective.

It is generally correct to follow the language of the statute when it specifies the offense, and by its terms makes the offense complete. This offense is complete when the breaking is established, and the intention to steal therefrom shown, if it further appears that the car was the property of another than the accused, or that he had no right to enter. An averment to the effect that the car belonged to the L. & N. Railroad Company, or to some person unknown to the grand jury other than the accused, would have cured the defect under the statute punishing those for forcibly breaking into outhouses, railroad stations, depots, railroad cars, and with the intention to steal, but an averment only that a building or car was forcibly broken open and entered into at or near Glasgow or Glasgow Station by the accused, with the intention to steal, charges no offense.

It might have been his own store or car, or his right to enter unrestricted, and, therefore, it should have been alleged that it was in the possession of or owned by another, giving his name, or stating that it was unknown to the grand jury, so as to negative the right of the accused to enter. This same statute provides "that if any one shall forcibly break and enter a car, with the intent to kill or rob any person," he shall be punished. Now it is manifest that an indictment charging that the accused broke and entered the car, with the intention to rob a person therein, without stating who, or that the name was unknown to the grand jury, and nothing more, would be insufficient.

The accused must have some notice that he may appear and defend, so when a judgment is rendered it will be a bar to another proceeding. Who was it the accused intended to rob? Whose car did the accused enter?

A statute making it a felony to forcibly enter a barn, with the intention to steal, under it an indictment charging A with forcibly entering a barn at or near the railroad, or at or near Glasgow, would be bad on demurrer. An indictment must show what offense has been committed, and as no offense is stated in this case the judgment of conviction is reversed and cause remanded, with directions to set aside the verdict and dismiss the indictment.

The remedy for the State is to refer the case to the grand jury if further steps are taken.

ESTEP v. COMMONWEALTH.

(Filed June 18, 1887.)

1. Self-defense—Where one who is assailed in his own house believes, and has reasonable grounds to believe, that his assailant is about to take his life, or inflict great bodily harm upon him, he has the right to defend himself then and there, and is not required to escape from his own dwelling house.

2. Defense of one's family—As the defendant's wife had been unlawfully assaulted with a rock, and was being beaten in his own house, he had the right to go to her rescue and defense, and if, by force or threats, the husband of her assailant endeavored to prevent him, he had the right to oppose force to force; and if he at the time believed, and had reasonable grounds to believe, his wife was in immediate danger of losing her life or suffering

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great bodily harm, he had the right to use whatever reasonable means were necessary, or reasonably appeared to him to be necessary, to rescue or defend her, even to taking the life of the husband of her assailant; and the jury should have been so instructed.

Connelly & Cline and R. T. Burns for appellant.

P. W. Hardin for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Lewis.

Appellant being indicted for the murder of Martin Scarberry, brother of his wife, was convicted of manslaughter, the homicide occurring, according to the testimony, under the following circumstances:

The residence of the two were not much more than one-quarter of a mile apart, and on the day of the killing the wife of the deceased, leaving him a short distance from it, went alone into the dwelling house of appellant where he, his wife, and others were, and, without speaking to any of them, seized a tin cup, whereupon appellant's wife said to her she took a good deal of authority there, to which she replied that she took enough to get her things, and would also take her tea kettle, and the other then told her to take her things; get out of the house and stay out. She did then go out, but soon returned with a rock under her apron, took a seat and remarked she intended to stay there an hour for aggravation.

The two women, between whom there appears to have been ill feeling, then renewed the quarrel, but what was said by them does not appear. While they were thus engaged the deceased rapidly approached the house, having rocks in his hands, but when near to it he sat down on a log, and, after sitting there a moment, he sprang into the house, and, jumping up two or three times, said with an oath, having the rocks still in his hands, he was the best man who ever jumped into that house. Thereupon his wife threw the rock she had under her apron at the wife of appellant, which struck the wall of the house near her head. The two women then clinched each other and fell upon the floor, the wife of the deceased having the advantage, commenced to beat the other in the face with her fist. Appellant, who does not appear from the testimony to have previously said or done anything, then went up to the deceased, and, putting his hands on his shoulder, said: "Martin, old brother, you take your wife out of here, and I will take care of mine, and let us have no fuss; peace is the best thing," to which the deceased replied, with an oath, he had come there for satisfaction, and was going to have it. He, in that connection, in the language of the witness, asked appellant "about some talk," in reply to which the latter said "he had not had it," and asked if that would not satisfy him, but the deceased again said he had come there for satisfaction, and was going to have it. Appellant then started as if going to part the women, who were still fighting, when the deceased pushed him back, saying: "G—d d—n you, stand back, or I will kill the last G—d d—n one of you." A woman present testifies that she also started to part the women, but was likewise shoved back by the deceased, who then threw up his right hand, still having the rocks, and was at that time shot by appellant with a pistol, the ball entering his back, as the witnesses say, where the suspenders crossed, and from the effects of the shot he died in a few days. The two women continued to fight after the shot was

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fired until parted by appellant and the woman who had before attempted to do it.

The evidence shows that the deceased was the best man in the neighborhood as to physical strength, and his character for violence was bad.

As the jury alone have the right to judge of the weight to be given to the evidence and the credibility of the witnesses, the only question before us is whether the lower court properly and fully instructed as to the law applicable to the case.

In the third instruction it is made a condition of the right of appellant to take the life of the deceased; that he had no other safe, or apparently safe, means of escape from the impending danger to himself. The instruction in that particular is erroneous and misleading, for it implied a duty of appellant to escape, even by leaving his own dwelling house, which had been entered by the deceased in a lawless manner, and with what was equivalent to a threat of violence to the inmates, whereas he was not required to leave it, but had the right to stand his ground and defend himself as well as the inmates of his house.

In the fourth instruction the right of the appellant to stand and defend himself is made to depend upon the fact that the deceased had sought him out for the purpose, and with the intent, to kill him, or inflict great bodily harm, and was, when the fatal shot was fired, manifesting an intention to commence the attack.

No such conditions are or should be annexed to the right of a person to defend himself when assaulted in his own dwelling house, nor is he in any case required to retreat therefrom to avoid his assailant, but if he believes, and has reasonable grounds to believe, one is about to take his life, or inflict great bodily harm upon him in his own dwelling house, he has the right to defend himself then and there, and is not required to escape therefrom.

Instruction No. 2, asked by appellant and refused by the court, it seems to us is even less favorable to the appellant than he was entitled to have it. It is as follows:

"If they believe from the evidence that at the time of the difficulty the wife of the deceased was making an assault upon the wife of the defendant, and that the deceased was present, aiding and abetting his said wife in making said assault, and that the defendant believed, and had reasonable grounds to believe, that death or great bodily harm was then about to be inflicted upon his wife, he had a right to use all necessary means to protect his wife, even to slaying the deceased."

We are unable to perceive upon what ground the lower court refused that instruction, for the defendant was certainly entitled to an instruction embodying substantially the principle contained in it.

It certainly could not have been upon the supposed want of evidence that the deceased did aid and incite his wife in making the assault, for she did not throw the rock with which she had armed herself until the deceased had forcibly and violently entered the house, similarly armed, and obviously with hostile intent.

Moreover, when appellant requested him to take his wife away that there might be peace he refused to do so, and even with force prevented appellant from separating the two women, but in our opinion it was not necessary that the deceased should have aided and abetted his wife in making the first assault with the rock upon the wife of appellant in order to give to the latter the right to rescue his wife from her assailant, and defend her against further violence. His wife having been unlawfully as-

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saulted with a rock, and then being beaten in his own house, he had the unquestionable and unconditional right to go to her rescue and defense, and if, by force or threats, the deceased endeavored to prevent him, he had the right to oppose force to force, and if he, at the time, believed, and had reasonable grounds to believe, his wife was in immediate danger of losing her life, or suffering great bodily harm, he had the right to use whatever reasonable means were necessary, or reasonably appeared to him to be necessary, to rescue or defend her, even to taking the life of the deceased.

For the errors indicated the judgment is reversed for a new trial and further proceedings consistent with this opinion.

PARRISH, &c. v. PARRISH'S TRUSTEE.

(Filed June 18, 1887.)

Construction of devise—Under the provisions of the will construed in this case the widow of the testator is entitled to the whole estate during the time she remains a widow, or until the testator's son arrives at the age of twenty-one years, the remainder in fee to the son, subject, however, to be defeated in case of his death without children or grandchildren, in which event it goes to the widow. But whether the estate devised to the son be an absolute fee, or, as the court thinks it is, a defeasible fee, his children can in no event take any interest therein as devisees under the will of their grandfather.

J. M. Benton for appellants.

B. F. Buckner, Geo. B. Nelson and W. M. Beckner for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Lewis.

D. N. Parrish, the only son, and T. A. Parrish, the widow of D. W. Parrish, deceased, having, by a joint deed, conveyed certain property claimed by them under the will of the decedent to appellees, W. B. and G. B. Nelson, in trust for the payment of their debts, the assignees instituted this action for the purpose of obtaining a judicial construction of the will. Charles S. Parrish, the infant child of D. N. Parrish, being made a defendant, and the lower court having adjudged that the infant defendant had no estate under the will, he, by his guardian ad litem, appeals to this court. After having in his will made devises of specific personal property to his son, who was at the time, 1877, an infant, and to his widow, and made provision for the education of his son, the testator proceeds as follows:

"The whole of the residue of my estate, not herein specifically given to my wife and son, I give to my wife for and during the time she may remain my widow, or until my son shall arrive at the age of twenty-one years, whichever shall happen first.

"From and after my son's attaining his majority, or the marriage of my wife, if she shall marry, she is to have such portion only of my estate as is specifically bequeathed to her in the second clause of this will, and such portion of, and interest in, the balance of my estate as the law gives to a widow by the way of dower and distribution, and my son is to have the balance of my estate in fee simple. Upon the arrival of my son at the age of twenty-one years he is to have five hundred dollars in addition to the specific legacies hereinbefore mentioned. The whole bal-

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ance of the estate herein devised to him may, in the discretion of my wife, or, in the event of her marriage before he attains the age of twenty-one years, of his guardian, be placed under his control, and shall be when he shall have attained the age of twenty-five years.

"Subject to the interest devised by this will to my wife, I give the whole of my estate to my son, Dabney Nelson Parrish, but should he die without lawful children or grandchildren living at the time of his death, then in that event the whole of the estate devised to him is to go and belong to my wife."

The only theory upon which Charles S. Parrish, the infant child of D. N. Parrish, or any other children he may have, could claim any interest under the will is that D. N. Parrish takes thereunder only a life estate, and that upon his death such of his children or grandchildren as may survive him will be entitled to a remainder interest, not as his heirs at law or devisees, but under the will of their grandfather.

It seems to us clear that the testator did not intend to give D. N. Parrish merely a life estate. On the contrary his language is: "My son is to have the balance of my estate in fee simple."

It is equally clear that under the will he does not take an absolute fee, for the language is plain and unambiguous that if he should die without lawful children or grandchildren living at the time of his death, in such event the whole of the estate devised is to go to and belong to the testator's wife. Nor can the time of his death be fairly made to refer to either the lifetime of the testator or the period between the death of the testator and the time of the son arriving at the age of twenty-five, for it could not have been contemplated that in the course of nature the son would die before the age of twenty-five leaving grandchildren.

According to the only construction that can be properly put upon the will the widow was given the whole estate during the time she remained a widow, or until the son arrived at the age of twenty-one years, the remainder in fee to the son, subject, however, to be defeated in case of his death without children or grandchildren, in which event it goes to the widow.

But whether the estate devised to D. N. Parrish be an absolute, or, as we think it is, a defeasible fee, his children can, in no possible event, take any interest therein as devisees under the will of their grandfather.

As the widow and son of the testator unite in the conveyance to appellees, they have acquired an absolute and indefeasible title to the property conveyed, or at least so much of it as was devised by the testator, D. W. Parrish.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

HUMPHREY v. WHITE, &c.

(Filed March 16, 1887.)

1. Bills of exceptions—Under the present Code of Practice, where the judge has refused to sign the bill of exceptions, or the verdict is assailed on the ground that it is not supported by the evidence, the appellate court will not

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set aside the verdict unless the evidence is stated in full in the bill of exceptions.

In this case the bill of exceptions, in stating the testimony of the several witnesses, gives the name of the witness, and in each instance, except one, states that he "testified in substance." At the close of the bill it is stated: "This was all the evidence in the case." Held—That it appears that the testimony is not stated in full, and the court can not, therefore, consider whether the verdict is sustained by the evidence.

2. The verdict in this case, although informal and irregular, showed that the plaintiff was not entitled to recover, and was, therefore, sufficient to authorize a judgment for defendants.

Wm. B. Noe for appellant.

Jep. C. Johnson for appellees.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Ward.

Appellant Humphrey sued J. W. White, sheriff, and his deputy, and the plaintiff in an attachment in the hands of the officers, and under which they were acting at the time of the alleged injury, or damage he claimed to have sustained by reason of the levy and seizure of his property to pay the debts of James Nofsinger, the defendant in the attachment.

Humphrey claimed to have bought the property from Nofsinger a short time before it was seized by the officer, and his title and ownership were denied.

The issue joined was whether it was the property of Humphrey or Nofsinger at the time of the levy. The jury returned this verdict:

"We, the jury, find for S. W. Rhoades, the defendant, $43.25, this being Nofsinger's one-fourth interest in the Whittier crop of tobacco."

Upon which verdict the court rendered a judgment dismissing the petition.

It is insisted that the verdict is not responsive to the issue, and was not sufficient to authorize the judgment. That the verdict is informal and irregular is manifest, but it finds for one of the defendants, and finds that the tobacco in contest was the property of Nofsinger. This being so, the plaintiff could not recover. We think the verdict, if correctly reached, sufficient to sustain the judgment.

The only ground upon which the verdict is assailed is that it is contrary to the evidence.

The Code of 1854, as it is called, provided as follows:

"Section 365. No particular form of exception is required. The exception must be stated with so much of the evidence as is necessary to explain it and no more, and the whole as briefly as possible."

Under the rule, even before the Code (Norton v. Sanders, 1 Dana, 14), as well as under the Code, it was necessary that the bill of exceptions should show that it contained all the evidence given on the trial below before the appellate court could reverse on the ground that the verdict was contrary to the evidence. (Bracken County Court v. Robertson County Court, 6 Bush, 774.)

The Code of 1877, as it is called, by subsection 2 of section 335 provides:

"If the judge refuse to sign the bill of exceptions as presented, or if the party wish to appeal upon the ground that the verdict is not sustained by the evidence, it shall be stated in full, and the bill of exceptions presented to the judge."

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The bill of exceptions in this case shows that fifteen witnesses testified on the trial below, and as to all of them except one the plaintiff, the bill says, giving name of witness, "being duly sworn, testified in substance," or "testified in substance." The bill does not give the testimony of any of the witnesses in full, as required by the Code, except the plaintiff.

It is true that the bill recites, at the close of the evidence introduced by plantiff, "this was all the testimony in chief introduced by the plaintiff," and at the close it says, "this was all the evidence in the case."

These recitals, or some other having the like effect, were necessary under the old rules of practice and the Code of 1854, and are not sufficient to show a compliance with the Code of 1877, in the face of the repeated statements that the substance of the evidence is given, unless it can be maintained that the Code of 1877 did not change the law.

We think the Code of 1877 changed the law, both by allowing the bill of exceptions in many cases, as provided in subsection 1 of section 365, to summarize or state the substance of the evidence, and by providing, in the subsection named above, that the evidence should not be stated in substance or by summarization, but in full.

It was intended that the appellate court should, in the classes named in subsection 2, test the verdict by the very evidence heard by the jury, as nearly as possible for it to be written down, and that the verdict should not, in case the judge refused to sign the bill, or in case the verdict was assailed on the ground that it is not sustained by the evidence, be set aside by the appellate court without having before it in full the evidence heard by the jury. The difference between the effect of a bill made up by bystanders, or by the judge who presided at the trial, which gives only the substance of what the witnesses said, from one which gives the evidence in full, is apparent, and we must, therefore, conclude that the legislature, by the new and much more comprehensive language, intended to make the change, and to say what it meant and mean what it said.

For the reasons stated we do not feel authorized to consider whether the verdict is flagrantly against the evidence, and the judgment must be, and is, therefore, affirmed.

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SUPERIOR COURT ABSTRACTS.

TAYLOR v. DENNY.

Filed June 1, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, affirming.

Conversion of property in custody of court—D., having had an execution against F. levied upon a lot of tobacco alleged to be held by F. jointly with T., brought this action against F. and T. for the enforcement of his lien. It appearing from T.'s own evidence that he had, after the institution of the suit, sold the tobacco for more than enough to pay the execution, a personal judgment was rendered against him for the amount of the execution. It is insisted that the judgment is erroneous because no amendment was filed suggesting the conversion of the tobacco by T.

Held—That while perhaps it would have been better for the plaintiff to have amended his pleadings setting up the conversion, yet as T. had sold the tobacco in contempt of the court's authority, the court should, without pleading, have ruled him to pay the proceeds of the sale into court, and, as the personal judgment is no more prejudicial that the rule would have been, the court having the power to enforce the rule by personal judgment, T. has no right to complain.

Evan E. Settle for appellant; O. B. Hallam for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. JONES.

Filed June 1, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Railroads—Killing of stock—The paramount duty of the agents in charge of a train is to look to the safety of the train and the property and lives immediately in their charge, and, to do this duty, they must keep a lookout on the track ahead of the train; subordinate to this duty they must use reasonable care to avoid injury to animals straying on the road.

The failure to present this idea to the jury was a prejudicial error in this case, the animal killed not being on the track, but at the side of it, prior to the time at which it was struck.

2. Same—As the mule which was killed was in charge of its owner, it was his duty, as soon as he saw the danger, to have taken such steps to have prevented an injury as any ordinarily prudent man would have taken, and if he failed to do so, then the railroad is not responsible unless the engineer or fireman in charge of the train, after apprehending the danger to which the mule was exposed, failed to exercise ordinary care to prevent the injury.

Wm. Lindsay for appellant; C. W. Lester for appellee.

RAGAN BROS. v. HITCHCOCK.

Filed June 1, 1887. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Barbour, affirming.

Appellate practice—Depositions used in evidence upon the trial of an ordinary action can not be considered in the appellate court unless identified by an order of court or embodied in the bill of exceptions.

In this case the bill of exceptions shows that several depositions were read on the trial which are not embraced in it or identified by an order of court. Held—That the court can not consider whether the verdict is sustained by the evidence, or whether the court erred in admitting evidence and in giving or refusing instructions.

John W. Blue for appellants.

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MAXFIELD, &c. v. LOVELACE, &c.

Filed June 1, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Bills of exceptions—As the bill of exceptions in this case does not state the plaintiffs' evidence in full, but merely what counsel agreed it conduced to prove, the objection that the verdict is not sustained by the evidence can not be considered.

2. Prejudicial error—Although an instruction as to punitive damages may have been erroneous, it was not prejudicial, as it is clear punitive damages were not given.

Nelson & Washington for appellants; E. W. Hawkins for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. FERRELL.

Filed June 1, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Burden of proof—As the defendant would have been entitled to a verdict under the pleadings if no evidence had been introduced, it was proper to refuse to it the concluding argument.

2. Bill of exceptions—There can be no reversal for an error in giving or refusing instructions unless all the instructions are included in the bill of exceptions.

In this case, as instructions given on motion of plaintiff are omitted from the transcript, the clerk stating that they can not be found, none of the instructions can be considered.

3. Excessive damages—Whether the damages were excessive or not depends upon the criterion by which they were found, and as the instructions can not be considered, it can not be said that the criterion was improperly fixed.

Lyttleton Cooke and Wm. Lindsay for appellant; J. C. Wickliffe for appellee.

SIMS, &c. v. BANTA, &c.

Filed June 8, 1887. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Arbitration and award—While it may be that the provisions of the statute which regulate arbitrations and awards do not take away the right to submit matters of dispute to arbitration as allowed by common law, yet if the parties have agreed in writing, as provided by the statute, the presumption that they agreed to an arbitration with reference to the statute should be indulged unless there is something in the mode of submission, or in the agreement itself, to show that it was a submission under the rules of the common law, independent of the statute, and the award should be set aside if it does not, in its essential features, conform to the statute.

The award in this case was properly set aside, as the arbitrators were not sworn, failed to give notice of the time and place of sittings, and heard evidence in the absence of the parties in interest.

2. Partnership—Partners can not, in the absence of an express contract, recover compensation for services in attending to the partnership business.

J. P. Norvell for appellants; Thomas Kennedy for appellees.

HAFFEY v. LETCHER, &c.

Filed June 8, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Street improvements—The charter of the city of Henderson provides that the grading and paving of streets shall be done at the cost of owners of lots fronting on each side of the street, except that the sidewalk is to be made at the cost and expense of the owners of the lots in front of which the sidewalk is built, the lot owners on the opposite side of the street not being chargeable with any part of the cost. The ordinance under which the improvement in this case was made directs the improvement of the street proper and making of the sidewalk on each side of the street to be done to-

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gether, there being no provision for a separation of the cost of the two improvements so that the cost could be adjusted as is contemplated by the charter.

Held—That the ordinance is invalid, and that the defect was not cured by the contract whereby the contractor was to be paid more for the work done on one side of the street than for that done on the other, nor was it cured by an apportionment made by the council in accordance with the contract.

2. Same—The power of fixing the grade of the streets to be improved being vested by the charter in the common council, they had no right to delegate the power or to leave the grade to be determined by the grades which might thereafter be made upon the adjoining or adjacent streets.

3. Same—The contractor has no cause of action upon his contract until he has completed the work contracted for. The fact that the improvement has been completed in front of the lots sought to be subjected does not give the contractor a right of action against the owners.

John L. Dorsey and M. Merritt for appellant; John Young Brown and W. P. D. Bush for appellees.

DUTY, ADM'R v. BIGSTAFF.

Filed June 8, 1887. Appeal from Bath Circuit Court. Opinion of the court by Judge Barbour, affirming.

Pleading—If the answer which avers that the note sued on had been settled and paid years before the action was brought was uncertain and indefinite, it could, upon motion of the plaintiff, have been made certain and definite. It is, therefore, now too late to complain for the first time that the answer is not good because of its indefiniteness

R. Gudgell & Son for appellant; J. J. Nesbitt, Young & White and W. H. Holt for appellee.

EMISON, &c. v. HINTON.

Filed June 8, 1887. Appeal from Scott Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Actions—Damages—A defeated litigant, honestly asking what he conceives to be his just rights, is not liable to his adversary for collateral and incidental damage caused by the existence of the litigation.

Appellants having inherited an interest in land, contracted to sell and convey it to G., but before the deed was made or the purchase money paid appellee instituted an action against appellants, seeking to subject this land to the payment of a debt which he alleged that appellant's ancestor owed him. That litigation having been decided against appellee, G. paid the agreed purchase money, but refused to pay the interest. Appellants seek by this action to make appellee pay its equivalent in damages.

Held—That appellee would not be liable even if actual damage were alleged, but none is alleged, since the use of the land, which it is to be presumed appellants had, was the equivalent of the interest.

Geo. E. Prewitt for appellants; Owens & Finnell for appellee.

ADAMS, &c. v. LANDRAM.

Filed June 8, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, reversing.

Practice—Verdict—Judgment—In an action by a personal representative against the devisees for the settlement of the decedent's estate the appellee, an attorney, was employed by appellants, two of the devisees, to protect their interests and to surcharge settlements made by the personal representative. After a judgment determining the rights of the parties the appellee had the court to award him a rule against the personal representative and the appellants to show cause why the personal representative should not pay him a fee of $200 for his services. There being an issue as to appellee's employment and as to the amount of his fee, these issues were by agreement submitted to a jury for trial, and the jury returned the following verdict: "We, of the jury, find for the plaintiff, and fix the amount at $175."

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Upon this verdict the court rendered judgment against appellants jointly for the amount thereof. Held—

1. The court had jurisdiction upon notice to all the parties to rule the administrator to pay to appellee the fee which appellants had agreed to pay him, or, in the absence of an agreement, a fair and reasonable compensation for his services rendered for them and at their instance.

2. There was no impropriety in the court submitting the issues to a jury, the submission being requested by both parties, and certainly after making the motion for the submission, and entering into an agreement for that purpose, appellants should not be heard to complain that the court did what they agreed it should do.

3. It was error to render a joint judgment against appellants, since there was not, and could not have been, a joint undertaking. One of the appellants being an infant his guardian, who employed appellee for his ward, could not have bound his ward to pay another's part of the fee. As the services of appellee affected each of the appellants alike, they should each pay a like amount.

4. Verdicts are to be favorably construed, and if it can be inferred from the verdict that the jury have found the point in issue, it is the duty of the court to work and mould it into form according to the real justice of the case.

While the verdict in this case may be informal, the meaning is plain.

E. E. Settle for appellant; J. J. Landram for appellee.

KENTUCKY CENTRAL R. R. CO. v. McGINTY, &c.

Filed June 8, 1887. Appeal from Clark Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Railroads—Master and servant—Special verdicts—A father, as such and as heir, sued appellant to recover for the killing of his son while in its employ. The deceased, who was employed as a "water boy," was killed in attempting to operate a brake, which was no part of his business. The jury found a general verdict for the plaintiff, and found specially that the death was caused by the willful neglect of the conductor in not warning the boy properly "in regard to the danger of operating brakes." Held—

1. As the boy was employed in a business that did not involve handling brakes, the company is not liable for an injury received by him while trying to operate them unless his effort to do so was by the procurement, or with the consent, of the employe in charge.

2. The special finding must be regarded as specifying all that was, in the opinion of the jury, willful neglect, and is equivalent to a declaration that there was no willful neglect except the failure to admonish, which would not be even ordinary negligence unless by reason of peculiar facts not disclosed. The special findings are, therefore, inconsistent with the general verdict, and must control.

Breckinridge & Shelby for appellants.

McKEE v. HAYS.

Filed June 8, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Husband and wife—Necessaries—The purchase of a house is a "necessary" within the meaning of section 2, article 2, chapter 52, General Statutes, if the purchase is reasonable, considering the wife's estate and rank in society, and the wife's general estate may be subjected to the payment of a note executed by her and her husband for the purchase money.

2. In an action against a widow upon a note executed by her and her husband during coverture, the plaintiff failed to allege facts showing that the note was for "necessaries," and asked merely for a personal judgment. By an amended petition the plaintiff alleged the omitted facts, and asked for the sale of defendant's real estate to satisfy the debt sued on. The period of limitation had not expired when the original petition was filed, but had expired when the amended petition was filed. Held—That the action is not

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barred, as the amended petition did not set up a new cause of action, but, simply made perfect that which had already been instituted.

Petree & Downer for appellant; John W. McPherson for appellee.

COMMONWEALTH v. THOMAS.

Filed June 15, 1887. Appeal from Livingston Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Commonwealth's attorneys—Misconduct in office—It is the official duty of a Commonwealth's attorney to abstain from all acts which prevent, or tend to prevent, the enforcement of a judgment of conviction which he has obtained. It is, therefore, official misconduct, for which he may be punished, to hire an agent and set him at work to keep the defendant out of the way after he has been convicted and fined, so the bail may be deprived of the benefit provided by sections 96 and 98 of the Criminal Code, and the State of the satisfaction of its judgment.

P. W. Hardin and J. C. Hodge for appellant; J. G. Husbands for appellee.

LINDSEY v. HAZLIP.

Filed June 15, 1887. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Statute of frauds—Appellee, by a written contract, leased his farm, and also the ferry privilege across the river from his farm, to A. for ten years, the lessee agreeing to pay him one third of the crops raised on the farm, and one-third of the tolls collected on the ferry. About two years after the beginning of the lease G. agreed with A. to take the farm and ferry and run them under the latter's contract with appellee. Appellee was a party to this arrangement, and consented thereto upon condition that G. would give J. as security for his performance of the contract. To all of this G. and J. agreed, and for that purpose signed the original contract as made between appellee and A. Held—That this was a sufficient writing to satisfy the requirements of the statute of frauds so as to bind G. and J., although they were not named as parties to the contract which they signed.

W. E. Settle for appellant; P. F. Edwards for appellee.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO. v. WATTS, &c.

Filed June 15, 1887. Appeal from Boyd Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. New trial—The verdict having been returned June 2, a motion for a new trial made on the 5th of June was too late.

2. Railroads—The fact that appellees sold to appellant the land upon which to build its road did not give appellant the right in the building to disregard the rights of appellees. On the contrary, it is to be presumed that it was contemplated by the parties at the time of the sale and purchase of the land that the appellant, in the building of its road, would use proper care and skill to prevent unnecessary injury to their property.

Appellees aver in their petition against appellant that they are the owners of a parcel of land in front of which appellant's railroad is built; that the appellant so negligently built and constructed its road as to obstruct the natural flow of water and cause its precipitation upon their lands in such quantities as to injure the grass and crops and interfere with the ingress and egress to the property, and render its occupation and use less valuable. It is also averred that the land on which the railroad is built in front of the property of appellees was sold by them to the railroad company to build its road upon. Held—That the petition is good.

Moore & Brown and Breckinridge & Shelby for appellant; K. F. Prichard and Silas Cobb for appellees.

BRENNER v. COMMONWEALTH.

Filed June 15, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Peddlers—Any itinerant person, whether a citizen of this State or some

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other State, who peddles goods, wares or merchandise, whether the product or manufacture of this or another State, without having obtained a license so to do, is subject to the penalty imposed by statute for peddling without license.

2. Same—A person whose business it is to make weekly or semi-weekly visits to his customers to solicit orders and deliver goods previously ordered, is neither an itinerant nor a peddler within the meaning of the statute.

O. W. & A. T. Root for appellant; P. W. Hardin for appellee.

MANN v. STOWERS.

Filed June 15, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, affirming on original and reversing on cross appeal.

Res adjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward.

In an action by a cestui que trust against his trustee for the settlement of the trust estate there was reference to the master commissioner, with directions to make a full and complete settlement, taking into account all that had passed between the parties pertaining to the trust, including what the services of the trustee were worth. The commissioner reported under this reference, but in his report allowed the trustee only a per cent. on the money actually handled by him, and did not report any allowance for the services of the trustee in renting and managing the trust property. A judgment was rendered against the trustee for the balance found due by him. The trustee by his action seeks to recover for services rendered by him in renting and managing the trust property, and to have the amount set off against the judgment in former action. Held—That the former judgment is a bar.

John H. Barker for appellant; L. T. Applegate for appellee.

McDONALD, &c. v. BAILEY, &c.

Filed June 15, 1887. Appeal from Clark Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Decedents' estates—Where the executor brings all the devisees and legatees before the court and asks a sale of property specifically devised in order to pay debts, it is erroneous to order the sale of the personal property bequeathed, and to turn the legatee over to an action for contribution. The court should first ascertain how much money is to be raised; then the value of each separate devisee; each devisee by an interlocutory order should be permitted to pay into court his ratable share thus ascertained and declared, and if any devisee fails to pay when thus called on his devise should be sold to raise his part. If any devise is insufficient to pay its part, the deficit must be re-assessed.

It was error in this case to order a sale of certain legacies to pay all debts.

B. F. Buckner for appellants; James F. Winn for appellees.

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KENTUCKY COURT OF APPEALS.

FULTON, &c. v. SHORT ROUTE RAILWAY TRANSFER CO., &c.

(Filed May 21, 1887.)

1. Elevated railroads—A company chartered to build "a railroad" merely has the right to elevate it wherever the character of the country makes it either convenient or essential to do so.
2. Same—An amended charter of a railroad company referring to city ordinances requiring the road to be elevated at the street crossings, must be deemed a legislative recognition of the right to "elevate" a portion of the road.
3. Eminent domain—When private property has been taken for a specific public use, and compensation made, it should not be used for a foreign purpose without a new legal taking, or the consent of the party from whom it was derived; but it may be applied to any new mode of user tending to the primary or general purpose, therefore, a railroad may be laid out over a highway, provided it is so laid out and constructed as not to be incompatible with the use of the highway in the other usual modes of passage and convevance.
4. The construction of a railroad along a street is not per se an encroachment upon the individual right of the abutting lot owner, and whether he can complain depends not upon the fact of the existence of the railroad, but the manner of its construction and operation. If he is thereby deprived of the reasonable use of the street he may appeal to the courts for relief, but if he is merely inconvenienced thereby, and suffers some remote consequential injury, he is without relief.
5. Injunction—When the construction and operation of a railroad over the streets of a city result in special and substantial injury to abutting lot owners by reason of smoke and cinders, the cracking of walls, etc., they may recover for the damages directly resulting from such causes: but until the road is built it is a matter of mere speculation whether any such injury will result, and as the law affords an adequate remedy for such injuries, and their character or extent can not be ascertained until the road is built, the chancellor will not interfere with the construction of the road merely because such injuries may result.

A. Garnett and T. W. Bullitt for appellants.

Temple Bodley and Woolley & Buckner for appellees.

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Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

The charter of the Short Route Railway Transfer Company, granted by the legislature in 1873, provides:

"Section 2. Said corporation is hereby granted the exclusive privilege to build, construct, maintain and operate a railway transfer company, by steam or animal power, for the transportation of passengers and freight, by the car load or otherwise, including that portion of the city of Louisivlle north of Main street from the east side of First street to the west side of Fourteenth street, for a period of ninety-nine years, dating from January 1, 1873.

"Section 3. Said corporation shall have the right, by and with the consent of the general council of the city of Louisville, to the use of or right of way to such streets and alleys, and such portion of the city's wharf within the limits named in the second section of this act as the interests of said corporation may require, and in such manner and under such reasonable restrictions and conditions as may be agreed upon between said corporation and the general council of the said city of Louisville."

Subsequent sections grant to the corporation, among other privileges, the right to connect its track with that of any other railroad terminating in the city of Louisville, and give to any shipper along its route the right to sidetracks and switches upon such terms as may be agreed upon between him and the transfer company.

A difference arose between it and the city as to the location of the road, and in the compromise it was agreed, among other things, that the road, in crossing First, Second and Third streets, should be so elevated as to permit vehicles to pass under it. To do this it became necessary to build an elevated railway along the Ohio river front of the city, and the company being about to do this the appellees, who are abutting lot owners, brought this action to enjoin it from either constructing or operating such a road along and over Water street, from the middle line of First street to the middle line of Third street, upon these grounds:

1st. That no legislative sanction had been given for the building of an elevated railway.

2d. That the appellants owned the fee to the center of the street adjoining their lots, subject only to the easement of the public in it as a street; and that any legislative grant of the right of way over it to the railway company, without providing compensation therefor, was in violation of the constitutional provision as to taking private property for public use.

3d. That aside from the ownership of the soil they, as abutting lot owners, had a right to the unobstructed use of the street for travel and for the purpose of ingress and egress, to receive light and air thereby, and to enjoy their property free from any inconvenience or injury special to them, such as the jarring or substantial injury to their buildings, the deprivation of light or air, the throwing of smoke, sparks or cinders into and upon their houses already upon some of their lots, or those which might be built upon the vacant ones; the disturbance to the occupants arising from the noise of passing trains, and the invasion of all privacy by reason of their proximity; and that all these rights would be illegally invaded and destroyed by the building of the road, and that injunction is the appropriate remedy for their protection.

The word "elevated" does not occur in the charter. It authorizes the company to construct and operate "a railroad" merely.

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It is, therefore, insisted that, considering the time when the charter was granted, it is improbable that the legislature intended to authorize the construction of any kind of a railroad save a surface one; that this intention is manifest from the charter provision as to sidetracks and switches, and that corporation grants must be construed with all the strictness compatible with their execution.

It appears, however, that only a portion of the appellee's road is "elevated," and from the first introduction of railroads portions of them have been elevated by reason of the topography of the country, or liability to floods, or the grades desirable in cities for the convenience and safety of the public.

Certainly a company chartered to build "a railroad" merely would have the right to elevate it wherever the character of the country made it either convenient or essential, and the evidence shows that if this road were a surface one from First to Tenth street it would frequently be submerged by the floods of the Ohio river.

After the compromise was effected between the city and the company, and on Apirl 1, 1882, the legislature amended the charter in various respects, and this amendment refers to the ordinances of the city of Louisville, which, among other things, required the road to be elevated at the street crossings.

It is true that it merely provides that any provisions in them in conflict with the amendment shall be void, but we must presume that it was enacted with the fact in view that a portion of the road would have to be elevated. In interpreting and giving effect to a statute the necessity, occasion, history of the times and probable object of it are to be considered, and while this amendment did not re-enact the city ordinances relative to the elevation of the road at the street crossings, yet it recognized the right of the company to build a road, which the city ordinances thus referred to required to be elevated, and which the city council, by virtue of section 3 supra had the power to enact.

Even if the power to build the road was questionable prior to this additional legislation, yet this legislative recognition of the right placed it beyond doubt.

It must be presumed that the appellants own the fee in the street, subject to the use by the public, and the question presents itself whether the easement existing by virtue of the dedication as a street is of the same nature as that granted to the company by the legislature.

Its power to appropriate a part of a common highway to the purposes of a railroad without making provision for compensation to the owners of the fee has been a fruitful subject of judicial conflict. It has been urged that it is an additional burden, a new and distinct servitude upon the estate, inconsistent with the original dedication, and can not, therefore, be imposed without compensation to the owner of the fee. Upon the other hand it is said that it is consistent with the dedication; that there is an identity of uses, and that the use of a part of a street by a railway does not exceed the limit of the easement already belonging to the public. This conflict of opinion mainly arises from a difference of view as to the uses contemplated by the dedication of a street to public use.

Upon the one side cases may be found holding that because the term "street" had acquired its meaning before railroads were in existence, that, therefore, it can not be presumed that this character of use was intended in the dedication, and if allowed that the limit of the easement is overstepped and the private

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property of the owner of the fee taken for public use, which, unless compensation be afforded, is inhibited by the Constitution.

In conflict with this view many cases may be found which hold that the dedication of a street to public use contemplates no particular mode of travel; that it embraces not only those then existing but any that may spring up in this age of invention and with advanced civilization; and that a railroad, being but a new mode of travel, is consistent with the uses contemplated by the dedication, and does not overstep the limits of the easement already in existence.

In determining the proper uses of a highway it seems to us to be immaterial whether the abutting owner has the fee subject to the easement or not. The public right embraces all modes of travel consistent with the intended use. If compensation has been made for the easement the subsequent appropriation to another mode of use within the limit of the primary purpose, or one of a like kind, certainly should not require further compensation.

In this age of advancement a rule confining it to a precise mode of use would be unreasonable.

It has even been held that there is no new taking when under legislative sanction a plank road or a canal is converted into a highway or a railroad, and some jurists have contended that when private property has been once taken for public use and compensation made the legislature may apply it to any public use irrespective of the special purpose for which it was taken. This view is based upon the idea that in practice at least, whether the fee or an easement merely is acquired, the full value of the land taken is given as compensation; but this doctrine is fraught with danger to private right, which, although it may be that of the humble citizen, it should be the pride of the judiciary to uphold; and it seems to us that where a grant has been made for a specific use that the subject of it should not be used for a foreign purpose without a new legal taking, or the consent of the party from whom it was derived, but that it may be applied to any new mode of use tending to the primary or general purpose.

It was said by the Supreme Court in the case of Barney v. Keokuk, 94 U. S., 340: "On the general question as to the rights of the public in a city street we can not see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent land owner, or in some third person.

"In either case the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water pipes, gas pipes and the like."

Pierce on Railroads, page 234, says: "The purpose of opening a highway or street is to provide the public with a right of passage for persons on foot or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles operated in such a mode and by such forces as an advanced civilization may require for the general convenience. The improved method of conveyance may incidentally increase or depreciate the value of property on the highway, but, provided the right of ingress and egress of passage and repassage is left reasonably free to the adjoining owner, the injury is one which the law does not recognize. A railroad laid out over or upon a high-

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way or street under proper legal authority is within the legal intent of the original sequestration or dedication, and is not an invasion of private right entitling the owner to compensation by virtue of the constitutional prohibition, provided it is so laid out and constructed as not to be incompatible with the use of the highway in the other usual modes of passage and conveyance.

It is not necessarily a nuisance, even in a large city, although it may to a certain extent interrupt the free passage of other kinds of vehicles, and unless unreasonable or permanently exclusive in its occupation of the highway, when authorized by competent authority, it is not an invasion of private "rights." The writer cites numerous cases in support of the text.

The design of a railroad is to facilitate travel. It, therefore, subserves the object of a street dedication instead of destroying it. It may, therefore, under legislative sanction, have a joint occupancy of a street with other modes of travel having the same end in view, but it can not occupy or use it to the unreasonable exclusion or obstruction of such other modes. The limitation upon the public right is that the appropriation of the street must not be inconsistent with the end for which it was established.

Whether the abutting lot owner owns the fee in the street subject to the public use or does not he, as such adjacent proprietor, has, however, a peculiar private right in the street which attaches to his lot. He has a peculiar use in the street as appurtenant to his tenement in order that he may enjoy it. The right is as much his property as the lot itself. He can claim no damage by reason of mere inconvenience or a consequential decline in value of property or rents arising from the repair of the street, but there can be no such exclusive appropriation of it, even under legislative authority, as to deprive him of its reasonable use. He is entitled to its reasonable use for all the ordinary modes of passage. This is an easement attaching to his adjoining lot; an incident of his title to it, and he can not be deprived of it without compensation. He, however, holds his property subject to the appropriation of the street by the public to such means of facilitating travel and commerce as will most redound to the public good, and it is only when this appropriation becomes destructive of the purposes for which the street was established, and he is deprived of its reasonable use for such purposes, that he can complain.

Indeed the right under legislative authority to permit the construction and operation of a railroad by steam along or upon a street is not now an open question in this State, however much conflict of authority may exist elsewhere, and this without regard to whether the fee subject to the public use is in the adjoining owner or not.

Beginning with the case of the L. & O. R. R. Co. v. Applegate, &c., 8 Dana, 289, followed by the cases of Wolf v. C. & L. R. R. Co., 15 B. M., 409; L. & F. R. R. Co. v. Brown, 17 B. M., 772; Newport & Cincinnati Bridge Co. v. Foote, 9 Bush, 264; Cosby v. O. & R. R. R. Co., 10 Bush, 382; E., L. & Big Sandy R. R. Co. v. Combs, 10 Bush, 382, and the J., M. & I. R. R. Co. v. Esterle, 13 Bush, 675, this doctrine has been repeatedly announced, and must now be regarded as firmly established in Kentucky, and we think it is supported by reason and public necessity, while at the same time individual right is preserved.

It follows that the construction of a railroad along a street is not per se an encroachment upon the individual right of the abutting lot owner, and whether he can complain depends not upon the fact of its existence, but the manner of its construction

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and operation. If he is thereby deprived of its reasonable use he may appeal to the courts for relief, but if he is merely inconvenienced thereby, or suffers some remote consequential injury, it is damnum absque injuria.

The structure in this case at the point where it is sought to enjoin its construction will be about 13½ feet high, supported by iron pillars 16 inches in diameter, and from 25 to 30 feet apart, and where they are in the street there is ample roadway upon each side of them, while where they are in the sidewalk they leave ample room for passage, and we fail to see that there is any unreasonable obstruction or exclusive appropriation of the street, while the character of the proposed structure is such that it is not likely to materially interfere with the passage of either light or air.

Before leaving this branch of the case it is proper to suggest that in the cases of the L. & F. R. R. Co. v. Brown; Newport & Cincinnati Bridge Co. v. Foote, and Crosby v. O. & R. R. R. Co., the railroad was elevated either by a solid wall or an embankment, which was pro tanto an exclusive appropriation of the street, but as it was not unreasonably obstructed the complaint of the abutting lot owners was not sustained.

The road, the construction of which is now sought to be enjoined, by reason of its manner of elevation, will afford less obstruction than did the building of the roads in those cases.

It is urged, however, that it will be specially injurious to the adjacent lot owners, and in a substantial degree, because it will jar their buildings, weaken their foundations, throw sparks, smoke and cinders into them by reason of their proximity, destroy their privacy and render them untenantable, and that these substantial injuries, peculiar to them and to which the general public are not liable, authorize the interposition of preventive equity. It is true that it is not the amount of pecuniary injury which authorizes such relief. If the injury goes to the substance of the right, and is of such a character that reasonable redress can not be had at law, the chancellor will, with the arm of equity, stay the impending wrong.

Whether any special and substantial injury will result to the adjoining owners in this instance is, however, as yet a mere matter of speculation, and, if any, its character or extent can not now be ascertained. If such should accrue its extent can be much better estimated after the road is in operation, and at most it would be a matter of mere damage, for which the law affords an adequate remedy. Undoubtedly if the structure shall be so located as to unreasonably obstruct the abutting lot owner's means of egress and ingress from and to his lot, or if he suffers substantial injury by having smoke, sparks or cinders thrown into his house, or its walls be cracked by the movement of heavy trains, he would be entitled to recover for the damages directly resulting from such causes.

This is because a private right would then be invaded and a direct substantial damage sustained. (J., M. & I. R. R. Co., &c. v. Esterle, and E., L. & Big Sandy R. R. Co. v. Combs supra.)

It was said, however, in the case of L. & O. R. R. Co. v. Applegate, &c., supra: "But both public policy and a long series of adjudged cases require that a public improvement, so beneficent in its general operations and results, and more specially when, as in this case, sanctioned by the legislature and the representatives of the local public, should not be destroyed or suspended by the injunction of a chancellor unless strong reasons for doing it be conclusively manifested."

This reason applies with peculiar force in this instance. The proposed work is one likely to redound largely to the public in-

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terest and that of a commercial metropolis. The road will connect the railroads coming into the city upon one side with those reaching it upon the other, thus supplying, as is shown by the testimony, a now much-needed connection, while, upon the other hand, it is as yet a matter of conjecture what injury, if any, will accrue to the lot owner, and if any he is not remediless.

The law of course will not override individual right in order that a public benefit may accrue, but under such circumstances the facts should be clearly shown and the ground made manifest before the chancellor should interfere.

Judgment affirmed.

Judge Lewis not sitting.

HECKMAN'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed May 21, 1887.)

Misnomer of defendant—Limitation—When a party enters his appearance and makes defense to an action he can not afterwards complain of the judgment that may be rendered against him upon the ground that he was sued by the wrong name, or that the name of a different person was inserted in the caption of the petition and in the summons; and it, therefore, necessarily follows that the action must be regarded as commenced and actually pending against him, at least from the time he so enters his appearance, if not from the time he is served with the summons.

In an action by an administrator to recover for the destruction of his intestate's life by the alleged willful neglect of the defendant, the defendant was, by mistake, named in the caption of the petition as the "Louisville, Cincinnati & Lexington Railroad Co.," instead of the "Louisville & Nashville Railroad Co." An answer was filed having the same caption as the petition, and containing simply a traverse by "the defendant." After the expiration of more than one year from the killing an amended petition was filed, alleging the mistake in the original petition, and asking judgment against the Louisville & Nashville Railroad Co. The Louisville & Nashville Railroad Co then filed an answer to the amended petition, relying upon the limitation of one year in bar of the action. Held—That it is evident from all the circumstances that the answer to the original petition was filed in behalf of the Louisville & Nashville Railroad Co., and had the effect to enter the appearance of that company, and having been filed within one year after the killing occurred, the action is not barred by limitation.

Young & Trabue, Kinney & Kinney and O'Neal, Jackson & Phelps for appellant.

Barnett, Noble & Barnett and Wm. Lindsay for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Lewis.

January 23, 1883, the administratrix of H. Heckman, deceased, instituted an action to recover damages for the destruction of his life in December, 1882, alleged to have been caused by the willful neglect of the servants of the defendant, named in the caption of the petition "Louisville, Cincinnati & Lexington Railway Company."

The summons on the petition was directed against the same defendant, and the return made thereon by the sheriff of Jefferson county was as follows:

"Executed on 'Louisville, Cincinnati & Lexington R. R. Co.,

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January 24, 1883, by delivering a true copy of the within to M. H. Smith, vice-president, he being chief officer in this county."

March 3, 1883, an answer, having the same caption and signed by Barnett, Noble & Barnett, was filed, which contained simply a traverse by "the defendant" of the allegations of the petition, and appended to the answer was a verification in the usual form signed A. M. Quarrier, who stated therein he was assistant to the president and assistant secretary of the defendant, and that the president and vice-president were then absent from this State, and that the secretary was too ill to attend to business.

In June, 1883, the administratrix having died, an order of revivor was made in the name of the present plaintiff and appellant as administrator de bonis non of the estate of the decedent.

All the motions made by the plaintiff were directed against Louisville, Cincinnati & Lexington Railway Company, and the caption of all orders made and entered on record was the same as of the petition until January 21, 1884, when the plaintiff moved to file an amended petition, which was filed February 7, 1884.

In that amended petition the plaintiff stated that by mistake the defendant was styled in the caption of the petition the Louisville, Cincinnati & Lexington Railway Company, when it should and was intended to be the Louisville & Nashville Railroad Company, which is the correct name of the defendant sued and intended to be sued in the action, and prayed that the defendant be required to defend by its correct name of the Louisville & Nashville Railroad Company, and for judgment against it as prayed for in the original petition.

May 31, 1884, an order was made dismissing the action as to the Louisville, Cincinnati & Lexington Railway Company, and June 21, 1884, the Louisville & Nashville Railroad Company filed an answer to the amended petition, pleading and relying upon limitation in bar of the action against it, and the sufficiency of that ground of defense presents the only question before us on this appeal.

As more than one year elapsed from December, 1882, when it is alleged plaintiff's intestate was killed, to February, 1884, when the amended petition was filed, the simple inquiry is whether that amendment made an entirely new action against the Louisville & Nashville Railroad Company.

Though a party against whom a cause of action exists may be sued therefor by the wrong name, yet if the summons be actually served upon him and he appears and files an answer it seems to us he is as effectually before the court, as much as a party to the action, and concluded by a judgment rendered against him, as if his name had been inserted in the caption of the petition and in the summons issued by the clerk. Such was the rule under the former system of pleading, for as said by this court in L. & N. R. R. Co. v. Hall, 12 Bush, 131, relying upon the authority of Chitty's Pleadings: "At common law, when the defendant was sued by the wrong name, he might plead that fact in abatement, but to make his plea good he was bound to give the plaintiff a better writ in the future by disclosing his true name." And, as held in the case cited, the same rule may be applied under our Civil Code. Moreover, section 134 expressly authorizes a petition to be amended at any stage of the action by correcting a mistake in the name of a party.

In Sherman v. The Proprietors of Connecticut River Bridge, 11 Mass., 337, the plaintiff brought an action against the defendants by the name of "The Proprietors of a Bridge over Connecticut River, between Montague and Greenfield, late in the county of Hampshire and now in the county of Franklin," and afterwards

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the plaintiff was permitted to amend his writ by altering the name of the defendants to that of "The Proprietors of Connecticut River Bridge."

It appears that certain persons were incorporated by the name mentioned in the writ, but that company having forfeited its charter a new and distinct one was created, having the name of "The Proprietors of Connecticut River Bridge." Said the court in that case: "The first corporation was dead, and the new one was created for the same purpose and object. The writ was served on the clerk of the existing corporation, by which regular notice was given to the real proprietors of the bridge. This is then the common case of misnomer. The amendment may be made on the common rule of an election by the defendant of the costs of the action to this time or a continuance."

In First National Bank of Baltimore v. Jaggers, 31 Md. Reports, 43, the court used the following language: "There is no doubt that where a party is sued by the wrong name, and he appears to the suit and does not plead the misnomer in abatement and judgment is rendered against him in the erroneous name, execution may be issued upon it in that name and levied upon the property and effects of the real defendant, but there is some conflict in the decision whether the same result will follow if he does not appear and the judgment is obtained by default. The weight of authority, however, is that this makes no difference, and if the writ is served on the party intended to be sued and he fails to appear and plead in abatement, and suffer judgment to be obtained by default, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments."

The same doctrine is stated in "The Lafayette Insurance Co. v. French, &c., 18 Howard, U. S., 404, and in Freeman on Judgments, 154, where numerous cases are cited.

In L. & N. R. R. Co. v. Hall, 12 Bush, 132, the plaintiff sued a corporation, styled "The Louisville, Nashville & Great Southern Railway Co.," and the summons was executed on Albert Fink, who was designated by the sheriff as vice-president of that corporation. On the calling of the cause "defendant by attorney moved the court to quash the sheriff's return on the process herein," and accompanied the motion with an affidavit by Fink, to the effect there was no such corporation known to him as the one made defendant to the action. And there was also an answer filed in which it was denied that there is, or ever was, any such corporation as the one sued, which was sworn to by "the attorney for the defendant."

In that case the court said: "The testimony showed beyond cavil that the proper defendant was in court. It knew its own name. The answer it saw proper to file was in the nature of a plea in abatement. It presented no defense whatever to the action, * * * and as it failed to plead further and failed to disclose its true corporate name it can not complain that the judgment was rendered against it in the name by which it had been sued."

In our opinion, not only according to unvarying authority on the subject but upon the principle of estoppel and common fairness, where a party enters his appearance and makes defense to an action, he can not afterwards complain of the judgment that may be rendered against him upon the ground that he was sued by the wrong name, or, what is practically the same thing, that the name of a different person was inserted in the caption of the petition and in the summons. And it, therefore, necessarily follows that the action must be regarded as commenced and actually pending against him at least from the time he so enters his appearance, if not from the time he is served with summons. We are then left with the single inquiry in this case whether or not

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the Louisville & Nashville Railroad Company did enter its appearance and make defense to the action within one year from the alleged killing of plaintiff's intestate, for if it did the plea of limitation can not avail. Though the summons was directed against the Louisville, Cincinnati & Lexington Railway Company, the summons was actually served on the Louisville & Nashville Railroad Company, for M. H. Smith, upon whom it was executed, was at the time the vice-president of the latter and not of the former company. It is true he states in an affidavit he was then the president of the former, but the summons was served on him as vice-president, not as president.

However, the main question is, in whose behalf the answer was filed March 3, 1883?

It is alleged, and not denied, that when Heckman was killed the Louisville, Cincinnati & Lexington Railway Company did not own or operate the road from Louisville to Lagrange, where the killing occurred, having previously sold and delivered possession and control of it to the Louisville & Nashville Railroad Company.

If the answer mentioned had been filed for and on behalf of the Louisville, Cincinnati & Lexington Railway Company it would have been a complete defense to the action against it, and, therefore, of course stated in the answer that at the time of the killing that company did not own, control or operate the road, and Heckman was not, as alleged in the petition, its employe. But the Louisville & Nashville Railroad Company could not truthfully make such defense, nor was it attempted to be made in the answer. Quarrier, who swore to the answer, was at the time an officer of the Louisville & Nashville Railroad Company, and as such, as is obvious, for that company made the affidavit.

It is alleged in the amended petition that Barnett & Noble, whose names are signed to the answer, prepared and filed it as the attorneys of the Louisville & Nashville Railroad Company. This allegation was, we think, improperly stricken out of the pleading by the lower court. But it makes no difference, so far as the question of fact is concerned, for it would have been easy enough for the attorneys to have stated, if it had been true, that they filed the answer of March 3, 1883, for the Louisville, Cincinnati & Lexington Railway Company, if it had been true. As this record stands we are satisfied the Louisville & Nashville Railroad Company caused the answer to be filed, and its appearance to the action entered within one year after the plaintiff's intestate was killed, and as unquestionably if the plaintiff had any cause of action at all it was against that company, we think the lower court erred in sustaining a demurrer to the reply. Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

DAVIS v. DAVIS.

(Filed June 16, 1887.)

1. Divorce and alimony—Where a judgment of divorce has been improperly granted to the husband instead of to the wife, although that judgment can not be reversed, the wife can not be deprived of alimony simply because the divorce was not "obtained by her," as should have been the case.

2. Same—Where the husband, having children by a former marriage, compels the wife, as a condition of living with him, to expose herself and chil-

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dren to a moral pestilence by allowing his own daughters to continue, as members of his family, to be guilty of fornication, such treatment is, in the true meaning of the statute, "behaving toward her in such cruel, inhuman manner as to destroy permanently her peace or happiness," if she be a chaste woman, and entitles her to a divorce on that ground, even if it may not be regarded as amounting to abandonment on the part of the husband. And where the wife leaves the home of the husband under such circumstances it can not be regarded as abandonment on her part so as to entitle him to a divorce.

R. C. Burns for appellant.

Prichard & Cobb for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, the husband, instituted this action against his wife, appellant, for judgment of divorce from the bonds of matrimony upon the alleged ground that a few days more than one year previously she, without any cause, wrongfully abandoned him, leaving his residence and going to the State of Missouri, where she then resided.

At the first term of the court after the institution of the action appellant, though only constructively summoned, entered her appearance and filed an answer, denying she wrongfully or without cause abandoned the plaintiff.

She states that at the time of their marriage appellee sought her in the State of Missouri, where she then resided, and by reason of his representations she was induced to marry him, sell her property at a sacrifice and come with him to Kentucky; that from the time of their marriage to the separation she was a faithful and devoted wife, but his conduct was so vulgar, adulterous and lewd as to render his home and society unendurable for a decent woman, and he was, besides, cross, quarrelsome and abusive; that at the time of their marriage she had a daughter just grown, who was virtuous and chaste, and a son about fourteen years of age, both of whom were dependent upon her for a support, and that in consideration of her agreement to marry him appellee agreed for her two children to come to Kentucky and to reside with appellee as members of his family, and they did so. But that appellee had two grown daughters, members of his family then, and so continued until the separation, each of whom was the mother of a bastard child, and were lewd women, and that appellee fraudulently concealed that fact from her. And she in substance states that she left the residence of appellee to prevent the contamination of her own children and the blasting of her daughter's reputation by the association which a residence with appellee and his two daughters required.

Upon motion the court struck out all that part of the answer which related to the conduct of appellee towards her and the character and conduct of his daughters.

Subsequently appellee moved to file two amended answers, but her motion in each instance was overruled.

In addition to the allegations contained in the original she states in the amended answers substantially that, after having left the residence of appellee, she sent messages to him to visit her for the purpose of preparing a home for her apart from his lewd daughters, but he returned no answer, and thereupon she went to the State of Missouri, having no other place to go.

In the second amended petition, which was made a counter-

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claim, she states that after their marriage he habitually behaved towards her in such cruel and inhuman manner as to indicate a settled aversion to her, and was so violent and abusive to her as to make her afraid to live with him. She therein prayed judgment for divorce, and, as was also done in her original answer, asked for alimony. But the lower court rendered judgment divorcing the parties and dismissing her counterclaim.

As this court has no power to reverse a judgment for divorce the only question presented by this appeal for our decision is whether, assuming the statements made by appellee in her pleadings to be true, she is entitled to alimony.

Section 6, article 3, chapter 52, General Statutes, provides that "if the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that (estate) of her husband as shall be deemed equitable, and be restored to the name she bore before marriage if she desires it."

Though the judgment rendered is that the "plaintiff, William Davis, and the defendant, Sarah Davis, be, and they are hereby, divorced from the bonds of matrimony as husband and wife," yet it can not be considered literally "a divorce obtained by her," for her answer and counterclaim were dismissed, and a divorce upon the ground of "abandonment by the one party of the other for one year," by the terms of section 1, same article, can be granted only "to the party not in fault." It is true section 2 provides that "a judgment of divorce authorizes either party to marry again," but such judgment can, for the cause mentioned, be strictly rendered in favor of but one of the parties.

If, however, the allegations made by appellant be true, it is clear not only that appellee was in fault, and consequently not entitled to the judgment of divorce, but she was entitled to it, and as a necessary seqence also to alimony.

We have thus an erroneous judgment which can not be reversed by this court nor annuled by the court which rendered it, except upon a joint application of the parties that nevertheless if given its full effect operates not merely to give appellee a divorce, to which, as the record stands, he was not legally entitled, but to deprive appellant of alimony, to which she was entitled, and that would have followed the judgment which the court ought to have rendered.

For if it be true, as alleged by her, that he, after their marriage, habitually behaved towards her in such cruel and inhuman manner as to indicate a settled aversion to her, a statutory cause for divorce existed, and she was entitled to a judgment divorcing her from him. And the lower court ought to have permitted her amended pleadings filed, and the issue thus tendeed to be tried. Moreover, if it was true, as alleged by her, that his two daughters had bastard children and continued as members of his family to be guilty of fornication, appellee was not only justified, but impelled by considerations that neither moral nor municipal law requires to be disregarded, to leave the house of appellee, and take her daughter and son with her, for it seems to us that if appellee tolerated the conduct of his daughters, which it is alleged they were continually guilty of, saying nothing about the monstrous and bestial crime indirectly charged against him, her abandonment of him, if in the meaning of the statute she did abandon him, was as much the result of his fault as if he had, by the actual use of physical force, compelled her to fly to save her life.

But we do not understand that the mere act by the wife of leaving or departing from the abode of the husband or from him is necessarily abandonment in the statutory sense of the word,

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nor that he may not himself be guilty of abandonment by compelling her, as a condition of living together, to expose herself and children to a moral pestilence. But whether such treatment of her by him be regarded as strictly abandonment or not, we are satisfied it is, in the true meaning of the statute, "behaving towards her in such cruel, inhuman manner as to destroy permanently her peace or happiness", if she be a chaste woman.

The question then arises whether appellant can be deprived of alimony, to which she was, as this record is presented to us, entitled, simply because the judgment of divorce was not "obtained by her," as should have been the case, but improperly and illegally obtained by the husband instead of her.

It seems to us that while a judgment of divorce is not subject to reversal it was not intended, nor should the statute be construed, so as to permit such judgment to illegally and disastrously affect property rights of either party.

In the case of Hulett v. Hulett, 80 Ky., 364, this court used the following language: "The marital obligation of the husband imposes upon him the duty of supporting and maintaining the wife, and in a case where the husband has abandoned the wife, or where his treatment of her is such as to compel her to flee to the parental roof, why, as was said in the case of Butler v. Butler, should the chancellor acknowledge the right and deny the remedy?"

The question in that case was as to the right of the wife to maintain an independent action for alimony, without regard to a divorce, and the following language used in Bulter v. Butler, 4 Litt., 206, was quoted with approval: "The chancellor, before the statute and since, in cases not embraced by it, which have strong moral claims, had, and has, jurisdicton to decree alimony, leaving the matrimonial chain untouched, but these authorities deciding in favor of the jurisdiction should prevail."

To deprive the wife of alimony in a case like the one before us, in our opinion, would be contrary to the spirit and policy of the law. If, therefore, appellant left the domicil of appellee for the causes stated by her, she did what she should be commended for and upheld in, and the erroneous judgment in favor of appellee should not operate to deprive her of alimony. The court, we think, erred in sustaining the motion to strike from the original as well as in overruling the motion to file the amended answers.

Judgment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

ANDERSON v. CINCINNATI SOUTHERN RAILWAY.

(Filed June 18, 1887.)

1. Water courses—Rights of riparian owners—Each proprietor of land through which water flows may use as much of it as is necessary for natural and domestic purposes, even if it be entirely consumed in the use, but he is limited as regards other purposes to a reasonable and proportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself.

2. Same—Dams—One may build a dam across a stream flowing through his land without obtaining leave from the county court as provided by section 1 of chapter 77, General Statutes, but if in doing so he interferes with the previous supply to other riparian owners he must answer in damages.

A railroad company built a dam across a creek near a point at which its

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road crossed the creek, by which a reservoir was formed from which water was taken to a tank to supply its locomotives with water. Appellant, the owner of a mill located two miles below this dam, and erected under an order of the county court granting leave as provided by statute, brings this action to recover damages for the unlawful obstruction of the stream that hitherto supplied the power for the operation of his mill. Held—That if there is such a detention of the water as impedes or delays the running of plaintiff's mill he is entitled to recover, the use by the defendant not being an ordinary use of the water.

3. Same—The fact that the defendant has leased its road and appurtenances to another does not deprive the plaintiff of his right of action against the defendant, the dam being the primary and continuing cause of the injury complained of.

4. Same—Under the leave granted by the county court, under the statute, to erect a mill or manufactory on a water course in this State, the owner acquires a vested right which can not be lawfully infringed by any other person or corporation, or taken or applied to public use without just compensation.

[A rehearing having been granted in this case, the opinion now published was delivered upon the second hearing. See former opinion in 5 Ky. Law Rep., 663.]

Curd & Waddle and Parker & May for appellant.

Morrow & Newell for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Lewis.

Appellant is the owner of a water grist mill erected by him in 1872 on Pittman's creek under an order of the Pulaski county court granting the leave as provided by law in such cases. Across the same creek, about one mile below its source and two miles above appellant's mill, appellees, the trustees of the Cincinnati Southern Railway, under charter granted by the general assembly, subsequently built their road, and at the same time erected just above the railroad crossing a wooden dam four feet high, by which a reservoir was formed, from which water was taken to a supply tank to be used in running their trains. But in 1877 or 1878, several years after the completion of their road, they erected in place of the wooden dam one built of stone, laid in cement, fourteen feet high, by which a reservoir was formed covering 10 or 11 acres of land, purchased by them of the riparian owner.

This action was brought by appellant against appellee for the alleged wrongful and unlawful obstruction and diversion by reason of the stone dam of water that hitherto flowed to and supplied the power for the operation of his mill, whereby, as he states, he has been injured and to a great extent deprived of the use and enjoyment of said mill.

For their defense the appellees answered: First. That since July, 1877, the railroad built by them, together with its franchises, appurtenances, etc., including the stone dam and reservoir, has been leased by them to the Cincinnati Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company, and appellees have not since that time been in the possession or had control of the dam or reservoir, and are not, therefore, liable for the injury complained of. Second. They deny that the flow of water to appellant's mill has to any extent been prevented or delayed by the erection of the stone dam, and state that there is no stream of water having channel or banks above

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the point where the dam is located, the reservoir having been supplied with water by surface drainage at times of heavy rains, and that if the water which flows above the dam was unobstructed it would not in any way affect appellant's mill, because the quantity during a portion of each year is so small as even, when added to that below, to be insufficient to run the mill, while during the residue of the time the quantity flowing below is sufficient to operate it as fully as if the dam had not been erected.

In our opinion the first defense is not available. The stone dam, which it is alleged by appellant obstructs and diverts the natural and accustomed flow of water to his mill, was erected by appellees as an appurtenance to their road, and being the primary and continuing cause of the injury complained of, there can be no question of his right to maintain this action against them for whatever damage has been unlawfully caused thereby. How far the lessees of the railroad may be liable, if at all, for taking the water already obstructed by the dam of appellees and using it in operating their trains is a question not now presented.

The right of every riparian owner to the enjoyment of a stream of running water in its natural state, in flow, quantity and quality, is now well established. "Every proprietor of lands on the banks of streams has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it is wont to run without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. Aqua currit et debit currere ut currere solibat is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he can not unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietor he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years (fifteen under our statute), which is evidence of it. This is the clear and settled general doctrine on the subject. All the difficulty that arises consists in its application." (2 Kent's Commentaries, 439.)

"The primary use of water is for natural and domestic purposes, and each proprietor of the land through which it flows may use as much of it as is necessary for those purposes, even if it be entirely consumed in the use, but he is limited as regards other purposes to a reasonable and proportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself." (Wadsworth v. Tillotson, 15 Conn., 366; Evans v. Merriwether, 3 Scammon, 492; Arnold v. Foote, 12 Wend., 330; Davis v. Field, 12 Ver., 118; The Mayor of Philadelphia v. The Commissioners of Spring Garden, 7 Barr, 348.)

Water may by a riparian owner be withdrawn from a stream by ordinary means or by artificial channels for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current. But it can not be withdrawn for the purpose of irrigation or for any other secondary and artificial purpose except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use. (Weston v. Alden, 7 Mass., 136; Colburn v.

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Richards, 13 Mass., 420; Cook v. Hull, 3 Pick., 279; Anthony v. Lapham, 5 Pick., 175; Evans v. Merriwether, 3 Scammon, 492.

It has always been the policy of this State to encourage the building of water mills, and being considered of "public use" the exercise by the legislature of the right of eminent domain in favor of them has never been called in question by the courts.

By section 1, chapter 77, General Statutes, which is substantially the same as section 1 of the act of 1797, continued in force by the Revised Statutes, it is provided that "a person owning land on a water course, the bed whereof belongs to him or the Commonwealth, and desiring to build on such land a grist mill, or other mill or manufactory useful to the pulbic, and needing a dam in or across the water course or the raising of an established dam or the cutting or enlarging of a canal above or below, may, by petition in writing filed in the county court of the county in which is situated the principal part of the land asked to be condemned, obtain therefrom a writ of ad quod damnum for the purpose of making the necessary condemnation, which shall embrace all the land demanded, whether lying in the same county or not."

But by subsequent sections of the same chapter it is provided that such lease shall not be granted if thereby the mansion house of any other than the applicant, or the out houses or any part of the yard, garden or orchard thereto belonging, will be overflowed or taken, or that any other legally established mill will be materially injured thereby, or that the health of the neighbors will be injured. And that no person shall, by reason of such leave, draw the water from the mill pond of another existing at the time of the leave, or otherwise do anything injurious to a vested right in any waterworks then existing on the water course.

By virtue of the leave thus granted to erect a mill or manufactory on a water course in this State the owner acquires a vested right, which can not be lawfully infringed by any other person or corporation, or taken or applied to public use without just compensation being previously made.

By virtue of the statutory proceeding one constructing a dam, or intending to do so, may apply to the county court and obtain permission to do so by paying to the riparian proprietors below and above the dam such damages as they may likely sustain by reason of its construction, and this is a full protection to the applicant; but if no application is made to the county court he still has the right to use his own land and the water flowing over it when not injuring others, as there is no restriction to be found in the statute or elsewhere by which the owner of the land where the stream runs is prohibited from building a dam when not interfering with the rights of others, but in doing so, if he so obstructs the natural flow of the water as to lessen the supply of his neighbor below, or to overflow his land above, he must answer in damages. The owner is entitled to the reasonable use of the water for natural and domestic purposes, but when he undertakes to divert the course of the stream, or detains the water by means of a dam, so as to prevent the previous supply to the riparian owners, he becomes a wrongdoer. In this case the owner of the mill below has protected himself against any claim for damages by reason of the extraordinary use of the water by his application to the county court, but if he had obtained no such leave, and the running of his mill obstructed the passage of the water and diminished its flow to the injury of those below, he would have been liable for the injury. So in this case, although the railroad company owns the land, if the construction of its dam and the use of the water diminished the flow to appellants

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mill so as to affect the running of his mill it must be regarded as an unreasonable use of the water, because the use of the water for the purpose of supplying the boilers on trains running on the road is something more than the ordinary use for domestic purposes. The use and detention of the water on a large stream by means of a dam for the purposes of the railroad might not be an unreasonable use, as ordinarily there would be ample water left for all the purposes of the riparian owner below, yet where the stream is small, or even large, if the dam so obstructs the water as to diminish the flow and lessen the capacity of the water power below, it is an injury to the proprietor for which damages may be awarded. The question, therefore, in this case is not whether the railroad company made an unreasonable use of the water, but whether its use for the purposes of the railroad injured the mill below. Where the water is detained by dams so as to run mills or supply locomotives it is not an ordinary use of the water, and while the company may not use more than is reasonably necessary for running its trains, nevertheless if it injures the mill of the plaintiff he is entitled to recover.

The instruction that the company had the right to its reasonable use was, therefore, misleading. The mere detention of the water or the construction of the dam is not of itself the injury. It must be such a detention as impedes, delays or affects the running of plaintiff's mill.

If the use by the railroad causes no material injury to the owner, then no recovery can be had, and this is a question of fact for the jury to determine.

The judgment below is, therefore, reversed and cause remanded for a new trial in conformity with this opinion.

RITT'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 9, 1887—Not to be reported.)

1. Master and servant—Railroads—If a superior orders a subordinate into a place of peril it is his duty to protect him, and in the omission or performance of this duty the superior represents the principal.

The conductor of a train having ordered a car repairer, who was also foreman of car repairers, to go under a car to make a repair, it was the duty of the conductor, if at the time in charge of the train, to see that the train did not move.

2. Peremptory instruction—Whether a train had passed from the control of the yard master into the control of the conductor, who was to take it on its journey, was a question of fact to be determined by the jury from all the testimony and circumstances in evidence, and there being testimony tending to show that the conductor had charge of the train, upon which fact the liability of the company depended, it was error to give the jury a peremptory instruction to find for defendant.

Wright & McElroy, Rodes & Settle and Edward W. Hines for appellant.

Wm. Lindsay and Mitchell & DuBose for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Holt.

Benjamin F. Ritt, while in the employ of the appellee, the

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Louisville & Nashville Railroad Company, as foreman of car repairers in its yard at Bowling Green, Ky., lost his life on the night of May 27, 1884, under these circumstances: The road south of said place to Nashville, Tenn., is one division, and that running north of it to Louisville, Ky., is another, making Bowling Green what is known as a terminal point, and at which the engine, caboose and entire crew of all through freight trains are changed. When such a train reaches there those in charge of it are relieved and the yard master takes charge of it. It is his duty to superintend the making up of trains and the movements of the cars and engines in the yard. It is the duty of the foreman of the car repairers, together with his assistants, to examine the incoming and outgoing cars, and make all needful repairs.

In the case of a through train the new conductor and fresh crew, who are to take charge of it and conduct it to its destination, are required to be at the yard a certain length of time before the time fixed for its departure, and it is the duty of the conductor before leaving to inspect the train. If the foreman of the car repairers learns in any way that a car is in bad condition he must repair it, and in case this will require more time than the stoppage of the train permits he reports to the yardmaster and the car is taken from the train and sent to the repair shop. The yardmaster and the foreman of the car repairers are in the main sovereign in their particular sphere of labor, but the one may call upon the other to do certain things. So, too, it being the duty of the conductor to see before his train starts forward that it is in proper condition, it appears to necessarily follow that he may direct any necessary repair that may be needed, and to this end may call upon the foreman to have it done.

An employe in one department of the service may, in some states of case or under certain circumstances, command the services of an employe in another department. (L. & N. R. R. Co. v. Collins, 2 Duvall, 115.)

If a conductor, just as he is ready to start upon a journey, discovers a defective brake, he should surely have the power to order its repair.

Upon the night of the accident a through freight train arrived from Nashville. It was switched upon a side track in order that other trains might pass upon the main track during the twenty-five minutes stop there. The crew, including the conductor, that had brought it in left it, the new one and the conductor, who were to take it on, being there ready to enter upon the performance of the duty. When the train first arrived the deceased, as foreman, with one of his assistants, had gone along the train and inspected it. Before the accident occurred all necessary changes, if any, in the composition of the train had been made. In the language of the witness it was "made up." The new conductor had passed along it and inspected it, and nothing remained to be done by him before starting save to receive his orders at the telegraph office and receipt for them. At this juncture he was informed by the conductor, who had brought the train in, that the brake upon the rear was not in good condition. The yardmaster appears to have been present at this time, but instead of referring the matter to him the new conductor sought the deceased and informed him of the trouble and told him in substance to attend to it. He tesitfies that he "requested" him to see to it. A fair construction of what was said makes it amount to a direction to attend to it, and if the conductor was then in charge of the train the doctrine of respondent superior applies. If it and

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its movements were then subject to his order he was por hac vice the superior of the deceased, and the representative or alter ego of the company.

They went together to the car. The deceased remarked in substance that he could fix the brake if the train did not start. The reply was: "I have not got my orders yet; I am not ready to go," and thereupon the deceased went under the car. In a few moments the signal sounded for backing the train and it at once did so, and Ritt was run over and killed.

His administratrix now seeks to recover damages upon the ground that his death was the result of the willful nelgect of the appellee.

After the testimony in her behalf had been offered in the lower court it peremptorily instructed the jury to find for the company, and of this she now complains.

This action of the court was based upon the ground that the conductor had no control of the train in the yard; that its movements, save when it started upon its journey, were entirely subject to the orders of the yardmaster; that the conductor had nothing to do with them, save to give the orders to move out after he received his orders; that the entire testimony showed this to be the case, and that there was a total absence even tending to show otherwise.

As this record stands those immediately in charge of the engine at the time of the accident are not chargeable with neglect because they had no notice that any one was under the train. It also appears that neither the conductor nor the deceased knew that the engine had been attached to the train. A curve in the track prevented them from seeing it, and they had not been informed of it.

It was the custom when a car repairer went under a car for the foreman or one of his assistants to notify those in charge of the engine of it so that it would not move until he came from under it.

It is urged that the deceased was not a subordinate; that he was the foreman of the car repairers, and that it was his duty, upon the occasion when he was killed, to have given this notice, and thus have prevented the accident

This, however, is not so if the conductor was at the time in charge of the train, and for the occasion his superior. If so he had a right to rely upon his seeing that the train did not move, and that he was protected in the hazardous duty which he had been directed to perform.

When he went under the car none of his assistants were at hand. The conductor was present, and while what the latter said related to the car starting on its journey, yet it is fair to presume that the deceased risked himself under the car owing to the presence of the conductor and what he said to him.

If in point of fact the conductor was then in charge of the train; if he then was for the occasion the superior of the deceased, then when he directed him to go under the train to make the repair, thus exposing him to danger, it was his duty to see that he was protected. If a superior orders a subordinate into a place of peril it is his duty to protect him, and in the performance or omission of his duty the superior represents the principal.

The attitude which the conductor then occupied was a question of fact to be determined from all the testimony and circumstances in evidence.

It is not proper for us to review all the testimony or give our opinion of the weight to which it may be entitled. It is sufficient to say that it was the duty of the conductor to inspect the train and have any necessary repair made. He certainly had charge of it for the purpose of putting it in order for the journey. It

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was "made up," and some of the witnesses say in substance that when this has been done and the conductor has inspected it and taken the numbers of the cars, and the train is ready to go that it is known as "his train" and is under his control, subject to change or stoppage within the yard by the yardmaster.

There appears to be a time, upon such an occasion, when it may be questionable who has control of a train. There is certainly good reason for the yardmaster having control of the movements of the cars in yard where there may be various trains moving and at the same time, but a state of case may arise when it is difficult to tell whether a train yet remains under his control or has passed under that of the conductor, or is at least in his charge, subject perhaps to interference by the yardmaster.

Whether this had occurred in this instance was a question of fact to be gathered from all the evidence and circumstances shown by it, and without further comment, as the case must be retried. It seems to us that such a state of case was presented that the question should have been allowed to go to the jury. There was not an entire absence of testimony tending to show that when the deceased met his fate the conductor was in charge of the train, and any doubt upon the question should be resolved in favor of the right of the jury to pass upon it.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

CITY OF LOUISVILLE v. MURPHY, &c.

(Filed June 1, 1887.)

1. Taxation—A statute providing for the imposition of a tax "as long as needed" to pay a particular debt authorizes the imposition of the tax until the debt is satisfied, or until a sum sufficient for that purpose has been raised by the tax.

The charter of the city of Louisville provides that "if in any year the general council shall fail to pass a city ordinance, or if the city ordinance in any year shall be invalid or inoperative, the rate of taxation for the succeeding year shall be as follows," specifying a certain amount for city purposes proper, a certain amount for school purposes, and so for various other purposes, and for subscription to certain railroads "as long as the taxes are needed, thirty cents." For some reason the city council failed to pass any levy ordinance for the collection of taxes for the year 1887, and, therefore, the only authority for collecting city taxes for the year is the charter provision quoted. Held—That the tax of thirty cents for subscription to railroads may be enforced, the bonds issued therefor being still unpaid. The fact that this tax is not needed for the year 1887 to pay interest, or to pay bonds maturing, is not a sufficient reason for restraining the collection of the tax, the object of the tax being the accumulation of money to pay the entire principal and interest.

2. Powers of mayor of city—While as a general rule the mayor of a city has no authority by virtue of his office to authorize litigation in behalf of the city or to employ counsel to represent it, cases of emergency may arise where the power must necessarily exist.

In this case the city officials were proceeding to collect a tax without any ordinance of the city council. The city council failing to take any action, the city attorney was not disposed to do so, but, being in doubt as to the validity of the tax, advised action of some sort by the mayor, who employed

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counsel to institute suit to restrain the collection of the tax. Held—That the emergency justified the action of the mayor.

B. F. Buckner, R. W. Wolley and J. G. Simrall for appellants.

L. N. Dembitz, Goodloe & Roberts, Muir & Heyman and Wm. Lindsay for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

These two cases, one in the name of the city of Louisville against Daniel Murphy and others, and the other in the name of P. B. Reed against the same parties, were heard together in the court below and argued as one case in this court. The object of each action is to enjoin the assessor of the city of Louisville from including in his tax bills an item of thirty cents on each $100 in value of taxable property levied to pay the interest on bonds issued by the city to the Louisville, New Albany & St. Louis Railroad, and not the Elizabethtown & Paducah Railroad. The entire amount due, or to become due, by the bonds is $2,500,000—$500,000 due in 1891 to the first named road, $1,000,000 due to the last named road in 1888, and the other $1,000,000 in 1903. Nearly all the bonds remain unpaid and all bearing interest.

By an act to amend the charter of the city of Louisville, approved March 30, 1880, it was provided that "the general council of the city of Louisville shall, for the purpose of providing for the payment of the principal and interest of the bonds issued by said city to the Elizabethtown & Paducah Railroad Company, dated October 1, 1868, and the bonds issued to the same company, dated January 1, 1873, and the bonds issued to the Louisville, New Albany & St. Louis Railway Company, dated September 1, 1871, continue to levy annually and cause to be collected a tax of thirty cents on each $100 worth of the property, real, personal and mixed, money, choses in action, bonds, stocks and evidences of debt in said city subject to taxation under the revenue laws of the State of Kentucky, and said levy shall continue to be made so long as it shall be necessary to pay the principal and interest of said bonds. Said taxes when collected shall be paid in to the sinking fund of said city, and said sinking fund shall, with said taxes and other resources, pay the aforesaid bonds.

"Section 5. The bonds authorized to be issued by this act, and all other bonds of said city for which the city is primarily liable, shall be a charge on the sinking fund of said city.

"Section 6. Nothing in this act shall repeal the authority which the city of Louisville has to levy and collect taxes to pay the principal and interest of the bonds herein charged on the sinking fund, should said taxes be necessary to pay the same."

By a subsequent act of May 12, 1884, amending the city charter, it is provided:

"Section 3. The general council shall in each calendar year, as early in the month of December as practicable, by ordinance levy an ad valorem tax not exceeding the following rates: For city purposes proper, not more than eighty-five cents on each $100; for the support of the high schools and common scohols, not more than thirty cents; for meeting the principal and interest of the bonds issued to the Elizabethtown & Paducah and the Louisville & New Albany and St. Louis Railroads, not more than thirty cents

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and a half; for the use of the sinking fund, not more than forty cents; for the house of refuge, not more than five cents; for cleaning and repairing sewers, not more than two cents; for cleaning and repairing public ways, and including footways and crossings, not more than thirty cents; for reconstruction and carriage ways of streets and alleys, in conformity with section 6 of the charter amendment act, approved February 20, 1873, not more than twenty-six cents; for bonds under the ordinance and vote of 1883, not more than twelve cents.

* * * * * * * * * * *

"Section 4. If in any year the general council shall fail to pass a levy ordinance, or if the levy ordinance in any year shall be invalid or inoperative, the rate of taxation for the succeeding year shall be as follows, and any tax bill made by color of an invalid levy ordinance shall be valid to that extent: For city purposes proper, seventeen cents on each $100 worth of property subject thereto; for school purposes, thirty cents; for subscription to the Elizabethtown & Paducah and Louisville, New Albany & St. Louis Railroads, as long as these taxes are needed, thirty cents; for the sinking fund, forty cents; for the house of refuge, two cents; for cleaning and repairing public ways, eight cents; for cleaning and repairing sewers, one cent; for reconstruction and carriage ways, six cents; for bonds under ordinance and vote of 1883, twelve cents; in each case on the $100 worth of property subject to such tax."

For some unaccountable reason the city council failed to pass any levy ordinance for the collection of taxes for city purposes for the year 1887, and, therefore, the only authority for collecting the taxes for this year for the purposes of the city is the act referred to in the fourth section, by which the legislature has said in the event the city council should in any year fail to pass an ordinance for that purpose, or if passed the ordinance should prove to be invalid or inoperative, then the legislative ordinance shall be enforced at the rate of taxation therein prescribed.

It is now maintained by counsel for the appellants that the legislative ordinance embraced by the fourth section of the act, in so far as it attempts to authorize the collection of taxes to pay the principal and interest of these bonds, is invalid and void, and if not that the tax imposed is not needed to pay the bonds or the interest on them for the year 1887.

The manifest object of the legislature in adopting the fourth section of the act in question was to provide the city with means to carry on the municipal government in the event the council failed to pass an ordinance authorizing the tax, and to provide a remedy for imposing taxation in the event the ordinance passed for that purpose should prove invalid. The contingency upon which this legislation is to be enforced has transpired, and the principal question is as to the validity of the enactment.

It is conceded by counsel for the appellants that as no levy ordinance was passed all the taxes imposed by the fourth section can be collected, except the tax to pay these bonds, because a definite and specific sum has been fixed by the legislature to be collected without condition or limitation as to all other taxes; but as to the bonds the levy is not only conditional upon the non-action of the council, but is made to depend upon the question as to whether such a levy is in fact needed for the payment of this indebtedness; that as there is no one to judge of the necessity for such collection, the city council having failed to take any action, neither the assessor nor the receiver of taxes can assume to exercise this discretion, nor could the legislature have invested them with such a power if such had been the object of the act.

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If the construction placed upon this act by counsel is the correct one we should not hesitate to reverse the judgment below.

The legislature may delegate the power to the general council of a municipality to legislate as to its internal affairs; in other words, the general council is the local legislature of the city government, and to that body may be confided a discretion as to the results and necessities of the local public, but to confide the power to the city officer or collector to impose taxes at his pleasure, even with a limitation, is not sanctioned by any judicial decision or constitutional precedent.

The object in creating the sinking fund, or the corporation known as the commissioners of the sinking fund of the city of Louisville, was that certain resources then existing belonging to the city, and such as might afterwards be acquired for that purpose, should be applied to the payment of the principal and interest of the public debt of the municipality. The act of 1869 increased the revenues of the sinking fund, and the act of March 30, 1880, directed that the general council should, for the purposes of paying off these bonds, that is, the principal as well as the interest, continue to levy and collect every year this thirty cents tax, to be paid over by the treasurer of the city to the sinking fund commissioners. This entire bonded debt was to be paid out of the funds belonging to the sinking fund, and the evident purpose was to raise money by taxation to meet not only the interest on the bonds, but to leave the money in the sinking fund to pay the bonds as they matured, nor were the resources of the sinking fund to be applied alone to this railroad debt, but to the entire debts of the city, and the fund to be held sacred for that purpose. If the purpose of this taxation was to pay the interest only and not the principal of the bonds, the question presented would be one of more difficulty, but the tax was levied, or directed to be levied, to pay the entire amount, principal and interest. The accumulation of the money is to pay the principal when due as well as the interest, and thus is denominated a sinking fund.

It is certain that the bonded debt, and for the payment of which the sinking fund is chargeable, exceeds $9,000,000, and near $2,000,000 of these railroad bonds outstanding, and the revenue of the sinking fund will not exceed $4,500,000, and while the resources of the sinking fund may be sufficient to pay this particular bonded indebtedness as it matures for the next few years, there are other liabilities existing to which its resources may be applied, and that there is a surplus ready to pay a portion of the principal as it becomes due is no reason why the collection of the tax should be restrained, or a restraining order go because this tax is not needed for the year 1887, for this would exclude the idea of the power of the legislature or the council under its authority to provide means under this taxing power conferred to meet the principal as well as the interest due on the bonds. Whether there is an actual necessity for the imposition of this tax for the year 1887 is not, it seems to us, a material inquiry. The collection is not indispensable, but might be postponed, and yet by withholding the collection the revenues of the sinking fund are being lessened for the payment of the debt of the city.

The city council could decline to make a levy of thirty cents upon the ground that the resources of the sinking fund were ample, or would be made so in succeeding years, to meet these debts. They might levy under the act of May 12, 1884, a less sum than thirty and one-half cents to pay the principal and interest of the bonds, but that has not been done and no levy imposed for

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any purpose, not even to defray the ordinary expenses of the city, and in that event the legislature has already provided in express terms the rate of taxation to be imposed, including the tax to pay these bonds, which is thirty cents, as long as these taxes are needed. What did the legislature mean by the use of these words "as long as these taxes are needed" is the important inquiry? It certainly did not mean to say that if the fund on hand was sufficient to pay the interest due on the bonds no tax should be imposed. The annual levy was not to pay the interest alone, but to raise a fund to pay the principal as well. To raise the whole sum by taxation when the debt becomes due would create a burden that no local public could bear, and, therefore, the object of the tax was to pay the interest and have a fund accumulating to pay off these bonds at maturity. There is no discretion left with the assessor or the tax receiver in regard to the amount of tax to collect when the city council has failed to pass any ordinance, or the ordinance if passed is invalid. The tax is thirty cents, and declared by legislative enactment. The city officers have no power to increase or diminish it, nor the right to judge of the necessity for collecting it. There has been no delegation of power to them by the legislature, and the duty of collecting under this legislative act the thirty cents for the payment of these bonds is as important as the collection of any other taxes imposed by it. This tax is to be collected as long as needed—that is, until the bonds are paid off and the law exists under which the tax is imposed. If the words as long as needed had been omitted the same necessity would have been attached to the ordinance, as it could not well be contended that after the bonds were discharged, or a fund sufficient in the hands of the commissioners to pay these bonds, that the council or the tax-gatherer could proceed to collect this tax. A direction to the council to impose the tax as long as needed means only its imposition until a sufficient sum in the hands of the commissioners for that purpose raised by this tax, which is equivalent to payment. A tax to be imposed as long as needed to pay a particular debt means an imposition of the tax until the debt is satisfied.

The discretion in this case is with the city council as to the amount of tax to be imposed. They may lessen it or not at their will under the act of 1884, but if such a power had been given to these city officials it would be null and void. The right to collect the thirty cents is only when the council declines to act, and when they fail to discharge this duty, the legislative act being mandatory, the officer proceeds to collect the thirty cents, and will continue to do so as long as the council declines to impose taxation for city purposes, or until their debts are paid. This tax may be a heavy burden for the year 1887, but the council evidently thought otherwise, else they would have controlled the taxation by diminishing the amount. It was doubtless believed by some that the sum ought to be reduced, and by others not, and knowing the existence of this legislative ordinance, and the fact that by its terms taxes were imposed for all city purposes, declined to make any levy. But whether or not their act in failing to make a levy was an implied adoption of the legislative ordinance is not important, for it is plain that the act of the legislature as to the amount of tax for the purposes in question is certain, specific, unconditional and mandatory, and with this construction there can be no difference between the council on either side or the court as to the application of the law to the facs.

That the tax may not be essential or necessary for the years 1887, 1888 and 1889 will not stay the operation of the fourth section of the act of May, 1884, and whether it should have been

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thirty cents or less is equally unimportant in this judicial proceeding. When the council fails to pass a levy ordinance the legislature says that a tax of thirty cents shall be collected as long as these taxes are needed, and that is not to pay the interest for one or more years, or the bonds maturing in one or more years, but until the debt is paid. The question of expediency is not an argument for or against the validity of this tax. It might have been diminished if onerous by the council in whom was vested the power, but the arm of the chancellor can not be extended to grant the relief. It is the duty of the commissioners of the sinking fund to make any surplus profits over to the city in the manner pointed out by the charter of the act creating the corporation. It is to be assumed that they will discharge this duty. The judgment, therefore, dismissing the action of P. B. Reed against the appellees is affirmed.

The question of the right of the mayor to employ counsel has been raised in the case of the mayor against the city, heard with this case. His right to an injunction is denied by the opinion already delivered in the case of P. B. Reed against the tax collector.

While as a general rule the mayor of a city has no authority, by virtue of his office, to employ counsel, the former being conferred by the charter or by the legislature of the city, cases of emergency may arise where the former must necessarily exist. It is then made the duty of the mayor to see that the law and ordinances of the city are faithfully executed, and that the official duties of the city officials are faithfully performed. In this case the council had failed to impose any tax. The city was left without the means, as the mayor had the right to suppose, of carrying on the city government.

The officials were proceeding to collect a tax without any ordinance of the city council. The city council was disposed not to move the one way or the other. The assistant city attorney advised action of some sort by the mayor. He was in doubt as to the validity of the act, but was not disposed to take steps (and we think properly) against the action, or rather the nonaction, of the city council, and steps about being taken by the city officials to collect the tax by distraint or otherwise. In such an emergency he called on cousel for advice, and brought the action to restrain what was supposed to be an illegal collection of a tax unlawfully imposed. We think that such a power existed, nor are the cases of Fletcher v. Lowell, 15 Gray, 103, and Butler v. Charlestown, 7 Gray, 12, in conflict with this view of the question. His appeal as mayor, however, must be dismissed on the merits of the controversy. This view as to the right of the mayor is sustained by the case of the Mayor v. Lockett, 13 La., 545, and while that case goes further than this court would be disposed to go, yet it is based on the fact that it was the duty of the mayor to see that the laws of the city are faithfully executed. We think the mayor has no general power to authorize litigation in behalf of the city or to control it. If so he could disregard the legislative will of the municipality, bringing and dismissing suits at his pleasure. It is certainly an exceptional case where it should be allowed, and one that seldom occurs, but the emergency in this case justified the act, as all the parties acted, no doubt, in the best of faith.

It is insisted by counsel for the appellants that neither the sinking fund commissioners nor the bondholder should have been made parties. This qustion only involves one of costs, so trifling as not to demand a reversal if the appellants are right. We have not considered it.

The judgment below is affirmed.

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TAYLOR v. COMMONWEALTH.

(Filed May 15, 1884—Not to be reported.)

1. The accused may waive the presence of his own witness and allow a statement, as embodied in an affidavit, to be read to the jury as evidence, although he can not be compelled to go into trial upon an admission by the prosecution as to the existence of the facts relied on as a defense. Whether the accused can waive the right of confronting the witnesses against him is not necessary to be determined. (But see Nichols v. Commonwealth, 11 Bush, 578.)

2. Misconduct of attorney in argument—The statement of the attorney for the Commonwealth in argument that the witness for the defense, whose statement was read as evidence, had not been sworn, and that his testimony amounted to but little, while improper was not prejudicial; and, besides, the court was not applied to to check his statements. (Same case reported in abstract in 5 Ky. Law Rep., 935.)

P. B. Thompson, Sr., for appellant.

Bell & Wilson, P. W. Hardin and Finley Shuck for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

* * * * * * * * *

The witness, Deshagar, was absent, and being a witness for the defense, and his testimony conducing to sustain the plea of self-defense, it was agreed, at the instance of the accused, that his statement, as embodied in an affidavit, might be read as evidence. It was read, and the point now made is that it was the constitutional right of the accused to confront the witness and have him in person before the jury to testify as to the truth of the facts about which his statements were made.

This was the witness for the accused, whose absence necessitated the agreement entered into by the accused, and whose testimony was introduced for the purpose alone of establishing his innocence, and, therefore, we perceive no reason for denying the accused the right to waive the presence of his own witness in order that he might have his trial.

Such a waiver is for the protection of the accused, and although he can not be compelled to go to trial when the witness is within the jurisdiction of the court without the presence of the witness unless by his consent, still where the accused on his own motion is willing to have the statement of his own witness read in his behalf there can be no valid objection to it, but, on the contrary, such a favor, when granted by the prosecution, must result beneficially to the accused in placing before the jury every fact essential to his defense.

It often happens that a material witness is about to leave the State, or go where the process of the court is powerless to reach him, or is unable to attend court, and in such cases the accused may take the deposition of the witness to be read on the trial as provided by section 153 of the Civil Code. Without such a provision the accused would be compelled to go to trial without the testimony of the witness for the defense; or if not allowed to take the deposition, the death of the witness being apprehended, the accused might be deprived of the testimony most essential to his defense, and a conviction had because the accused was without power to waive his constitutional right.

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To permit the deposition to be read in behalf of the accused, and then to reverse the judgment of conviction on the ground that the presence of his witness was indispensable, would be a mockery of justice, and result at once in establishing a rule that would prevent any defense by the accused, however meritorious, unless his witness is present in person to testify to the facts relied on.

The accused can not be compelled to go into his trial upon an admission by the prosecution as to the existence of the facts relied on as a defense, but when the accused proposes to read a deposition in his own behalf, or a statement of facts evidencing his innocence of the crime charged, it is not such a waiver of a constitutional right as would preclude the court from pronouncing a judgment of conviction upon a verdict of guilty. Whether the accused can waive the right of confronting the witnesses against him is not necessary to the determination of the question raised in this case. (Hill v. State, 17 Wisconsin, 697; McCorkle v. State, 14 Indiana, 39; State v. Warner, 16 Indiana, 357; State v. Reckards, 21 Minn., 47; Price v. State, 36 Miss., 531; Lynch v. Conn, 88 Pa. State, 189; U. S. v. Santos, 5 Blatchford, 104.)

The argument of the attorney for the Commonwealth in closing the case, to the effect that Deshagar had not been sworn, and his testimony amounted to but little, and, besides, no effort was made at the time to check his statements, or the court appealed to for that purpose.

There are other objections urged not necessary to be considered further than to allude to the points raised. Some one in the crowd cried out that he is cut with a knife. "Lord, have mercy; he has stuck a knife in me." Who this was does not appear, but it was spoken during the trouble, and by those perhaps who were lookers on, but how this prejudiced the accused we are unable to perceive. Witnesses upon this record state that both the accused and the deceased were peaceable, quiet men, but the unfortunate killing of the one by the other, and the facts transpiring at the time, evidence an utter disregard of law and order on the part of both, and we see nothing in the record to palliate the conduct of either or to mitigate the punishment of the accused for taking the life of Brown.

We feel constrained, therefore, to affirm the judgment below.

ROWLAND, &c. v. MANONS, &c.

(Filed January 19, 1887.)

1. Stepfather and stepchildren—If a stepfather takes his stepchild into his family the relation of parent and child is established, and the stepfather can not demand compensation for maintenance and education, and the child can not claim pay for services. While sometimes even the father or mother may be permitted to assert a claim for maintenance when the parent is poor and the child has an estate, better enabling it to support itself than the parent is to support it, yet the mere fact that the parent is insolvent is not sufficient to justify a claim for compensation.

2. Guardian and ward—A guardian bought a note which he designated as his ward's. The obligor in the note procured his appointment as guardian that he might receive this note as a part of the trust estate. The former guardian, in settling with his successor, turned over the note in lieu of that.

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amount in cash, and the note was treated as paid. The last guardian being in default, the ward sued him and his sureties, and obtained a judgment against them. The sureties now sue the former guardian to recover the amount of the note turned over to his successor in lieu of that much cash. Held—That the ward could have recovered of him that sum and interest, and that the sureties of the last guardian are entitled to be substituted to the ward's rights

(Reported in abstract in 8 Ky. Law Rep., 618.)

H. C. Lilly & Sons for appellants.

J. M. Sebastian and J. W. Rodman for appelles.

Appeal from Owsley Circuit Court.

Opinion of the court by Presiding Judge Bowden.

In order to maintain the judgment in favor of George M. Treadway against his former guardian, Reynolds, and his sureties, it is not material whether Reynolds collected from his predecessor, L. L. Manons, the balance in his hands as guardian, or failed to collect it. It was his duty as guardian to get it, and the ward may look to him for it. There is no excuse for the failure to discharge this duty. The evidence shows that it was intentional and predetermined, it having been his object, in procuring his appointment, to take up a note for $500 which he had executed January 31, 1871, at one year to Cole, and which had fallen into the hands of Manons, the guardian.

We see no reason to disturb that judgment on account of items relating to the maintenance of the ward. The rule is well settled that while a stepfather is not bound to take care of the children of his wife by a former husband, yet if he takes such a child into his family the relation of parent and child is established, and the stepfather can not demand compensation for maintenance and education, and the child can not claim pay for services. Sometimes even the father or mother will be permitted to assert a claim for maintenance where the parent is poor and the child has an estate better enabling it to support itself than the parent is to support it.

In this case it appears that Reynolds is insolvent, but that may be, and yet his condition may not have been such as justified his demand for compensation, but it appears that Reynolds was allowed no commission on the items, $698.65, $83.83, $129.86 and $145.39, aggregating $1,057.68. He should have been allowed $52 88, leaving $1,158.68 as of May 1, 1881, which would, with interest added, amount to $1,297.72, May 1, 1883, for which sum, with interest from the latter date, judgment should have been rendered in favor of the ward.

But the cross petition of the appellants, who are Reynolds and his sureties, presents a different question. We will assume the state of case as Manons alleges it in his pleadings and proves it in his testimony.

In October, 1868, Manons qualified as guardian of his grandson, George M. Treadway, whose mother about that time married Reynolds. January 31, 1871, Reynolds bought a tract of land from Cole for $1,700, and for part of the purchase money gave Cole a note for $500, due in one year. In February, 1872, about a month after this note matured, Manons bought it for $475. Cole had not conveyed to Reynolds, and the latter having exchanged places with Winn the deed was made to the latter, Winn taking possession. Manons took no steps towards collecting the note, nor does it appear that Winn had been spoken to on the subject, or that any lien was claimed. Reynolds becoming pressed finan-

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cially, procured his appointment as guardian, with a veiw to apply, the ward's money to his own benefit, and especially intending to take the $500 note as part of the ward's estate in Manons' hands to keep from being "eaten up" by interest, as Manons' witness states his declarations to have been. He qualified in April, 1875, and May 1st following he gave to Manons a receipt for $698.65, which was the entire estate in Manons' hands. Manons says he paid to Reynolds the $500 note, the interest being added, and "some amounts," by which we suppose he meant some other claims, and the rest in money. It is shown that he paid only $33 in money, which leaves $665.65 to be made up of the note, with interest, and the other sums. The amount of the note was then $597.50, which fixes the other amount at $68.15.

Manons had some money of his own, and was guardian for three other children. When in hand the funds were not kept separate. When he made loans he would sometimes take notes payable to himself as guardian, and sometimes payable to himself in his own right. Cole did not assign the $500 note. There was nothing on it to indicate that he held it as guardian. Considering all these facts we must understand Manons' statement that he bought the note as an investment of his ward's funds to mean no more than that he bought the note for his ward. The appellants allege that he paid the note off to assist his son-in-law, but there was no evidence of that. No one seemed to care to have Cole's testimony. We will assume that Manons gave the correct version.

It is quite free from doubt that he had no right as guardian to invest even the ward's money in promissory notes, and certainly he could not mix several funds and then, having bought a note, designate it as the property of one of his wards. He clearly could not have required his successor in the trust to take the $500 note as part of the trust fund. If his ward had come of age he could not have made him take it. The reason is the same for both cases. It was not a part of the trust fund. If he had died it would have formed part of his personal estate.

He did not assign the note to Reynolds as guardian. Even if that had been done the effect would not have been different. As guardian he could not sue himself as an individual. The note was surrendered to Reynolds as obligor, and was treated as paid. Manons proved by one of his sons-in-law that Reynolds stated before he became guardian, and as a reason why he desired to become guardian, that Manons had "lifted" the note for him, and that he wanted to take it in. If Manons had paid Reynolds the entire sum in money, and had then taken his receipt, and then had taken back $597.50 in pay of the note, and $68.15 in pay of other claims, there can be no doubt that the ward could have held him bound for thus taking what he knew to be a trust fund as payment of his personal demands. The case is stronger than that. It was his duty to pay to his successor the amount he had in hand when his trust ended—not in claims he held on the successor, but in cash. He did not in fact pay what he had. He appropriated $665.65 of the trust fund in his hands to the payment of claims he held against Reynolds. If the ward, coming of age, had sued him for that sum and interest, it would have been no answer that Reynolds consented to it. The reply would have been that Reynolds could not release him from liability, nor protect him by conspiring with him to misapply the ward's funds to his own use, or to that of Reynolds.

This right the ward has seen fit to forego. He can not be criticised for so doing. He could elect. But if others are required to pay what Manons failed to pay, and because of the failure of

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Reynolds to make him pay, they may fairly ask to be substituted to the rights of the ward, and have a judgment for whatever they are thus in effect compelled to pay for Manons. The sureties of Reynolds assumed that he would get the estate into his hands and prudently keep it on loan, but the method adopted by Manons laid upon them a much heavier burden, since they became responsible in the event Reynolds should not, by his personal industry, make the money which they had the right to assume was already made and ready to be handed over.

The judgment in favor of George M. Treadway against the appellants is reversed, with directions to render a judgment for $1,297.72, with interest from May 1, 1883.

The judgment dismissing the petition and cross petition of the appellants' sureties against Manons is reversed, and the case is remanded, with directions to render judgment in their favor against Manons for $665.65, with interest from May 1, 1875, which may be enforced in discharge of Treadway's demand, and which those sureties may enforce for their own use when they shall have paid that much of the judgment Treadway recovers against them.

KENTUCKY LODGE, NO. 39, I. O. O. F. v. LIMEBACK.

(Filed February 9, 1887.)

1. Benefit societies—Sick benefits—Members of a voluntary association who desire to assert rights growing out of their society relationship must appeal to the tribunals created within the association for that purpose, and are bound by the decisions of those tribunals.

Under the rules and regulations of appellant, a benevolent society, the question whether a member is entitled to sick benefits is to be determined by the noble grand, the principal officer of the lodge, with a right of appeal to the lodge and then to the Grand Lodge of the State. Appellee, a member, having applied to the noble grand for sick benefits and been refused, instituted this action without appealing to the lodge. Held—That the civil court will not hear his complaint.

2 Pleading—The defendant having set forth in its answer certain rules and regulations which it charged it had adopted, the denial of the plaintiff that the defendant had furnished any tribunal for determining the right of a member to sick benefits was but the pleader's construction of those rules, and not a denial of the adoption of the rules. (Reported in abstract in 8 Ky. Law Rep., 705.)

3 A bill of exceptions will be accepted as a true exhibit of what it purports to be, and the court will not stop, upon the mere suggestion of counsel, to inquire whether, when signed, it was a mere skeleton, and afterwards improperly filled in by the clerk.

J. J. Landram and Masterson & Gaunt for appellant.

Geo. C. Drane for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Barbour.

The appellant is a benevolent and charitable insitution, established by a warrant and dispensation granted by the Grand Lodge of the State of Kentucky, an organization incorporated by an act of the general assembly of the State, with power to establish subordinate lodges. One of the principal objects of the order is the care and support of its brothers in sickness and distress.

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Among other provisions in appellant's constitution it is provided that "any member of this lodge who has been six months in fellowship in this jurisdiction, and is clear of the books, shall be entitled to such benefits as the by-laws of this lodge prescribe, but not more than $5 per week in case that sickness or debility prevents his following his usual occupation, provided that such sickness or disability was not caused by vice or immorality.

"When a member is sick it shall be his duty to report himself to the noble grand as soon as practicable, by message or otherwise, and it shall be the duty of the noble grand, on being informed of the sickness, to call on him in person or otherwise and ascertain the time of his sickness, and if satisfied the brother is entitled to benefits he shall draw on the treasurer for the sum allowed by law."

Appellant's by-laws fixed the amount to be paid sick members at $3 per week.

Appellee became a member of appellant's lodge in 1859, and continued a member up to 1881, when he brought this action, in which he claims benefits on account of his sickness from 1873 up to the institution of this action. He avers that he reported himself to the noble grand at the beginning of his sickness, and that the defendant (appellant) had notice all the time of his sickness, etc., but has failed and refused to pay any part of said weekly benefits.

Waiving the question whether the petition exhibits the right of the appellee, a member of a voluntary association, to appeal to the civil courts to determine his rights in the society, we are of opinion that the allegations of appellant's answer and amended answer, which are not denied, clearly show that he is not entitled to any relief in this action.

Appellant in its pleading alleges in substance that it is controlled by the orders, rulings, decisions and laws of the grand lodge, and that such orders, rulings, decisions and laws form part of appellant's rules, regulations and laws, all of which plaintiff bound himself, upon becoming a member of the lodge, to cheerfully conform to and abide by, and that the question as to whether plaintiff was, or is, entitled to benefits is, by the constitution, by-laws, rules and regulations of the order, and by the decisions of the grand lodge, which are a part of the laws, rules and regulations of the defendant, to be determined by the noble grand (principal officer) of the lodge, and by the lodge itself; and if the member considers himself aggrieved by the noble grand or by the lodge his remedy is by appeal, first, from the noble grand to the lodge itself, and from the lodge by appeal to the grand lodge of the State, and from the grand lodge of the State to the grand lodge of the United States. The appellant also copies in and makes a part of its answer numerous decisions of the grand lodge.

In his reply appellee does not deny that the rules, etc., of the grand lodge are part of appellant's rules, laws, etc., or that the decisions and rules set out in the answer were adopted by the grand lodge. His reply is simply a presentation of his construction of the rules and decisions.

His denial that by its constitution, etc., defendant has provided him any mode of proceeding, or fixed any tribunal which should decide between the members and the lodge as to the rights of the members to sick benefits, or provided any means by which his right to the same should be enforced, and his averment that the decisions as to the right of appeal set forth and quoted in the amended answer do not apply to appeals on the question of sick benefits, etc., is clearly insufficient.

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The decisions, etc., being admitted, they speak for themselves and show expressly that in numerous cases the appeals were in cases for sick benefits. The whole reply upon these points is but the pleader's conclusion. There is no rule better settled or founded on better reason than that which holds that members of a voluntary association who desire to assert rights growing out of their society relationship must appeal to the tribunals created by and within the association for that purpose, and are bound by their decisions.

The whole current of authority is to the effect that in voluntary associations, where the member can apply for the assertion of his rights, or has his rights determined by a tribunal existing within the society, relief will be denied him by the judicial tribunals of the country for that reason, nor will they stop to inquire whether the action of the judicature of the society was regular or its judgment correct.

"Individuals who form themselves into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land, and those who become members of the body are presumed to know them, to have assented to them, and are bound by them." (White v. Brownell, 2 Daly, 329.)

The lodges of which appellant is one are benevolent and charitable institutions, whose objects commend them to the public favor.

Such associations, beneficial as they are to their members, could not exist if each member could, when he felt aggrieved, fly to the civil courts.

In this case the appellee seems willing to invoke the laws, rulings and decisions of the order, by virtue of which alone he can have any right, to aid him in enforcing his claim against the order of which he is a member, and at the same time repudiates the laws, rulings and decisions in so far as they do not conform to his ideas of right.

To encourage such an action would effectually destroy the cohesive power of all voluntary associations. How could a society exist if a member could select those provisions in its constitution, by-laws or rulings by which he proposes to hold the society and other members bound, and reject all the rest, and still insist upon the rights of a member?

In White v. Brownell, 2 Daly, 329, the court says "that where a member joins a society of this kind he is presumed to know and assent to its rules. If he wishes to dissent from any existing rule lawfully adopted, and to escape being bound by it, he must procure its repeal or withdraw from the society. If, knowing what the rule is, he remains in the society he is bound, however loudly he may protest against such rule. If each member is to be a law unto himself there can, as already suggested, be no association. The majority must control in determining what the laws of the society shall be, and the minority must submit or cease membership. Membership and obedience to the rules are reciprocally the consideration for each other, and a member can not insist upon having the one without the other."

In Anacosta Tribe of Red Men v. Murback, 3 Md., 94, the court, in speaking of a society similar to this, where a member was suing for sick benefits, says: "These are private, beneficial institutions, operating on the members only, who, for reasons of policy and inconvenience, affecting their welfare, and perhaps their existence, adopt laws for their government, to be administered by themselves, to which every person who joins them as-

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sents. They require the surrender of no right that a man may not waive, and are obligatory on him so long as he chooses to recognize their authority."

We have numerous precedents in our own State to the same effect in cases involving the jurisdiction of ecclesiastical tribunals. (Watson v. Avery, 2 Bush, 347.) And in a recent case, Schmidt v. Abraham Lincoln Lodge, MS. opinion, December 2, 1886 [8 Ky. Law Rep., 655], the Court of Appeals says: "In becoming a member appellant agreed to abide by such rules and regulations as might be adopted by the organization for the control of its funds and the government of its members, and the association providing the method for the expulsion of its members, this court will not undertake to supervise its action by determining that its judgment was not in accordance with its by-laws, or for causes that had no foundation in fact. The tribunal existing within the organization must alone determine such a question." In that case the member, by his expulsion, had been deprived of the right to any part of the fund (which he had largely contributed) which was held for the benefit of the members.

While, with the view of the case we have taken, it is immaterial whether the bill of evidence is considered or not, we will say that we can see no reason for rejecting it. There may be in it superfluous matter, yet it purports to contain all the evidence, is signed by the judge and certified by the clerk, and we can not stop, upon the mere suggestion of counsel, to inquire whether, when signed, it was a mere skeleton, and was afterwards improperly filled by the clerk. We must accept it as a true exhibit of what it purports to be.

Upon the evidence, even if all the material allegations of the defendant's pleadings had been denied, the defendant was entitled to a judgment.

The case, looking at it in the best light possible for the plaintiff, is this: Plaintiff was a member of the lodge in good standing. He had been sick for years. His case was one which he could have presented with good reason for believing his order would hear him and grant him relief. Instead of doing that, after applying to the noble grand and being refused, he sought no relief from his lodge, asked no appeal to the tribunals to which he knew he had the right to appeal, but without assigning any reason for his failure to seek relief from the tribunals, which he had agreed should determine his case, he appeals to the civil court, and asks that it assist him in asserting his claim in violation of his own contract. The civil court should not hear his complaint.

The court below should have sustained the defendant's motion for a judgment, notwithstanding the verdict.

The judgment is reversed and cause remanded, with directions to set aside the judgment and enter a judgment dismissing the plaintiff's petition.

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SUPERIOR COURT ABSTRACTS.

JOSEPH v. LYON & DAVIS BROS.

Filed June 15, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. A mortgage to secure one as endorser or surety is valid though it does not specify the debts for which the mortgagee is, or is to become, liable.

2. Words and phrases—"Endorsements"—While technically there is a difference between the meaning of the words "endorsement" and "suretyship," yet they are popularly used interchangeably, and where a debtor executes a mortgage to secure one from loss by reason of any "endorsements" made by him for the mortgagor, the court will give to the word "endorsements" its popular rather than its technical signification.

3. Construction of mortgage—A mortgage to secure certain debts due from the mortgagor to the mortgagee, and also to secure the mortgagee from loss "by reason of any further advancements made or any endorsements" by the mortgagee, secures the mortgagee not only against future endorsements but against loss by reason of his liability as surety existing at date of the mortgage.

4. Pleading—While the rule is that if one of several defendants relies upon a defense which goes to the entire merits of the action, such as payment, accord and satisfaction or other meritorious defense which shows that the plaintiff ought not to recover, a judgment can not be rendered against any of the defendants until that plea is disposed of, and if the defendant should succeed upon such a plea the action must be dismissed as to all of the joint defendants, that rule does not apply in this case.

A debtor having executed a mortgage to secure the mortgagee against loss by reason of debts due from him to the mortgagee, and also against loss by reason of the mortgagee's liability as surety for the mortgagor, the creditor instituted this action seeking to be substituted to the rights of the surety under the mortgage. Appellant having been made a party to the action asserted claim to the mortgaged property, alleging that he had purchased it just before the institution of this suit, but his answer does not state from whom he purchased, nor does he aver that he is the owner of the debts due from the mortgagor to the mortgagee, which are secured by the mortgage, but as the mortgagee sets up these facts in his answer, it is claimed that appellant is entitled to the benefit of them.

Held—That if appellant was the owner of the debts on the mortgagor he should have set it up for himself; no one else could do it for him.

5. Subrogation—Nulla bona—It is not a prerequisite to an action by a creditor against the principal and surety seeking to be subrogated to securities provided by the principal debtor for the indemnity of his surety that there should be either a return of nulla bona or an attachment. Nor can this be regarded as an action to set aside a fraudulent conveyance. The appellant simply becomes a party to the action, and claims the property by virtue of a pretended purchase which is held to be fraudulent.

6. Interest—The notes sued on, which were executed in the State of Indiana, are payable in ninety days after date, and each by its terms bears 8 per cent. interest from date. The petition alleges that the statutes of Indiana in force at the time the notes were executed provided that by agreement in writing, signed by the party to be charged thereby, any rate of interest not exceeding 8 per cent. per annum may be contracted for. Held—That upon this uncontroverted allegation the plaintiffs were entitled to recover 8 per cent. interest on each demand from its date until its maturity, but from its maturity the interest should have been computed at the rate of 6 per cent. only.

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Montgomery Merritt for appellant; W. P. D. Bush and S. B. & R. D. Vance for appellees.

GILLEN, &c. v. KENTUCKY NATIONAL BANK.

Filed June 15, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, affirming; Presiding Judge Bowden dissenting.

Pledge—A mere failure upon the part of the pledgee to sell the property taken in pledge does not make him responsible in damages for depreciation in market value of the thing pledged, and especially so where the pledgor has consented to the delay by executing renewal notes; and thereby postponed the day of payment.

Elliott & Hemingray, M. A. & D. A. Sachs and Richards & Hines for appellants; Carey & Spindle for appellee.

ORMSBY v. JAMISON.

Filed June 15, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Street improvements—In this action to enforce a lien for street improvements it appears from the petition, first, that a public way in the city of Louisville has been improved by original construction; second, that it has been improved by ordinance and by contract approved by the general council; third, that the property sought to be charged with the lien is situated within a fourth of a square contiguous to the improvement; fourth, that the improvement has been inspected and received; and, fifth, that the cost has been apportioned among the respective owners of property within the limits subject to assessment according to the number of square feet owned by them respectively. Held—That these allegations, especially after judgment, are sufficient to create the lien contemplated by the charter.

2. Same—The petition alleges that the ordinance was published in the Courier-Journal and Louisville Anzeiger, each a newspaper published in said city, the former in the English language and the latter in the German language, each having the largest bona fide circulation in said city in its language. It is also averred that after the work was completed the engineer gave notice, on the — day of — —, 1884, by publication in each of said newspapers, of the time and place he would inspect and determine whether said work was completed in accordance with the ordinance, etc. Held—That these are averments of facts, not of conclusions, and are sufficient. If the allegation of the publication of the notice was indefinite, in that the blanks as to the time of the publication were not filled, the defendant by motion could have had the petition made more definite by requiring the plaintiff to fill the blanks.

3. Same—Copies of the respective newspapers were the best evidence of the publication of the notice, but as the allegations of the petition as to publication were not denied in the answer, it was unnecessary to prove it, and the admission of the statements of witnesses as to the publication could not have prejudiced the defendant.

4. Same—The engineer having inspected and received the work as done in accordance with the ordinances and contract, his judgment is conclusive, and the defendant can not, in the absence of fraud, be heard to complain that the work was defectively done.

5. Same—Some years prior to the passage of the ordinance for the improvement, the cost of which is sought to be recovered in this case, the street improved under this ordinance was graded under a former ordinance and the defendant was compelled, under the apportionment then made, to pay $25. In the judgment in this case the court reduced the amount apportioned against him to that extent. Held—That this action of the court was within the curative powers granted it by the act of 1882.

6. Same—The fact that the street improved in this case had been partly graded under a former ordinance did not make the improvement in this case a reconstruction.

Sam B. Richardson for appellant; Simrall & Bodley and F. W. Morancy for appellee.

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EVANS v. RHEA.

Filed June 15, 1887. Appeal from Union Circuit Court. Opinion of the court by Judge Ward, reversing; Judge Barbour dissenting.

1. Partnership—Advances to a firm and advances from it do not constitute debts strictly speaking, but are only items in the account between the partners in the winding up of the concern.

2. Mortgages—Subrogation—M. & E. having formed a partnership in the drug business, purchased from C. a stock of drugs, for the purchase price of which they executed to C. their notes, to secure which E. executed to C. a mortgage on certain real estate owned by him. Thereafter M., with the consent of E., sold his interest in the business to R., who was substituted to all the rights and obligations of M. The notes executed to C. by the original firm were paid by R., he and E. entering into a written agreement which recited that it was the understanding that any money paid by R. on the notes to C. were to be refunded with 8 per cent. interest at such time as the "house" might be able to spare the same from its business, or on the final settlement of accounts. The firm having been dissolved, all of its assets were turned over to R., the only creditor of the firm, and he seeks, by this action, to be substituted to the mortgage lien which C. had on the real estate of E., asking that the lien be enforced to the extent of one-half the sum paid to C., it appearing upon a settlement of partnership accounts that E. is indebted to R. in a sum exceeding that amount. Held—That this relief can not be granted. It is not one-half the debt paid to C., but a sum equal to that amount, found due upon a settlement of partnership accounts, to which it is sought to subject the mortgaged property. A mortgage can secure nothing except the debt named in the mortgage.

Cromwell Adair, Ken Chapeze and Richards & Hines for appellant; D. H. Hughes, W. P. D. Bush and F. F. Bush for appellee.

NORTH v. MONTEREY AND CEDAR CREEK TURNPIKE CO.

Filed June 15, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Turnpikes—It is the duty of companies incorporated by law and authorized to construct and maintain public roads and collect toll thereon, to keep them in such order as to "secure travelers against the incidental accidents to which ordinary use of them may be liable."

2. Pleading negligence—In actions for damages, caused by the negligence of another, it is not necessary to state the facts upon which the party expects to rely in evidence to show negligence. If facts are alleged which show the relation between the parties out of which the duty arises as to the breach of which the complaint is to be made, then it is sufficient to aver generally that it was performed negligently and carelessly. But the attempt to state the facts does not make the petition bad unless the facts stated negative the averment of negligence.

Thomas R. Gordon for appellant; T. J. Hardin for appellee.

BEGLEY v. EVERSOLE.

Filed June 15, 1887. Appeal from Leslie Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Vacating judgment—The judgment sought to be vacated recites that the defendant had been duly summoned. The summons, as copied into the transcript, is dated November 27, 1885, but it is endorsed returnable to the December term, 1884, and as having been executed November 28, 1884. The judgment was rendered December 18, 1884. The appellants came into court December 19, 1884, and moved the court to set aside the judgment, but there was then no claim that they had not been properly summoned. The affidavit filed discloses no defense, and the answer tendered is not part of the record. Held—That nothing appears to authorize the court to vacate the judgment.

J. M. Unthank for appellant; J. C. Eversole for appellee.

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ROBINSON & CO. v. WHITNEY, &c.

Filed June 15, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Sale bonds—Appellees, sureties in a note, brought suit against the principal to compel her to pay the debt for which they were bound, and obtained an attachment, which was levied upon the defendant's property. At the sale the sureties became the purchasers, executing their bonds for the purchase money, but soon thereafter resold the property to the defendant, and took a mortgage on it and other property to secure themselves. The debt for which the sureties were bound having been paid by the principal, the appellants, creditors of the principal, instituted this action against appellees, seeking to subject to the payment of their debt the proceeds of the sale bonds executed by appellees, alleging that their debtor was the beneficial owner of the bonds. Appellees answered, alleging that the sale bonds had, by agreement between the parties, been canceled. Appellant replied, denying the alleged satisfaction of the bonds, and alleging that the attempt at a settlement was void. Held—That the transaction was in effect to substitute the property for the sale bond, and appellees having given up the title to the property, and bond they had given for the price of it was properly agreed to be canceled.

Cornelison & Mitchell for appellants; Apperson & Woodford for appellees.

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KENTUCKY COURT OF APPEALS.

BREWER, &c. v. HILL, &c.

(Filed September 17, 1878—Not to be reported.)

1. To entitle a creditor to relief under the "Act of 1856" he must show that he sues within the six months allowed by the statute, and the fact that he was an infant when the cause of action accrued can make no difference.
2. A petition upon an administrator's bond must set forth the covenants contained in the bond.
3. A creditor can not sue to set aside a fraudulent conveyance unless he has return of nulla bona.

Wm. Carroll for appellants.

Caldwell & Harwood and Webb & Masterson for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Cofer.

The act of 1856 gives to the creditors of one who has made a sale, assignment or mortgage, in violation of its terms, a right to have such sale, assignment or mortgage adjudged to operate as a transfer of all the debtor's property for the equal benefit of all his creditors, provided some one or more of such creditors shall bring an action for that purpose within six months after the mortgage or transfer is legally lodged for record, or the delivery of the property or effects so transferred.

The appellants did not sue until more than six months after the recording of the mortgage, and after the possession of the land had been surrendered to the mortgagees.

The mortgage to Kephart and others was recorded February 19, 1869, and possession of the mortgaged property was surrendered and the equity of redemption was sold, as alleged in the petition, March 5, 1872, and this suit was not commenced until September 8, 1872. Thus it appears on the face of the petition that the suit was not commenced in time to entitle the appellants to relief under the act of 1856, even if the allegations be conceded to be true.

That some, or even all, of the appellants were infants when the right of action accrued can make no difference. The second

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section of the act is not a statute of limitation but an enabling act. It gives a right of action which did not previously exist, and declares that the right must be exercised within a specified time. In such cases the plaintiff must show that he comes within the time allowed. (Wintersmith & Young v. Pointer & Conway, 2 Met., 457.) The statute does not extend the time in favor of infant plaintiffs, and the court has no power to do so.

The allegation of actual fraud is not sustained by the evidence.

There was no error in dismissing the petition as to Moore. He was sued as the surety of Hill in his bond as administrator of Brewer, but none of the covenants contained in the bond were set out in the petition, and it, therefore, did not contain a statement of facts constituting a cause of action against him. And we may remark, in regard to the charge of actual fraud in the mortgage to Kephart, &c., and the deed to Griffin Kelley, that the appellants, not having a return of nulla bona against either Hill or Moore, could not maintain a suit to subject the property on the ground that it had been conveyed in fraud of creditors.

The judgment must, therefore, be affirmed.

BARCLAY, &c. v. MASONIC SAVINGS BANK.

(Filed September 26, 1878—Not to be reported.)

The wife may devise her separate estate, or estate conveyed to her with power to dispose of it by will, without the consent of her husband. And while the husband may defeat the probate of the will if the consideration paid for the property moved from him, yet as the devise in this case was to the husband, and he accepted it by having the will probated and then mortgaged the property to secure his own indebtedness, he can not now question the wife's right of disposition even if the original consideration for the property moved alone from him, and the right of the wife to devise was inserted without his knowledge or consent.

Lane & Harrison for appellants.

Russell & Helm for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

The conveyance by Rose and wife of the 30th of September, 1865, to Mrs. Ronald vests her with full power to dispose of the property in controversy by deed or will. The language of the conveyance is, "with full power in the said Ann Elizabeth Ronald to sell the same or dispose of the same by will and testament as if a feme sole."

One of the prime objects of the conveyance was to vest her with the right to make such disposition of this property as she saw proper, and her right to pass the title by last will in such a case was expressly authorized by the statute in force when the devise was made. "A married woman may, by will, dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will." It is not necessary that the husband should consent to a devise by the wife of her separate estate, nor is he to be consulted when she attempts to make such disposition of property under the exercise of a power conferred on her by the instrument under which she holds it.

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The husband's assent in neither case is required. It may be, and is doubtless true, as contended by counsel for the appellant, that in cases where the husband is in fact the owner of the property conveyed, or where the consideration paid for it is, by reason of the marital relation, the money of the husband, the latter may defeat the probate of the will or have the power cancelled, but in this case the wife, in the exercise of the power, devises the estate to the husband. He accepts it by having the will probated and then makes a mortgage of the property to secure the payment of his own indebtedness.

A complete title was vested in the wife by the conveyance to her, with the power to devise it. The devise was made to the husband. He accepts it, and it is now too late for him to question this right of disposition even if the original consideration for the property moved alone from him and the right to devise was inserted without his knowledge or consent. Neither the husband nor his children are entilted to the property as against the appellees.

Judgment affirmed.

BETHEL, &c. v. VANMETER.

(Filed October 8, 1878—Not to be reported.)

The execution of a bond of indemnity does not divest the claimant of title to the property or deprive him of the right to sue for its recovery. The statute merely gives him an additional remedy on the bond. But if the statute attempted to deprive the owner of his property by such a summary proceeding it would be invalid.

Wilson & Hobson for appellants.

A. B. Montgomery for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hines.

Appellant having an execution against McGaba caused it to be levied upon a crop of corn, a portion of which was claimed by the appellee. The officer refused to proceed with the sale until appellant had executed a bond of indemnity. At the sale appellant and one Smith purchased the corn, whereupon appellee instituted this action to recover it or its value. Appellant relied upon the execution of the bond as a bar to the action for the recovery of the specific property, and a demurrer being sustained to that portion of the answer, a verdict and judgment was rendered for the return of the corn, or, in default thereof for the sum of $120, its value, with interest and fifteen dollars damages for its retention.

Appellant insists that the execution of the bond mentioned in sections 709 and 711 of Myers' Code, being the same as 641 and 642 of the present Code, operates to divest the claimant of all title to the property, and compel him to resort to the bond for the recovery of damages for the loss.

Such a construction is not authorized by the language of those sections. The provision required to be contained in the bond by which the purchaser receives a warranty to such an estate or interest as is sold, and the provision expressly releasing the officer from liability for the levy and sale clearly manifest the intention to give the purchaser a remedy upon the bond in case the prop-

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erty should be taken from him by superior title, and to leave the officer without embarrassing and vexatious suits in the discharge of his official duties. A warranty of title to the purchaser would be without meaning unless it was intended to provide for such an emergency.

Whether, however, such is the intention manifested by the law makers is immaterial, since the owner can not be divested of his title by any such summary proceeding. Such an act of the legislature would be in palpable violation of the fundamental law, and, therefore, inoperative. These provisions of the Code, instead of attempting to deprive the owner of the property of the right to sue for its specific recovery, gives him an additional remedy upon the bond.

There is no substantial error in admitting testimony or in granting instructions.

Therefore, the judgment is affirmed.

ASHER v. MONDAY.

(Filed October 22, 1878—Not to be reported.)

Where a vicious horse has injured the horses of his owner's neighbor and the owner is sought to be made liable therefor the true test, if the owner was not aware of the vicious habits of the animal, is: Did the owner use such means as an ordinarily prudent man would have used in order to keep a horse of like condition and temper within his own enclosure in order to prevent his injuring the property of others? If it appears, however, that the fact that the horse was dangerous was known to the owner, it was his duty to use extraordinary care in order to provide against his injuring the horses of his neighbors And in either case the fact that the owner of the injured horse had no fence around his premises is immaterial.

T. C. Winfrey and Sallee & Sallee for appellant.

Alexander, Baker & Read and Hindman & Sampson for appellee.

Appeal from Adair Circuit Court.

Opinion of the court by Chief Justice Pryor.

In a case like this it is immaterial whether the appellant had a fence or not around his premises. It can afford no protection to the appellee. The proof shows the character of the horse and his vicious habits, at least when outside of his own enclosure; and it was the duty of the appellee to have so confined the horse as would have prevented him from injuring the horses of his neighbors. He is not to be held, however, to the highest degree of diligence if not aware of the vicious habits of the animal. The true test in such a case is: Did the appellee use such means as an ordinarily prudent man would have used in order to have kept a horse of like temper and condition within his own enclosure in order to prevent his injuring the property of others?

If it appears, however, that he was a dangerous horse, and that fact known to the appellant, it was his duty to use extraordinary care in order to provide against his injuring the horses of his neighbors. These two propositions should have been submitted to the jury.

Judgment reversed and cause remanded, with directions to award a new trial and for further proceedings consistent with this opinion.

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ARNOLD'S CURATOR, &c. v. LAIRD, &c.

(Filed November 19, 1878—Not to be reported.)

Where a widow sells her dower before its assignment, and places the purchaser in possession of the mansion house and curtilage, he may assert any claim that the widow might have asserted, and is, therefore, not chargeable with rents.

Stevenson & O'Hara, J. G. Carlisle and C. D. Foote for appellants.

Simmons & Schmidt for appellees.

Appeal from Kenton Chancery Court.

Opinion of the Court by Chief Justice Pryor.

The act of 1796 gave to the widow the mansion house and plantation, free of rents, until dower was assigned, and the Revised Statutes limited the right to the mansion house and curtilage, that is, to the dwelling and outhouses pertaining to it, the yard, garden, etc., adjoining the plantation or messuage, if any.

She may abandon the premises, however, by surrendering possession to the heir, or cease to occupy it by herself or tenant, so as to preclude her from asserting any claim to rent, but as long as she occupies, either by herself or tenant, or, by a lease or sale, places one in possession, and is living on the annual rental or the proceeds of her sale, the party entering may assert any claim that the widow could have asserted. In the conveyance from the widow to Arnold she not only conveys her dower, but all other rights she had in the premises, such as the possession and use under the statutes of Kentucky as widow.

She may have had no means of support outside of the right to use this property, and, instead of possessing it herself, she placed Arnold in possession upon the payment of a certain sum of money, in consideration of which he not only obtained her dower, but, by express contract, the right to the use and possession with which the widow was invested by statute.

It is not necessary that the widow should continue to reside in the mansion house. If she is enjoying the use, or the benefits derived from a sale of the use, the right to rent being an incident to her right to dower, may be vested in others by her until dower is assigned.

In the case of White and Wife v. Clark, 7 Monroe, 642, the second husband and wife rented out the premises, but continued to enjoy the use, although not living on the place, and they were adjudged entitled to the rent.

In the case of Renfro's Heirs v. Taylor, 12 B. Monroe, 402, the widow of Renfro had one child by the latter, and that died in infancy. Supposing that the land derived by descent from the father passed to the infant's paternal grandfather, the widow having, in the meantime, married, and, having purchased the land of the grandfather, in conjunction with her husband, sold and conveyed the land to Taylor, and placed him in possession. The uncles and aunts of the infant, some years after, instituted an action to recover the land, alleging that they took from the infant, and sought to make the purchaser liable for rent. It was held in that case as the widow had the right to retain the mansion house and plantation free of rent until dower was assigned her, and was in possession at the death of her husband, that neither the widow nor her vendee was liable for rents.

This case is analogous to the one before the court, and, we think,

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must apply. In the attempt to construe the act in question the only difference in the two statutes is that the last diminished the widow's right by giving to her only the mansion house and curtilage, while the former statute gave her the entire plantation on which the mansion stood.

The court, therefore, erred in charging Arnold with rents.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

ANDERSON v. HAYS, &c.

(Filed December 19, 1878—Not to be reported.)

1. An appeal bond, whereby the obligors undertook to satisfy the judgment of the quarterly court upon an appeal from a justice's court, did not bind the sureties to perform the judgment of the circuit court, the cause having, by agreement of parties, and, without the knowledge or consent of the sureties, been transferred to that court.

2. A petition upon an appeal bond should have set forth the terms of the bond in substance. Making the bond a part of the petition did not cure the defective averments.

Smith & Richardson for appellant.

C. W. Lester and R. D. Hill for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hines.

The allegations of the petition and the amended petitions do not sufficiently set forth a covenant and breach thereof. The bond sued upon should have been set forth in substance so as to show the undertaking on the part of the parties to the bond. This was not done. Making the bond a part of the petition does not cure the defective averments. But even if that were done appellant could not recover. The bond, as exhibited, was an undertaking to satisfy the judgment of the quarterly court that might be rendered in the cause. No judgment was there rendered, as appears from the petition and amendments, but the cause, by agreement between the plaintiff and defendant, and without the knowledge or consent of the sureties in the bond, was transferred to the circuit court, and it is upon the judgment there rendered that recovery is sought to be had. The pleadings fail to show that appellees undertook to satisfy the judgment that might be rendered in any other than the quarterly court. The failure to prosecute the cause to judgment in the quarterly court was a waiver by appellant of his right to go upon the sureties in the bond for the appeal from the justice's court.

Judgment affirmed.

WHITE, &c. v. O'BANNON, &c.

(Filed September 17, 1887.)

1. In endorsing a levy on land upon an attachment the generality of the description makes no difference, provided it is sufficiently intelligible to fix

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the lien of the attachment. The same precision is not required that is required in a sheriff's return upon an execution.

In this case the land upon which the attachment was levied was described as "one hundred and forty acres of land near Eminence, Henry county, the property of defendants." Held—Sufficient.

2. A verbal sale of land invests the purchaser with no legal or equitable title whatever, and a verbal division stands upon precisely the same footing.

A verbal division of land owned by A and B jointly was agreed upon.

Thereafter A, by title bond, sold to C that part of the land allotted to him in the division. Subsequently an attachment was levied upon the entire tract of land as the property of A and B, and at the sale D became the purchaser of that part of it which had been allotted to A in the verbal division. Thereafter B, by writing, conveyed to A his undivided interest in that part of the land which C. who had purchased it from A, seeks, by this action, to recover of D. Held—That the verbal division conferred upon A no title to this land, and, therefore, his sale to C conferred upon C no title; and the levy of the attachment having created a lien upon the land, that lien was not overreached by the subsequent conveyance from B to A, although that conveyance was made pursuant to the previous verbal division.

Geo. C. Drane for appellants.

Wm. Lindsay for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Bennett.

In September, 1870, A. G. Roberts instituted two actions of debt in the Shelby Circuit Court against John W. and James H. White. Roberts sought in each action to recover judgment against John W. and James H. White on their joint indebtedness to him.

About the same time W. C. Baskett brought suit in the Shelby Circuit Court against John W. and James H. White for the purpose of recovering judgment against them on their joint indebtedness to him.

John W. and James H. White were personally served with summons to answer each of the foregoing actions. Also orders of attachment against the property of both of the Whites were issued in each of the foregoing actions, and were directed to the sheriffs of Shelby and Henry counties.

Those sent to Henry county were levied by the sheriff of that county, on the 9th and 12th of September, 1870, on a tract of land containing 140 acres as the property of both the Whites.

At the March term, 1871, judgment was rendered against both the Whites by default in each of the foregoing actions, and the attachment in each action was sustained, and the 140 acres of land attached by the sheriff of Henry county was ordered to be sold. The sheriff of Henry county was directed to make the sale. The sheriff, pursuant to said order, sold the land on the first Monday in January, 1872, and G. W. Bondurant became the purchaser of 62½ acres at the price of $1,354.74. At the October term, 1872, the commissioner of the Shelby Circuit Court, by the order of that court, conveyed the 62½ acres to G. W. Bondurant.

At the March term, 1871, of the Shelby Circuit Court Shelby Scearce obtained personal judgment against John W. and James H. White, and execution was issued thereon and directed to the sheriff of Henry county, which was levied April 3, 1871, upon the same tract of land, but subject to said attachments; and on the first Monday in January, 1872, the sheriff sold 7½ acres of the tract, which satisfied the execution. G. W. Bondurant became

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the purchaser of this land. The two parcels thus bought by him on the same day amounted to seventy acres.

Two or three years after Bondurant purchased the land he conveyed it, by deed duly acknowledged and recorded, to Smith Guthrie, and he, in the year 1881, sold it by executory contract to the appellee, James, O'Bannon.

On the 23d of May, 1871, John W. White signed and acknowledged a deed to the 140 acres of land to Judge B. J. Peters in trust for the appellant, Juliet White, wife of John W. White, which deed was recorded in the Henry County Court on the 3d of June, 1871.

In 1883 the appellees, James O'Bannon and Smith Guthrie, brought suit in the Henry Circuit Court against the appellants, Juliet White and her trustee, Judge B. J. Peters, for the purpose of removing the cloud from the title of seventy acres of land which rested thereon by reason of the conveyance by John W. White to said Peters in trust for Juliet White, and of quieting their title to the same.

The appellants resisted the appellees' right to the relief sought mainly upon two grounds: First, flhat the levy upon the land was void for want of a sufficient description of it; second, that Judge B. J. Peters, before and at the time of the issuing of the orders of attachment, and the levy, or pretended levy, of the same, was the owner of said tract of land in trust for the appellant, Juliet White.

These grounds will be noticed in their order. The sheriff's return on one of the orders of attachment reads as follows:

"Came to hand Sept. 11, 1870, at 10 o'clock a. m., I levied this attachment on about one hundred and forty acres of land near Eminence, Henry county, the property of defendants. The defendants not being found, and no person being found on the land, I posted a true copy of the within attachment on the door of the house on the land.

"A. H. DITTO, S. H. C."

The endorsement of the levy on each of the other orders of attachment is in the same language as the foregoing, differing only in the dates of the respective levies. Are these endorsements sufficiently descriptive of the land levied on? We think they are.

The appellants' counsel contends for the same particularity of description in the endorsement of a levy upon land on an order of attachment as is required in the indorsement on an execution of its levy upon land. Without deciding whether the endorsement upon these orders of attachment would be a sufficient endorsement on an execution of its levy upon land, it is sufficient to say that, in making the endorsement of the levy, a distinction is taken between the levy of an attachment and the levy of an execution. The levy of an attachment upon land is merely for the purpose of creating a lien on it, for the purpose of giving the court issuing the order jurisdiction of the property, that it may be thereafter, by the court's order, applied to the payment of the plaintiff's judgment, if he obtain one. And the court, thus having control of the property, may, in its order of sale, enlarge the description as given by the sheriff's return, so as to accurately identify the land. In other words, after the sheriff has made his return of the levy the property is then under judicial control, and the sale of it by order of court is a judicial sale. And the court, while it can not enlarge the quantity of property levied on, or substitute other property in its place, may disregard the descriptive language of the return, and engraft in its order of sale an accurate descripton of the property, so that all persons may

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understand what property is to be sold, and for what property they are bidding.

The court's deed recites these steps as connecting links of the purchaser's title, upon which he has the right to rely as furnishing him all of the title that the defendant had to the property attached.

For these reasons any words which designate and comprehend the property levied on are sufficient. The generality of the description makes no difference, provided it is sufficiently intelligible to fix the lien of the attachment.

The sheriff, in his levy upon real property, and sale of it under execution, acts in a ministerial capacity, and by the levy, "when carried to a sale," the defendant is divested of his title to the property, and the purchaser is invested with the title. The sheriff's advertisement usually recites the descriptive terms of the return upon the execution; and these terms are usually inserted in the deed (indeed they should be so inserted) in order that the deed itself may show a consecutive chain of title from the defendant in the execution to the purchaser. Therefore, greater precision should be required in the sheriff's return on an execution than on the order of attachment. (Drake on Attachments, section 237; Waples on Attachment and Garnishment, page 172; Freeman on Executions, section 281.)

The sheriff's endorsement upon each order of attachment shows, first, that they were, on the 12th day of September, 1870, levied on a tract of land containing one hundred and forty acres, which was situated near the town of Eminence, in Henry county, Ky.; second, that this land was levied on as the property of the defendants; third, that, as they were not found, copies of the orders of attachment were posted on the front door of the house on the land.

According to the principles just announced we think that the endorsement upon each of the attachments was sufficiently intelligible to fix the lien of the attachment upon said land.

The appellants made their answer a counterclaim against the appellees, by which they sought to recover the land in controversy, upon the ground that they, at the time of the issual and levy of the attachments, were the owners of the land by purchase from John W. White. They contend that sometime in 1869 the appellant, B. J. Peters, as trustee of the appellant, Mrs. White, purchased, by title bond, the one hundred and forty-acre tract of land from John W. White, the husband of Mrs. White, and that on the 23d day of May, 1871, John W. White signed and acknowledged a conveyance to B. J. Peters, as trustee, to said land, which was recorded on the 3d of June, 1871; that at the time John W. White executed the title bond to B. J. Peters he was the owner of the entire tract of land.

It is needless to discuss what the legal or equitable rights of the appellants would be if these facts were all true. That they are not true in at least one important particular is proven by the record, which shows that John W. White, at the time the attachments were levied on the one hundred and forty acres of land, only owned an undivided one-half of it, and James H. White owned the other. It is true that the proof shows that before the levy of the attachments John W. and James H. White had verbally agreed on a division of the lands which they jointly owned, and that the tract of land in controversy was to belong to John W. White, but it is also true that James H. White did not convey, by any writing, his undivided half interest in this tract of land to John W. White until the first day of February, 1871, which was long after the attachments were levied. And the attachments were levied upon the land as the property of both

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John W. and James H. White, to secure debts for which they were jointly bound.

It is well settled that a verbal sale of land invests the purchaser with no legal or equitable title whatever, and a verbal division stands upon precisely the same footing. And as John W. White acquired no legal or equitable title to James H. White's undivided interest in the land by the verbal division, it follows that the appellants, by their purchase by title bond, acquired no legal or equitable title to said interest. And the attachments having been levied on the land before James H. White had conveyed his interest therein to John W. White by any writing, a lien was thereby created on said interest, which lien the subsequent written conveyance by James H. to John W. White, although made pursuant to the prior verbal agreement of division, which antedated the levy of the attachments, could not overreach.

Therefore, as Bondurant purchased only seventy acres of the tract of land at the attachment sale, which was not quite half of it, and which was subject to the attachments, the lower court did right in rendering judgment for the appellees.

The judgment of the lower court is affirmed.

To a petition for rehearing Judge Bennett delivered the following response of the court:

In view of the fact that the counsel for the appellants stated orally at bar, as well as in his petition for a rehearing, that the statement in the opinion herein, to the effect that the agreement between James and John White to divide the land in controversy, they being the joint owners thereof, was verbal, and was not reduced to writing until February, 1871, is directly contradicted by the record, we deem it proper to respond to that statement.

In the appellants' answer is the following unguarded language: "Defendants say that before the institution of the suits of Baskett, Snooks and others, in the Shelby Circuit Court, referred to in plaintiffs' amended petition, the said James H. White and John W. White had agreed upon and made a division of their lands in Henry and Shelby counties held jointly, in which division the above-named tract was allotted to the defendant, John W. White, and the possession thereof surrendered up to him, which division was afterwards, by deed dated February 1, 1871, ratified and confirmed.".

"Had agreed upon" a division! How? By writing? The answer does not say so. On the contrary the answer says that the division was ratified and confirmed by the deed of February 1, 1871. The word writing is not an unfamiliar word in this country; and the necessity of a written contract in order to pass a legal or equitable title to land is well known to the distinguished counsel, and it is but simple justice to him to presume that he would have stated in the answer (for he drew it) that the agreement of division was in writing if such had been the case. But he mentions no writing except the deed of the 1st of February, 1871, which it is alleged "ratified and confirmed the division;" not a previous written agreement.

But it is stated in the petition for a rehearing that John W. White proves that the agreement of division was in writing. Let us see.

On page 140 of the record Mr. White says that he and his brother, James H. White, "agreed on a division" of their lands. On page 141 he says that the reason why he and his brother did not make deeds to each other at the time they "agreed upon a division" was that he and his brother "got at loggerheads," and

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that each refused to make a deed to the other. So he states distinctly that at the time they "agreed on a division" each refused to make a deed to the other, and it is not intimated down to this point that the agreement to divide was in writing.

He says, on page 148, "there was a written agreement between us settling the partnership, written by Judge Wheat, and left by mutual consent in his hands, * * * and that it was put to record three or four years afterwards."

On page 95 it is claimed by the appellants in their rejoinder that James H. and John W. White "purchased or owned or used the land in controversy as partnership property or as part of their stock in trade." No where is a statement that there was a written agreement settling the partnership, and a denial that the land in controversy was "purchased, owned or used as partnership property or as a part of their stock in trade." Therefore, to hold that the land in controversy was included in that written settlement, and that the written settlement operated as a transfer of James H. White's interest therein, would not amount to the dignity of construing language, but would be a gross and palpable abuse of it.

Again, it is nowhere alleged in any of the appellants' pleadings that the division of the land was evidenced by any writing except by the deed of February 1, 1871.

And the question as to whether or not John W. White owned his brother's undivided interest in the land in controversy at the time the attachments were levied thereon was put directly in issue by the pleadings. And the burden of proof being on the appellants to establish that fact and the necessity of establishing it by written evidence being well known to their learned counsel, we must presume, first, that it would have been alleged that the division was evidenced by writing, if true; and, second, that if the writing referred to by John W. White would have shown that the land in controversy had been divided, the writing, or a copy of it, would have been filed in the case.

Again, it is said in the petition for rehearing that the point raised in the opinion herein, to the effect that the land in controversy was levied on and sold as the property of James H. and John W. White, and that at the time of the levy and sale the legal title was in them, and that the pretended division, if it ever took place, was only verbal, and, therefore, passed no enforcible equity as against the attaching creditors, was never raised by counsel either in this court or in the court below.

It is impossible for us to know what points were raised in argument in the lower court. But it does appear from the pleading that the question was put in issue. It also appears that the counsel for the appellee made the point in his brief on file in this case. But suppose the point was not raised by counsel! Should we, in the language of the school boys, exclaim "dog fall" and square honors? Or should we give the case our best efforts and decide it as we see it? We think the latter should be done.

The petition for rehearing is overruled.

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WHITEHEAD v. DARLING.

(Filed September 22, 1887—Not to be reported.)

Settlement of accounts—Appellee was the owner of a distillery which was operated by appellants under an arrangement whereby they were first to pay expenses, including whatever might be due them, if anything, for their services, and after that a debt which appellee owed them; any balance after that to belong to appellee. In this suit for a settlement of accounts between appellants and appellee: Held—First—That persons to whom were referred the accounts of the parties were not selected as arbitrators, but merely to make a statement of the accounts, and their action can not be considered as a bar to this suit, which was subsequently brought to settle the accounts.

Second—It was equitable to credit appellants by attorneys' fees incurred in the defense of attachments levied upon the distillery property at the instance of appellee's creditors, the property belonging to appellee and being merely operated by appellants as his employes.

(Petition for rehearing filed and overruled.)

Masterson & Gaunt for appellant.

Winslow & Winslow for appellee.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Holt.

This appeal, for the most part, involves questions of fact only. We shall notice such matters only as, in our opinion, admit of question, although the entire and unnecessarily large record has been carefully examined. The parties to the contest, before this action was brought, selected two persons for the purpose, as is claimed, upon the one hand, of settling and arbitrating all matters of account between them; while upon the other it is said that they were only to take the account books and make correct copies, and put the accounts in such form that the parties in interest could themselves settle them. In pursuance of this agreement the parties so chosen did make a statement of the accounts, but, in the light of the entire testimony, their action can not be considered as a bar to this suit, which was subsequently brought to settle them.

Arbitrators determine matters of difference. They are judges of both the law and the fact. By the common law they are not bound by court rules of practice, but decide ex æquo et bono, being allowed the greatest latitude.

In this instance the persons do not appear to have been selected to decide what, in their opinion, might be right between the parties, but only to make a statement of their accounts.

It is contended upon the one side that the appellant, H. J. Whitehead, should be allowed pay for his services in attending to the distillery not only from April 1, 1880, when it commenced running, up to April 1, 1881, when Whitehead & Barrett ceased to operate it, but for the time during which they were preparing to do so; while upon the other it is urged that he is entitled to pay only from August 14, 1880, when the agreement of the parties was reduced to writing.

It is evident, however, that the written contract was intended and understood by the parties as applying to the year from April 1, 1880, to April 1, 1881, during which Whitehead & Barrett operated the distillery, and the action of the lower court in allowing pay for that period was correct.

Nor, in the light of the testimony, can it be disturbed as to the

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item of $50 claimed to have been paid to Keenan; the $55 paid Barrett; the $91.50 said to have been paid to Brown, and the $48.84 "to add to last month's statement."

The evidence as to these items is of an unsatisfactory character, or at least so much so as not to warrant a reversal of the chancellor's opinion.

It is not claimed but what the amounts paid Adams and Carrico were in fact owing to them by the appellee, Darling; and it is proven that the appellant, Barrett, loaned to the distillery the $200 which the commissioner allowed him—in fact the loan is not denied.

It is insisted, however, that these items were all included in the settlement of August 14, 1880, between the appellants and the appellee, when the latter fell in debt to each of them in the sum of three thousand dollars.

The testimony shows, however, that the settlement included nothing save the indebtedness of the appellee to the banks, which the appellants had either paid or for which they were liable, and matters of account growing out of the running of the distillery by the appellants during a previous year.

It is urged, however, that the pleading of the appellant, Whitehead, asserting the Adams debt, only claims $1,547.17, when the commissioner and the court below allowed him $1,749.12.

The pleader first states the several amounts paid by the appellants on the Adams claim, and as stated they amount to but $1,547.17; but he avers that the aggregate so paid was $1,749.12, and when the appellant, Whitehead, who verified the pleading, testifies, he gives several sums so paid, and as thus stated the amount to the last-named sum. He moreover supports his testimony with written evidence of the payments in the form of receipts. Under these circumstances the claim of the appellee by cross appeal, that his judgment should be increased by the difference between said two sums, is at best technical and not supported by right, and the averment in the pleading of the sum total paid will be regarded instead of the statement of the several sums paid, as they evidently embrace a mistake.

The appellee also claims that the appellants should not have been credited by certain attorney's fees paid by them. It appears that he was involved; that certain of his creditors had sued out attachments, which had been levied on the distillery, and which was then being run by the appellants. The attorney's fees were incurred in defending these attachments. It is said that the appellants were interested in operating the distillery, and hence in defeating the attachments and that they, therefore, should not be credited by these fees as against Darling, or that he at least should only be charged with a proportionable part of them.

The appellee, however, was the owner of the distillery. His theory of the arrangement under which it was being operated by the appellants is that they were first to pay the expenses of doing so, including whatever might be due them, if anything, for their services; that next they were to pay a mortgage debt to a third party that had been created in order to raise means to run the distillery, and also to pay themselves what the appellee owed them, and then any balance was to belong to the appellee.

This view we think is correct, and it is supported by the evidence.

It, therefore, appears that although the business was carried on in the name of the appellants, that they were in effect and fact only employes of the appellee, and it was equitable to credit them in the settlement of their accounts with the attorney's fees incurred in the defense of the appellee's property.

Judgment is affirmed upon both the original and cross appeal.

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BOGGS v. COMMONWEALTH.

(Filed September 8, 1887—Not to be reported.)

1. Third conviction of felony—The statute which provides that a person convicted the third time of felony shall be confined in the penitentiary during his life is not unconstitutional.
2. Same—The fact that the accused has been convicted of felony and sentenced to the penitentiary on more than two previous occasions does not prevent his punishment under the statute by confinement in the penitentiary for life.
3. Where an indictment charges former convictions for felony it is not necessary that the words "against the peace and dignity of the Commonwealth of Kentucky" should be appended to each specification of former conviction, and in fact in this case they could not with propriety have been so added, as the previous convictions charged had taken place in other States.

Alpheus Baker for appellant.

A. Kohn for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant being charged with the crime of grand larceny committed in the county of Jefferson in the year 1886, and also with having, on three previous occasions, been convicted of felony, the punishment of which is confinement in the penitentiary, was, by the verdict of the jury in the case, found guilty under the indictment and sentenced to the penitentiary for life.

As the record before us contains no bill of exceptions showing what instructions were given or refused, or what evidence was produced on the trial, it must, on this appeal, be assumed that the jury was properly instructed, and that the verdict is sustained by sufficient evidence.

The constitutionality of section 12, article 1, chapter 29, General Statutes, which provides that a person convicted a third time of felony, the punishment of which is confinement in the penitentiary, shall be confined during his life, has been heretofore passed upon by this court, and is no longer an open question. (Mount v. Commonwealth, 2 Duvall, 94; Taylor v. Commonwealth, 3 Ky. Law Rep., 785.)

The indictment in this case charges that the accused had been convicted of felony and sentenced to the penitentiary on three previous occasions, each of which is specifically set out and described. And counsel argues that as the last was in fact the fourth and not the third conviction, he could not, under the statute, be punished by confinement in the penitentiary for life.

The jury, in their verdict, found him guilty of the offense of grand larceny as charged in the indictment, and also found that he had, on two previous occasions, been convicted of felony, the punishment of which is confinement in the penitentiary, and to satisfy the statute provided in such cases they were bound, as they did do, to fix his punishment by confinement in the penitentiary of this State for life, for we do not perceive how the previous commission of three or more felonies can alter or negative the fact that as many as two were committed before the accused was indicted and tried for the last offense.

It is true the Constitution provides that all prosecutions shall be carried on in the name and authority of the Commonwealth

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of Kentucky, which was done in this case, and conclude "against the peace and dignity of the same." That provision was literally complied with in this case, for the indictment does conclude with the words quoted.

It was not necessary the words should be appended to each specification of former conviction for felony, nor in fact could they have, with propriety, been so added, for all the previous convictions mentioned had taken place in other States beyond the jurisdiction of this Commonwealth.

We do not perceive wherein the substantial rights of the accused have, in the slightest particular, been prejudiced.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

BRANNIN, BRAND & GLOVER v. BRAWNER, &c.

(Filed November 10, 1886.)

1. Pleading—Departure—When an amended petition seeks to recover for the same debt sought to be recovered by the original petition, but sets out a different evidence of it, the amendment is not a departure and should be allowed to be filed.

In an action upon an account against joint defendants one of the defendants pleaded that the account had been merged into a note purporting to have been signed by both of the defendants, but also alleged that his name had been signed to the note without his authority, and that the note was void as to him. The plaintiff, by an amended petition, set up the note relied on as a merger of the account. Held—That the amended petition should not have been stricken from the files. If the note is valid as to both defendants the plaintiffs should be allowed to recover upon it, and if void as to one of the defendants the plaintiffs are entitled to recover upon the account.

2. Merger of account in note—Where a note into which it is alleged an account against two persons has been merged purports to be the obligation of both, when in fact it is void as to one of them, the account is not merged. (Reported in abstract in 8 Ky. Law Rep., 434.)

Ira Julian for appellants.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Barbour.

In this action appellants sought to recover of the appellees, Brawner & Simonis, a balance of $214.08 upon an account for money loaned and advanced.

Appellees, in separate answers, resist a recovery. Simonis denies any liability, claiming that while he had borrowed $1,000 from appellants, he had paid the same, and that any other money loaned or advanced was to Brawner alone. He further pleads that for the money sued for Brawner had given to appellants a note to which, without his (Simonis') authority, knowledge or consent, he (Brawner) had signed the names of Brawner & Simonis; that this note was accepted by applelants, who knew that he was not a partner of Brawner, and had no interest in the money covered by the note. He pleads this exemption and acceptance of the note as a merger of the account sued on.

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Brawner sets up substantially the same state of facts, and relies upon a settlement theretofore made with appellants.

Appellants replied, controverting all the allegations in the reply, and also filed an amended petition in which he sets up several notes purporting to have been executed by appellees, among which is the note Simonis relies upon as a merger of the account.

In this state of the pleadings the court below, upon the defendants' motion, struck the amended petition from the files, and upon the face of the pleadings dismissed the plaintiffs' action, and discharged their attachment.

The amended petition was doubtless stricken from the files on the ground that it was a departure from or inconsistent with the cause of action set out in the original petition. But we do not regard the amendment as a departure in this instance, nor should it be held as inconsistent with the original petition.

While we hold that the exemption and acceptance of a note in settlement of an open account is a merger of the cause of action upon the account, it is so from the fact that the parties have, by their agreement, changed the character of the indebtedness. But when the note which is relied upon as a merger is a nullity, and not enforcible against the alleged obligors, it certainly can not operate as a merger of the cause of action upon the account. Courts will be liberal in allowing amendments to the end that cases may be fully and fairly presented on the merits.

The general provisions and spirit of the Code of Practice require that form should yield to substance, and authorizes a change in the statement of the cause of action, when the amendment presents an altered state of facts growing out of the cause of action set forth in the original petition, when it seeks to recover for the same debt sought to be recovered in the original petition, but sets out a different evidence of it. In this case the note set out in the amendment is based upon the account stated in the original petition—the same cause of action set out in two distinct forms. And it is not only proper, but a fair regard for the rights of all the parties seem to demand, that the plaintiffs should set up the note in this action, for if they are not entitled to recover upon it, because it is not the note of the obligees, as is the contention here the plaintiffs should certainly have the right to recovery but for the delivery of the note to them. And, on the other hand, if the appellees are compelled to pay the account the note should be cancelled or declared a nullity as to them. Here the defendants say that the plaintiffs can not recover the amount of the account of them because of the acceptance of the note in satisfaction of the account, and at the same time say that the note is void, at least as to one of them. The plaintiffs do not know whether the note is void or not. Must they go to the useless expense of discontinuing their action upon the account, and then institute a suit upon the note, and prove its validity, that they may afterwards institute another action upon the account? Or, upon the other hand, is it necessary that the defendants shall try the issue in an action in which the note is no part of the record, and, if a judgment is rendered against them, be compelled to allow the note to remain in existence against them, or resort to an independent action to have it cancelled? We think not.

In Hord v. Chandler, 13 Ben Monroe, 404, the Court of Appeals held that one who purchased a note, and had been induced to do so by the fraudulent representations of the seller, will, notwithstanding he may not show a right to recover the amount paid for

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the note by offering to return it in a reasonable time, have a right to recover damages for the fraud.

In a New York case (Brown v. Leigh, Abbott's Practice Reports, N. S., 193) the court held that under section 172 of the Code of Procedure, which authorized a plaintiff to amend his complaint of course by setting forth a cause of action of the same class as that contained in the original complaint, but that he might, by omitting the original cause of action, insert another of a different class, provided the summons was appropriate to it.

And in Beatty v. Dudley, 80 Ky., 381, the Court of Appeals held that the allegations in a petition, that the defendant had fraudulently assigned certain notes, and the allegation that he was insolvent, and had assigned them with a view of giving the assignee preference, though apparently inconsistent, are not condemned, as it is in effect alleged that the pleader does not know which is true. This case seems to be in point.

The amended petition should not have been stricken from the files. The judgment of the court dismissing the petition and discharging the attachment is also erroneous.

As to the appellee, Brawner, no reason is assigned for dismissing the petition as to him.

It is suggested that the action was dismissed as to Simonis because the note set up was a merger of the account sued on.

As we have said, one of several defendants can not resist a recovery upon an account for money loaned upon the gorund that the account had been merged in a note purporting to be the obligation of the joint defendants, when he, at the same time, pleads that the note is not his act, and was executed without his authority.

It is true that an account several may be merged by the creditors accepting, in satisfaction of the joint account, the note of one of the debtors, but the appellees do not allege any such acceptance in this case.

In Donephan v. Gill, 1 Ben Mon. 200. George Donephan and Josh. Smoot, merchants, trading as Donephan & Smoot, having, through the partner, Smoot, bororwed from Mrs. Gill $700, Smoot delivered to her a sealed obligation for payment, signed Donephan & Smoot. In a suit upon the obligation Donephan denied any authority to bind him by a seal, and pleaded non est factum.

This suit was discontinued, and an action of assumpsit instituted against Donephan & Smoot to recover the borrowed money. Donephan relied upon the execution of the obligation as a merger of the assumpsit for the money borrowed. The court held that he was estopped by his plea of non est factum, and says: "It is well settled by adjudged cases that receiving the individual obligation of one partner may be prima facie a constructive extinguishment of a pre-existent partnership liability, on a contract of superior dignity, in consideration of which it was given, because, in the absence of any other fact, the presumption may be that such a bond was accepted as a satisfaction, and not as a collateral security merely. But this doctrine does not, in our opinion, apply to the facts in this case. Here the only rational presumption is that Mrs. Gill accepted the bond, not as the single obligation of Smoot, but, according to its apparent import, as the joint undertaking of Donephan & Smoot, and upon the credit of Donephan as well as of Smoot. Considering it then according to its technical effect, as the obligation of Smoot alone, it was never accepted as a satisfaction of the implied liability of Donephan & Smoot, and unless it had been so accepted it could not per se

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extinguish the joint assumpsit resulting by implication of law from the joint borrowing."

And to the same point is Calk v. Orear, 2 Ben Mon., 420. The appellant in the court below moved the court to set aside the order dismissing the action, and to reinstate the case on the docket, and to reinstate the attachment, which motion the court overruled.

The judgment is reversed and the cause remanded, with direction to the court below to set aside the order striking the amended petition from the files, and the order dismissing the action and discharging the attachment, and for further porceedings consistent with this opinion.

PARKS v. PARKS, &c.

(Filed February 2, 1887.)

1. The mortgagee of personal property may, after condition broken, maintain an action to recover possession of the property, and may, therefore, enjoin the sale of the property under execution.
2. Increase of mortgaged animals—A mortgagee has the same right to the issue of female animals embraced in the mortgage that he has to the mothers themselves.
3. The long delay of the mortgagee in enforcing a judgment for the sale of the mortgaged property is not conclusive evidence of fraud.

At the time executions were levied on mortgaged property several terms had passed since the master was ordered to sell the property, but at each term he made report that he had not sold, and further time was given to execute the order. Held—That the right to enforce the judgment has not been lost.

John T. Norvell for appellant.

Thos. Kennedy for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Ward.

In Brown v. Phillips, 3 Bush, 658, following the case of Swigert, &c. v. Thomas, 7 Dana, 226, and Spalding v. Scanland, 4 B. Mon., 365, it was said, that the common law right of the mortgagee of personal property, after condition broken, to the possession of the mortgaged property is now unmodified by statutory provisions. He may maintain detinue to obtain possession of the property, now the action by that name.

After he gets possession he will be accountable to the mortgagor for use, or hire or other income.

The interest of the mortgagor in personal property may be levied upon and sold, as provided in article 14, chapter 38, General Statutes; but before possession is delivered to the purchaser he must give bond, payable to the encumbrancer and owner, as provided in subsection 4 of section 1 of said article and chapter.

This section is in substance the same as section 36 of the execution law of 1828, which, in the case of Swigert v. Thomas, &c., was construed not to impair the right of the mortgagee in posession of the property after condition is broken. The mortgagee might be willing to look to the provisions of the bond, which it was the duty of the officer to take, but he was not, under the law, compelled to do so. But in this case the allegation, undenied, is that

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the officer and the plaintiffs in the execution were about to sell, and would, unless enjoined and prevented from so doing, sell the property in disregard of appellant's mortgage, which property was necessary to the payment of the mortgage debt. To prevent this the mortgagee had the right to enjoin this threatened and impending violation of his rights, if the property was covered by his mortgage.

Most if not nearly all the property levied upon was the produce of mares and cows embraced in the mortgage, and it is insisted that they are not liable to the mortgage.

It is aruged that the cases of Douglas, &c. v. Cline, &c., 12 Bush, 608, and Wooley v. Holt, 4 Bush, 788, and other cases, have exploded the common-law idea that the mortgagee is the owner of the legal title to the property. In these cases the contest was as to the rents and profits arising from the use of the property, and themode of reaching and appropriating it to the payment of the mortgage debt. As to the right of the mortgagee to the rents and profits, as held in these cases, they in no way differ from the case of Castleman v. Bett, 2 Ben Mon., 271. It was never held that the mortgagee was, in the absence of a contract to that effect, entitled to the rents until he obtained possession of the property. Now he can not obtain possession of real estate until there has been a sale, but he may, on prescribed conditions, sequester the rents by having a receiver appointed. Whether these cases, as to movable personal property, overrule the case of Brown v. Phillips, supra, we need not determine, unless it could be said that the issue of live stock embraced in a mortgage are to be controlled by the same rule applicable to rents.

The issue of property embraced in a mortgage has never been placed upon the same footing as rents and profits. While it has been held that the mortgagee was not, in the absence of a contract to that effect, entitled to the rents or profits arising from the mortgaged property until he gets possession, it has also been held that the mortgagee has the same right to the produce, or descendants of female animals embraced in the mortgage, that he has to the mothers themselves. (Hughes v. Graves, &c., 1 Littell, 318; Forman, &c. v. Procter, &c., 9 Ben Monroe, 126.)

But it is claimed that the long delay of the mortgagee in enforcing his judgment for the sale of the mortgaged property is conclusive evidence of fraud, and, therefore, prevents the assertion of any right against the execution creditors.

Rights and liens secured by judgments are sometimes lost by delay for an unreasonable time to enforce them, but we know of no case which holds that such delay is conclusive evidence of fraud. In this case the master of the court was ordered to sell the property, and at each term of the court thereafter, until the levy of the execution complained of, he made report that he had not sold, and further time was given to execute the order. In the absence of averments it is not to be presumed that these orders were procured with a fraudulent purpose to injure the creditors of the mortgagor. Besides, the admitted allegations show that four payments were made on the mortgage debt after the order of sale and before the levy of the executions, amounting in the aggregate to $1,024.50.

We think the petition and amended petition presented a cause of action, and that the demurrer thereto was improperly sustained.

Judgment reversed and case remanded for further proceedings.

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CENTRAL PASSENGER RAILWAY CO. v. BISHOP.

(Filed February 9, 1887.)

1. A carrier of passengers "must use the utmost care and skill which prudent men are accustomed to use under like circumstances," and this rule applies as well to a company whose cars are drawn by horses as to one whose cars are drawn by steam engines.

2. Burden of proof—Where a passenger whom a carrier has undertaken to transport is injured by an accident which occurred under circumstances under which such accidents do not generally occur, if proper care is used, the burden is on the carrier to explain how it chanced to occur.

In this case there was a collision between the defendant's street car and a railroad train belonging to another company, whereby the plaintiff, a passenger on the street car, was injured. Held—That the burden of proof was on the defendant to show that the collision was not caused by negligence on the part of the driver in charge of the street car, and the jury was properly so instructed. (Reported in abstract in 8 Ky. Law Rep., 781.)

Brown, Humphrey & Davie for appellant.

Helm Bruce for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Presiding Judge Bowden.

The appellee sued the appellant to recover damages on account of injuries received while a passenger on the appellant's street car, alleging that the driver of that car negligently attempted to cross the track of the Louisville Railway Transfer Company closely in front of an approaching train drawn by a steam engine, and that the engine struck the car he was on, and threw him out against a street curbing, whereby he was injured. The appellant denied negligent conduct, and alleged that the engine was negligently run against its car, without its fault. In other matters the petition was reversed. On a verdict for the appellee judgment was rendered, and a motion for a new trial was overruled.

The following instruction asked by the appellant was refused:

"By negligence is meant a failure on the part of the defendant, or its agents or servants, to exercise such care as persons of ordinary prudence, engaged in the same line of business, ordinarily exercise under similar circumstances to those proved in this case."

And this instruction was given:

"It was the duty of the defendant and its employes in carrying plaintiff to use the utmost care and skill which prudent men, engaged in similar services, are accustomed to use under like circumstances," and that it was negligence in the driver if he failed to take such care.

It is insisted that the rule which requires the use of the utmost care and skill, applied to those who operate steam engines, is not applicable to the driver of a street car drawn by horses or mules.

We do not see why the decision in Louisville City Railway v. Weams, 80 Ky., 420, should not be regarded as conclusive on this question without argument. That was an action against a company whose street cars were drawn by horses. As applicable to such cases, and as a rule to be observed in the further trial of that case, the court declared: "The rule is that a carrier of passengers for hire must use the utmost care and skill which prudent men are accustomed to use under like circumstances." The

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circumstances were, so far as the motive power affected them, that the driver was the manager of two horses; and in his management of them it was held he was bound to use all the care and skill which prudent men are accustomed to use in managing two horses driven on such a railway. It was not said he must have the utmost possible skill as a driver, nor that his care should be all that the most dangerous exigency would demand, but that, having as he ought to have, skill sufficient for the purpose, the passenger was entitled to the benefit of all that skill, and to all the care which a prudent man, so skilled, is accustomed to use in such a case. But as the hazard is not so great as when one operates a steam engine, such great skill is not required, nor is such anxious care necessary. The passenger may fairly require an adequate care and skill sufficient for his protection, so far as skill and care may assure it, whether the car is drawn by mules or by steam engines, but, as was said in Weams' case, the degree of care and skill increases with the hazards. That is true in the same sense of any driver of horses, with regard to different horses, some being more vicious than others, and with regard to different roads, some being more dangerous than others. That is the substance of the authorities referred to by appellant, except that which is quoted from Thompson's Carriers of Passengers, 206, in which he states what he says is the modern English rule. But in his note to Ingalls v. Bills, 9 Met., 1, in 43 Amer. Dec., 357, Mr. Freeman very clearly shows that the cases relied on do not sustain the text, if it is to be understood as meaning that the later English cases require less care than that formerly demanded. It seems, however, that such was not the meaning. It merely marked the introduction of a new form of stating the old rule. The "reasonable" care required was a chromatic scale of diligence, touching a very high octave when applied to the management of very dangerous instrumentalities. "The highest degree of care to which human skill and foresight can attain consistent with the carrying on of the business, and with the known methods and the present state of the particular act." and "to use the best precaution in known practical use," are deemed only reasonable care.

The rule under consideration has elsewhere been applied in cases of accidents to vehicles drawn by horses. (Ingalls v. Bills, 9 Met., 1; Farish & Co. v. Reigle, 11 Gratt., 697; Stokes v. Saltonstall, 13 Peters, 181; Tuller v. Talbott, 23 Ill., 357.

This disposes of the alleged error in the seventh instruction, for if the utmost skill and care are required the carrier is liable for slight negligence causing an injury. (Story's Bailments, section 601; Curtis v. Rochester, &c., R. R. Co., 1 N. Y., 534.)

The sixth instruction was this:

"If they shall believe from the evidence that plaintiff was injured whilst traveling as a passenger in defendant's street car, by a collision between defendant's car and a railroad engine, the burden of proof is on the defendant to show that there as no negligence on the part of the driver in charge of said street car to cause such collision."

A carrier of passengers for hire is not an insurer of their safety. His undertaking is that the instrumentalities are as safe as the utmost skill and care proper for such matters can make them, so far as, by the exercise of like skill and care, can be discovered, and that there shall be a like skill and care in their management. (Ingalls v. Bills, 9 Met., 1; Farish & Co. v. Reigle, 11 Gratt., 697; Sullivan v. Philad. & Read. R. R. Co., 30 Pa. St., 234; Freeman's notes to these cases.) The liability is, therefore, for slight negligence.

When negligence is denied the burden is on the plaintiff to

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prove it, as in other cases he must, when he seeks to recover on that ground. "It generally happens, however, in cases of this nature, that the same evidence which proves the injury done proves also the defendant's negligence; or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it." (Holbrook v. Utica, &c., R. R. Co., 12 N. Y., 236.) It is a general principle of the common law that a presumption of negligence is raised against a person having a duty to perform whenever there is evidence of an accident which usually, and according to the ordinary course of things, would not have happened if proper care had been taken by such person. (Caldwell v. N. J. Steamboat Co., 47 N. Y., 282; Millen v. St. John, 57 N. Y., 567.) It is the duty of a carrier to provide suitable instrnmentalities and careful management in the degree heretofore stated. The presumption of negligence does not arise from the mere fact that there was an injury to a passenger, nor from the isolated fact that there was an accident to the vehicle which caused the injury, unless that fact is so related to the carrier's duty as to suggest a failure to discharge it. In addition to the mere happening of the accident it must appear that it resulted from a defect in some of the instrumentalities, or from want of diligence in the management of them. The authorities sustaining the proposition are collected in 62 Amer. Dec., 679. The mere existence of a defect is not conclusive that the carrier was negligent; it may have been such that no skill or care could have detected it so as to prevent the accident. But that is a rare case, and as defects are generally discoverable by proper care, the presumption in any particular instance is that the defect in that instance could have been discovered if proper effort had been made. (Kansas Pacific Ry. Co. v. Miller, 2 Col., 456.)

If the accident was not caused by a defect it must have been produced by mismanagement or a vis major. If evidence shows it was the latter, the hypothesis of mismanagement is excluded, and there is no basis for any presumption. The plaintiff must then go further, and show that the carrier is responsible for or notwithstanding this vis major.

But if this uncontrollable force is not shown to have been the sole cause of the accident that is, if the plaintiff's evidence does not exclude mismanagement, and the case disclosed is such that proper care would generally succeed in avoiding injury—for example, by keeping the vehicle out of the path of this force, or by getting it out—the presumption is that what can generally be done could, with proper skill and care, have been done in that case, and the carrier must show that it could not have been done. The obligation to supply skillful and careful management is quite as strong as to supply sound and sufficient roads, cars and machinery. The rule is commended by its practical fairness. It is not meant that a carrier should be liable when there was no negligence, but when a passenger has paid his fare and taken his seat he is under no obligation to aid in the management; he may be at ease, and rely upon that diligence which he has paid for. If an accident occurs under circumstances in which they generally would not occur, if proper care is used, the passenger may, with more justice, call on the carrier to explain how it chanced to occur, consistent with the proper discharge of his duty, than the carrier can call on him to prove what exact degree was not taken. The carrier or servants know, or ought to know, the facts, and the passenger can not be presumed to know them.

In this case there was a collision between the defendant's street car and a railroad train belonging to another company. That the defendant was bound to use proper care and skill to be off

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of that crossing when the train was almost there, and about to pass over it, is free from doubt. That with proper care that can be generally done is equally clear. That which is done a dozen times every day for years together can presumably be done every time a proper effort is made. That due care can avoid a collission at such a crossing can, as a general rule, be more confidently affirmed than that latent defects in rails, cars and machinery can be discovered by the use of the utmost skill. The assumption that they are so discoverable places on the carrier the burden of showing that it could not be done in the particular case; and the similar assumption that the proper care will generally enable the driver to get over the crossing without being run into by the train is certainly as well founded in experience, and ought to give rise to the same presumption of negligence, requiring the carrier to show the particular circumstances which rendered it impossible to do so in this case, with the use of proper care. This does not assume that the servants of the railroad company were not negligent; on the contrary, it assumes that, notwithstanding there was such negligence, a driver of a street car can ordinarily keep off of the crossing when a train is about to pass over it.

Thompson (Carriers of Passengers) having laid down the rule that while the burden is on the plaintiff generally to show negligence, he does this by showing that the accident happened through the failure of some of the means adopted and used by the carrier in attempting to make the transit (in which the management must be understood as included), says this rule "does not apply when the plaintiff's evidence shows that the accident was caused by something so wholly disconnected with the operations of the carrier's business as not to involve the safety or sufficiency of his instrumentalities or the negligence of his servants." That is quite obvious. If the plaintiff alleges negligence, and then proves the existence of a vis major as the sole cause, clearly he has no case. He states as illustrations such cases as these: 1, When a passenger is shot by some one outside of the car; 2, Where an obstruction is suddenly placed on the track in front of a train; 3, Where one misplaces a switch; 4, Where a ship is fired on by a piratical craft. It is plain that if the plaintiff's evidence shows a complete defense, as it would in each of these cases stated, that would be an end of the injury. But if, in the second and third states of facts, the plaintiff's evidence had merely shown that he was injured by the car going off the track, it seems clear that the burden would have been laid on the company to show, in the one case, that the misplacement of the switch and the obstruction in the other were the acts of strangers, and done so recently that the fact could not have been detected. All the cases are to that effect.

The plaintiff's evidence in this case was in substance that trains passed the crossing at all times of the day and night, and, therefore, were to be guarded against at all times; that the train was going east; the crossing was so situated that the train could not be seen by the street car driver till car and train were dangerously near the crossing; the custom with the trainmen, which was observed in this instance, was to whistle for the crossing about one hundred and fifty yards before reaching it, and to ring the bell constantly after whistling till the crossing was passed; passengers on the car heard both whistle and bell, besides the headlight on the train projected its light forward a hundred yards, so that the coming of the train could be known while it was yet that far off; under these circumstances the driver of the car, which was moving at five or six miles an hour, while the train was not going that fast, either did not hear or did not

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heed the whistle or the bell, but came at the crossing in a fast trot, and attempted to drive his mules across under the lash.

These were the attendant circumstances. The evidence did not exclude mismanagement as a cause of the accident, but very strongly suggested it, even upon the assumption that the trainmen were guilty of the grossest negligence.

udgment is affirmed, with damages.

VERSAILLES & NICHOLASVILLE TURNPIKE CO. v. THE TOWN OF VERSAILLES.

(Filed September 14, 1887.)

Respective duties of town and turnpike company as to repair of road—Where a turnpike company, authorized to build a pike "from Nicholasville to Versailles," constructed its pike from a point in the town's corporate limits, and afterward the town limits were extended so as to take an additional part of the pike, and the company kept in repair all the pike in the town limits for a certain time, when it quit repairing that part, and thereafter the town made proper repairs and sued the company to recover the amount thus expended.

Held—First—When the exact terminal points are not otherwise indicated the words from and to are inclusive, and the company may select terminal points within the corporate limits, so that the pike will connect the actual boundaries, as distinguished from the legal boundaries.

Second—While the company collects toll for the use of that part of its pike lying within the town, it is not exempted from the duty of repairing it.

Third—But the duty to repair does not depend on a continued receipt of profits, for when the company has constructed its pike its power to locate is exhausted, and it can not evade duties thereby assumed by abandoning a part of the road.

Fourth—As to the public, it is, in a case like this, the duty both of the town and company to repair; as between themselves, it is the duty of the company, and when, on the company's failure to make repairs, the town makes them, it may recover of the company what it has been forced to spend.

(In this case an appeal has been granted by the Superior Court to the Court of Appeals.)

J. D. Hunt and Ed. M. Wallace for appellant.

D. L. Thornton and W. O. Davis for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Presiding Judge Bowden.

The appellant was incorporated March 1, 1848, at which time the southern boundary of the town of Versailles was about 186 yards from the intersection of Morgan and Main streets, known as Dean's corner. The appellant located its terminus at Dean's corner, and from that point constructed its pike to Nicholasville. In 1868 the town limits were extended 304 yards, making it 490 yards south of Dean's corner; and in 1880 there was another extension. The appellant kept in repair all of the pike in the town limits until December, 1878, when it quit repairing that part. Thereafter the town made proper repairs, and sued the appellant to recover the amount thus expended. From a judgment against it the appellant prosecutes this appeal.

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Section 1 of the appellant's charter declares that it is incorporated "for the purpose of making a turnpike from Versailles to Nicholasville." It now contends that these towns are to be excluded, and that as it had no power under its charter to make its pike within the town boundary, it is not under any duty to keep that part of it in repair. This defense, if valid, applies to only so much of the road as lies within the town limits as they existed when the appellant was chartered.

Whether we seek the meaning of the words from and to in etymology or in common use, the radical idea of the former is that of beginning, and of the latter that of ending. When used with reference to objects merely to denote the distance between them, the objects are excluded, but in many cases we use the word from in the sense of out of, and to in the sense of into. "He came from Rome and went to London" does not mean that the starting point was the boundary line of Rome, or that the ending point was in the boundary line of London. Both places are included. "From alpha to omega"—"from the highest to the lowest"—and similar sentences, are inclusive. While the words from and to retain the invariable meaning of beginning and ending, it is by an ordinary construction that we determine in each case just where the initial and terminal points are—as a line that runs to a stream not navigable goes to the middle of it. So here, the purpose being to connect two towns by a good road, it is to be understood that this practical benefit was intended to reach the actual towns to be benefited. It is well known that a town on paper may be so much larger than the actual town that a road terminating at the corporate limits would, as matter of fact, entirely fail to provide those facilities which the legislature manifestly intended.

The charter of the appellant distinguishes between the towns, as terminal points, and the corporate limits of the town; for it provides expressly that the nearest toll gate shall be at least one-half mile from the limits.

A mathematical point has position only and no extension; a town is but a large point, having extension; and we usually so conceive it when speaking of anything coming from it or going to it—the beginning and the ending covering the whole of this point. It may be that in ordinary cases the words from and to, when used with reference to the location of a railroad or a pike, should not be extended beyond the compact part of the town, as that will provide presumably all the facilities intended by the legislature; but in the special case there may be reasons to say that even this limitation should not be placed. There is in the record before us enough to show that a pike was evidently desirable, and it is probable that the beginning point was located at Dean's corner in order to have a continuous line. In view of this fact, and of the discriminating use of the names of the towns, when designating terminal points, and the boundary line when fixing the exact limit of the nearest gate, it may not be difficult to conclude that it was the manifest purpose to authorize such a connection. But if this is not so, and if there is nothing in the charter indicating the exact terminal limits except the words from and to, we think the adjudged cases sustain us in saying that the appellant was not thereby precluded from selecting a beginning point within the town limits. It was so held by this court in Wilson v. Midway and Scott County T. R. Co., 4 Ky. Law Rep., 727. In addition to the cases there cited, which need not be here revlvewed, are these: Rex v. Inhab. Norwich, 1 Strange, 177; Smith v. Helmer, 7 Barb. Sup. Ct., 416; Union Pacific R. R. Co. v. Hall, 91 U. S., 342. It, therefore, seems to

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us that the appellant had the right under its charter to make Dean's corner a terminal point.

When it had once located its road its power to locate was exhausted, and it could not evade the duties thereby assumed by abandoning a part of its road to the public, even if it had done so. But it is not pleaded, nor is it found as a fact, that it abandoned any part of its road. It quit repairing; but there is no intimation that it ever ceased to collect all the tolls it claimed, or had the right to demand, when it first made the road. The charter fixed the toll at certain sums for every five miles, and in the same ratio for shorter distances. The nearest gate could not be closer to the town boundary than a half mile; no charge could be made for travel from the town up to the gate, or from the gate into town; but those who, going from the town, passed through the gate could be charged for the distance between the gate and Dean's corner. That benefit the company derived from making its beginning point at Dean's corner, and there being nothing to suggest that it has given up any part of the toll proper for the entire distance between Dean's corner and the first gate, it must be assumed there has been no such surrender, but that the company has been receiving all the time all the toll due to it on the supposition that its terminus is at Dean's corner: It has merely abandoned the burden of repairing, retaining the benefit of tolls.

The legislature, by the special charter incorporating the town of Versailles, gave it the means and made it its duty to keep the streets in repair. By a subsequent special charter, in the exercise of an undoubted power, it gave the appellant the right to construct its pike over the street of the town, providing that it should keep it in repair. This duty of repairing was in its nature a condition of the grant; it is conceded that it existed in respect to all of the road lying out of the town boundaries; there is nothing in the charter itself excepting that part which lies in the town, and when we consider that the duty of repairing was, when exacted of the town, a mere tax and public burden, but when exacted of the appellant it was a mode of payment for a benefit received, it is difficult to see on what ground the appellant can claim that it should be exempted from the discharge of an expressed duty, to be performed in consideration of a conceded privilege, and that the town should be required to perform it. It is to be remembered that the people of the town are taxed for the purpose of keeping its streets in repair, and if they may be forced in this way to keep the pike in repair, and yet be forced, whenever they use the pike, to pay toll to the company, which tolls include the fund for repairing, they are compelled to pay twice for the same use. It does not seem reasonable that the company, while collecting tolls for the use of that part of its pike which lies in the town, should be exempted from the duty of repairing it, the effect of which would be that every dollar paid by the taxpayer of the town for the purpose of such repairs would be used for the benefit of a private corporation, and not for a public purpose. It may be doubted if the legislature has the power to produce such a result by any method whatever. It seems clear to us that in the absence of a provision to that effect it should not be assumed that it was contemplated. Our conclusion is that, as between the town and the company, it is the duty of the latter to keep its road in repair. It may be observed that this conclusion does not rest on the ground on which the duty of a railroad company to repair highways at crossings is maintained.

When two persons, with respect to a third person, owe a duty, which, as between themselves, is the duty of only one of them,

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the one whose duty it is ought to perform it, and if he fails to do so the other may perform it and recover what he is thus compelled to pay. It was the duty of both the town and the company, with respect to the public, to keep in repair; as between themselves it was the duty of the company; the town, to protect itself from indictment and liability to any who might be injured by reason of the effect, was compelled to make the repairs, and it could, therefore, recover what it had thus been forced to expend.

The extension of the town boundary so as to include a part of the pike originally lying out the town in no way affected the rights or obligations of the company. (Com. v. Erie & N. E. R. R. Co., 27 Pa. St., 339.) If it were conceded that when the legislature extended the limits the company could have elected to abandon all of the road thus included, the concession would not affect this case because there is nothing in the record to show that there was such an abandonment. It is to be presumed that tolls have been demanded and received according to the provisions of the charter and the rights of the company. The mere fact that the company refused to make repairs after December, 1878, does not imply that it did not thereafter, in fixing it tolls, consider and treat as part of its road that portion which lies in the town limits, and thus demand and receive pay for the use of that portion.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

CHAPEZE v. YOUNG.

Filed September 14, 1887. Appeal from Louisville law and Equity Court. Opinion of the court by Judge Ward, affirming.

Principal and surety—Parol testimony—The principal in a joint note, signed by himself and surety, may, in the absence of restrictions upon his authority, obtain as many additional sureties or guarantors as may be required to make the paper available for the puposes intended by the original makers, and the sureties and guarantors so obtained may stipulate the terms of their liability as between themselves and prior parties, and those terms may be proved by oral evidence.

T. B. Fairleigh for appellant; Bullitt & Shield for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. BEAVEN'S EX'OR.

Filed September 14, 1887. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, affirming.

Railroads—The paramount duty of the company's agents in charge of a train is to look to its safety and that of the persons and property thereon; subordinate to this duty is the duty to use ordinary care to prevent injury to stock that may stray on track by using means to apprehend the danger, and to avoid it after it is discovered. and a plaintiff can not recover unless the danger was discovered in time to avoid accident, or, by the use of ordinary care, could have been discovered in time to avoid it.

W. J. Lisle for appellant; H. W. Rives for appellee.

ALLEN & SHAFER v. PURYEAR.

Filed September 14, 1887. Appeal from McCracken Circuit Court. Opinion of the court by Judge Barbour, affirming.

Practice—In the absence of a part of the testimony from the bill of evidence this court can not say the lower court erred in giving or refusing instructions, nor that the verdict is against the evidence.

Bigger & Gardner for appellants; H. Burnett for appellee.

SINGLETON v. UTTERBACK.

Filed September 14, 1887. Appeal from Woodford Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Contemporaneous writings—On the facts of thisc ase, Held—The deed made by Singleton to Utterback, absolute on its face, and for the recited consideration of $8,000, must be read with the writing given by Utterback to Singleton at the same time, providing for a reconveyance on payment of $860 rent and the sum of $8,600; that the parties contemplated a loan of money and not a conditional sale; that the deed and writing have the effect of a mortgage, and Singleton, having paid usury, may recover it.

Ed. M. Wallace for appellant; W. C. P. Breckinridge and H. C. McLeod for appellee.

KENTUCKY CENTRAL R. R. CO. v. McGINTY.

Filed September 9, 1887. Appeal from Clark Common Pleas Court. Modifying opinion by Presiding Judge Bowden, reversing.

1. Verdicts—Inconsistent motions—Where there is a general verdict for the defendant and a special verdict and the plaintiff moves for a judgment on the special verdict, and, while that motion is pending, moves for a new trial because the special verdict is contrary to the evidence, the latter motion is an adandonment of the former. He can not ask a judgment on a false finding of the facts.

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2. Same—But if there is a general verdict for the plaintiff and a special verdict the defendant may make both motions, and they will be treated as alternative. He may rely on all objections to a judgment that the plaintiff ought not to have.

Breckinridge & Shelby for appellant.

MERTINS, RECTOR, &c. v. ROHR & CO.

Filed September 14, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Practice—Bills of exceptions—Depositions read to the jury in an ordinary action must be copied into the bill of exceptions or made part of the record by an order of court.

2. Same—If this is not done the evidence, as a general rule, will not be considered, nor will any alleged error be considered which depends on the evidence.

3. Same—But when, as in this case, an instruction is refused which ought to have been given, whatever the evidence omitted from the record may have been, the error is reversible. The plaintiff's testimony sustained his pleadings; it is in the record; the testimony of three witnesses for him is omitted; he was entitled to have the jury instructed on the hypothesis that his evidence was true, even if all his witnesses had contradicted him.

Wilson & Sprigg for appellants; Ed. W. Hines for appellees.

BARR v. SHIELDS.

Filed Spetember 21, 1887. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Infants—Avoidance of contract—Where an infant contracted, in consideration of a horse and schooling, to serve another until he came of age, and after becoming so sued to recover damages for the failure of the defendant to give the horse and to provide the schooling, and the defendant successfully relied on the statute of frauds to prevent a recovery, whereupon the plaintiff amended his petition and sought a recovery for the value of his services.

Held—That this contract, having been adjudged unenforcible at the instance of the defendant, the plaintiff is not bound by his attempted affirmance, but may proceed upon the promise which the law implies from the rendition of service.

Kennedy & Son and Hanson Kennedy for appellant; Throop & Morgan and J. P. Norvell for appellee.

WICKLIFFE v. MOORE & GRIGSBY.

Filed September 21, 1887. Appeal from Washington Circuit Court. Opinion of the court by Judge Ward, reversing.

Assignment—Set-off—Where a principal has delivered to his agent his promissory note to be assigned by him to raise money for the principal's use, and the agent assigns to another and credits the principal by the amount of the proceeds in his account, and renders a statement to the principal showing these facts:

Held—This is a sufficient notice to him of the assignment of the note, although he does not know who the assignee is, and he can not plead as set-off against it claims on the original payee arising after the notice.

J. D. Wickliffe and W. C. McChord for appellant; J. W. S. Clements for appellees.

BUTLER v. SLOSS, &c.

Filed September 21, 1887. Appeal from Logan Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Practice—In an ordinary action, where the law and facts were submitted to the judge for trial, Held—That the evidence being conflicting, this court will not say the judgment of the lower court is contrary to evidence.

2. Same—Matters known to a party and his counsel before the case is

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decided can not be afterwards relied on in a motion for a new trial as newly-discovered evidence.

Browder & Edwards for appellant; W. L. Reeves and J. G. Coke for appellees.

TURNER v. BOURNE, &c.

Filed September 21, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Exemptions—(Suggested but not decided)—Where a horse is the property of partners, owning and holding him in the stud for rewards, a partner's interest is not exempt in lieu of a work beast.

2. Same—(Decided)—Where a lawyer claims the exemption of his library he can not claim any work beast in addition.

3 Order of sale—A recited conformity, in a report of sale, to the order is presumptively true in the absence of evidence that it is not true. If a defective direction should be regarded as a reversible error on an appeal from the order of sale that would be no reason for setting aside a sale made in exact compliance with the order which is not appealed from.

C. Cyrus Turner for appellant; H. L. Stone and Wm. Lindsay for appellees.

McCLAIN v. McCLAIN.

Filed September 21, 1887. Appeal from Spencer Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Petition for rehearing—Former opinion (ante, page 52) withdrawn, as a misconception of the account reported by the master; the former judgment of this court set aside, and the judgment of the circuit court affirmed.

Thos. J. Barker for appellant; G. G. Gilbert for appellee.

FRANKLIN v. FRY.

Filed September 21, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

Attachment—The taking by a sheriff of a bond stipulating "that the defendant will perform the judgment of the court, or the property or its value shall be forthcoming, subject to the order of the court," will not discharge the attachment.

E. P. Campbell for appellant; Landes & Clark for appellee.

HOWARD'S ADM'R v. SNYDER.

Filed September 21, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Statute of frauds—A party may avail himself of the statute of frauds either by pleading it specially or by denying the alleged contract, and objecting to the oral evidence offered to sustain it.

2. Same—Rents—One who has enjoyed the use of land under an oral agreement, which was not originally enforcible because of the statute of frauds, is liable for the value of that use.

3. Same—Contracts not to be performed till the death of a certain person, or till the happening of some contingency, are not within the statute of frauds.

C. Brock and H. L. Stone for appellant; Turner & Turner for appellee.

MEGIBBEN v. SHAWHAN'S ADM'R.

Filed September 28, 1887. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, affirming.

Corporations—Personal obligation of officers—Several trustees of a music hall executed to one of their number a promissory note by which they jointly agreed to pay him a sum of money, and on the margin of the note was endorsed: "This money is borrowed for the Æolian Music Hall."

Held—First—This is the personal obligation of its singers and not the obligation of the corporation.

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Second—It is the same though the payee is one of the obligors.

Third—That the obligors authorized agents to rent the hall and collect rents for the purpose of paying off this and other notes, and that the agents have failed to account for the rents does not present an equitable defense to the plaintiff's claim.

A. H. Ward for appellant; West & Perrin for appellees.

CHESS & WYMOND v. COOPER.

Filed September 28, 1887. Appeal from Hancock Circuit Court. Opinion of the court by Judge Ward, affirming.

Motion for new trial must be made within three days after the verdict or judgment is rendered, except for the cause mentioned in section 340, subsection 7 of the Code, or unless unavoidably prevented.

G. W. Williams & Son for appellants.

McILVOY, &c. v. RUSSELL & AVRITT.

Filed Spetember 28, 1887. Appeal from Washington Circuit Court. Opinion of the court by Judge Ward, reversing.

1. A contract to pay attorneys "5 per cent. of all that they might save or make" for an estate "by excepting to the settlements of the estate as made by the master," does not entitle them to a percentage on uncontested claims.

2. Same—"To save or make" for an estate is to enforce its demands which are denied, and thereby preserve the estate; to make defense against unjust claims, and thereby make the estate secure.

J. W. S. Clements and W. C. McChord for appellants; W. P. D. Bush for appellees.

HART v. LANE.

Filed September 28, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Principal and surety—Where judgment is rendered against the principal and surety on a promissory note, and execution against the principal being returned unsatisfied, the surety pays the amount of it. Held—He may recover of the principal the sum so paid, either by obtaining an assignment of the judgment under section 9, chapter 104, General Statutes, or by an action on the implied promise.

Cornelison & Mitchell for appellant; Young & White for appellee.

MILLER, GUARDIAN v. HUMPHREYS.

Filed September 28, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming with damages.

Guardian and ward—M. had incurred personal liabilities to various persons for his ward's benefit, and thereafter obtained a judgment against the former guardian, H., as assignor on a note on S. & L., assigned to M. by H. in full of demands against him, and paid these debts out of the money collected on that judgment. On appeal this judgment was reversed and H. procured a rule on M. to show cause why he should not refund the money received under it. M.'s response set up the foregoing facts. Held—That the response was insufficient to discharge the rule.

W. P. D. Bush and Muir & Wickliffe for appellant; J. C. & C. H. Wickliffe for appellee.

FITZPATRICK & McCORMACK v. THE M. E. CHURCH, SOUTH, &c.

Filed September 28, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Barbour, affirming.

Mechanic's lien—Application of payments—The M. E. Church, South, contracted with R. for the building of a church. B. contracted with R. for the erection of a chapel in connection with the church. Both buildings were put up at the same time. F. & M. retained a lien on the church for material furnished R. They seek to enforce their lien for an unpaid balance of R.'s account with them. On this state of case,

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Held—First—Where payments received on the account have not been applied to any particular items the court will not apply them to those articles which were not used in the building of the church, that the lien may be enforced for the unpaid balance of the whole account.

Second—Where the parties for whom the building was erected were not indebted to the contractor when notified of lien, nor subsequently thereto, the contractor's creditors for material can assert no claim against them, the right of the creditors being acquired through the contractor.

Wood & Day for appellants; Peters & Tyler for appellees.

PRYSE v. TAYLOR.

Filed September 28, 1887. Appeal from Lee Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Assumption of fact—Where the lower court heard proof on an exception to depositions that they were taken on interrogatories and that one of the parties and his attorney were present, and overruled the exception, Held—That though it does not sufficiently appear from the record that they were not taken on interrogatories, this court will assume that fact did not appear by evidence heard which is not in the record.

H. C. Lilly & Son and John L. Scott for appellant; C. F. & A. R. Burnam for appellee.

SCHUPP & SCHMITT, &c. v. THOMASSON'S EX'OR, &c.

Filed September 28, 1887 Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

1. Vendor and vendee—Lien—A vendor of realty having received in part payment therefor several notes, left them with the vendee, who was to discount them, and, after paying off certain encumbrances on the property, turn over the residue of the proceeds to the vendor. The vendee assigned the notes and paid off the encumbrances, but failed to pay over the residue.

Held—That there was no lien on the property to secure such residue.

2. Marshalling liens—Where one lien covers the whole of a fund and another only a part of it, equity will compel the satisfaction of the first out of that part of the fund which the second does not cover.

P. A. Gaertner for appellants; Bacon & Stites for appellees.

TRABUE v. REYNOLDS.

Filed September 28, 1887. Appeal from Barren Circuit Court. Opinion of the court by Judge Barbour, affirming.

Trustees—Security—Where a trust fund is money, and the financial condition or conduct of the trustee, although having the right to hold the fund for his own benefit during his life, creates a reasonable fear for the safety of the fund, if left in his hands, he should, on the application of the remainderman, be required to give security.

J. B. Leslie for appellant; W. P. D. Bush for appellee.

CAIN'S ADM'R v. CAIN'S ADM'R.

Filed September 28, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, dismissing.

Appeals—Schedule—If an appellant, under an appeal granted by the clerk of this court, wishes a partial transcript, he can not have it made out and filed when the appeal is granted; he must file a copy of the judgment and then file his schedule in the office of the clerk of the lower court, with notice that the appellee may, during the twenty days after notice, file his schedule. When this course is not pursued an appeal can be prosecuted only on a complete record.

J. R. M. Polk for appellant; A. A. Hagan for appellee.

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KENTUCKY COURT OF APPEALS.

SCOTT'S EXO'R v. SCOTT.

(Filed March 18, 1887.)

1. Action to quiet title—The possession of one of several joint owners of land is the possession of all, and where one is thus in possession by his co-tenant, he may maintain an action to quiet his title.

2. Presumption as to validity of execution sale—As it is to be presumed that an officer has done his duty, it must be presumed that a sheriff who has made a sale under an execution did not do so without a levy or by virtue of a levy made when the execution was not alive, and, therefore, it rests with the party denying the validity of the sale to show such irregularity.

In this case an execution under which a sale of land has been made shows by an endorsement upon it when it reached the sheriff's hands, but does not expressly say when it was levied. Held—That the endorsements, when read in the order in which the events occurred, must be regarded as substantially stating that the execution was levied the day it reached the officer's hands.

3. A conveyance which is actually fraudulent may be disregarded by an execution creditor of the grantor, who may, without attacking the conveyance, levy his execution upon the land as that of the debtor, and sell it for his debt; and the title thus acquired is not a mere equity or right to control the legal title and have the fraudulent transfer vacated by an appropriate proceeding, but it is the legal title itself against which the fraudulent transfer is no transfer at all.

4. Lis pendens—A suit of a creditor to set aside a conveyance as fraudulent which was not brought until after an execution of another creditor had been levied upon the land as that of the grantor did not operate as a lis pendens as to the execution, and the purchaser at the execution sale, subsequently made, acquired a perfect title, which was not affected by a subsequent decree and sale thereunder in the suit to set aside the conveyance as fraudulent.

5. Mere inadequacy of price is not ground upon which to set aside an execution sale, and, therefore, notice of the inadequacy of price does not affect one who subsequently purchases from the execution purchaser.

[This case has been pending upon a petition for rehearing, hence the delay in its publication.]

J. S. Bronaugh and Wm. Lindsay for appellant.

Ben. P. Campbell for appellee.

Appeal from Jessamine Circuit Court.

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Opinion of the court by Judge Holt.

John D. Scott was the owner of an undivided one-third of three separate tracts of land. He conveyed his interest in two of them to one Rogers on March 17, 1878, and his interest in the remaining one having been sold under two executions, one in favor of one Campbell and the other in the name of Robert J. Scott, and purchased by the latter at the amount of the two debts, the sheriff, on March 14, 1878, conveyed it to him.

On June 18, 1878, an execution in favor of R. A. Buckner, and against John D. Scott, issued upon a judgment rendered upon a debt which was created prior to the conveyance to Rogers and Robert J. Scott. It came to the sheriff's hands on the following day, and in this controversy it is claimed upon the one side that it was levied upon that day upon the interest of the execution debtor in the three tracts of land, while upon the other hand it is urged that it does not appear that it was levied while alive or before its return day, which was the fourth Monday in July, 1878.

The interest of the debtor in the larger and also in the smaller tract was sold under it on August 29, 1878, and purchased by the appellant, Hannah Scott, at a little over $800, but she failing to give bond for the purchase money the execution was returned unsatisfied.

No reason is assigned for this failure upon her part. A ven. ex. issued on October 21, 1878, and under it the debtor's interest in the three tracts was sold on December 16, 1887, and purchased by the plaintiff in the execution, R. A. Buckner, at the price of $638.43. The sheriff conveyed it to him on September 17, 1880, and he on August 22, 1881, and for $741, conveyed it to the appellee, Edward S. Scott.

Prior to October 21, 1878, Thomas B. Scott had obtained a judgment for a considerable sum against John D. Scott upon which an execution had issued and been returned "no property." The creditor having died, his executrix, the appellant, Hannah Scott, instituted an action, on the day last named, against John D. Scott, Robert J. Scott and Charles W. Rogers, seeking to have conveyances to them declared fraudulent, and the property embraced by their deeds subjected to the payment of the judgment in favor of her testator. She obtained a judgment on August 18, 1881, declaring them void as to the creditors of John D. Scott, and subjecting the landed interests named in them to sale for the payment of her debts, save that Robert J. Scott was allowed a lien upon the interest he had purchased at sheriff's sale for the Campbell execution debt paid by him, and for a portion of his execution debt found by the court to be just, because, although the debtor, John D. Scott, had procured the Campbell and Robert J. Scott judgments to be rendered, yet the plaintiffs in them were not shown to have participated in the fraudulent purpose.

As the suit by Thomas B. Scott's executrix was not brought until after the issual and levy of the Buckner execution, it did not operate as a lis pendens as to it. Under her judgment the lands were sold, the interest of John D. Scott in two tracts being purchased by Robert J. Scott, and the interest in the other by Robert S. Perry.

Neither Buckner nor his vendee, Edward S. Scott, were parties to her suit.

The present action was brought by the latter to quiet his title and for a division of the land. Hannah Scott, executrix of Thos. B.

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Scott, Robert J. Scott, Robert S. Perry, Charles W. Rogers, and the other joint owners of the land were made defendants.

It is urged, first, that the appellee has never had the actual possession of the land, and that this action is in the nature of a bill quia timet, and can not, therefore, be maintained. If, however, his vendor, R. A. Buckner, acquired title by his execution sale, then as it has, by purchase, vested in the appellee, the possession of the other joint owners inured to his benefit, and the possession of one was that of all. It is inconvenient, if not often impossible, for several owners who have the right to occupy the same tract of land to do so at the same time; the actual possession of one, therefore, will not be considered adverse to his co-owners, but as the common possession of all. They are tenants in common, all being in law in the actual possession. Their common ownership makes the rule necessary.

Aside from this, however, this action not only seeks to quiet the appellee's title, but to obtain a division of the land.

It is next said that as the appellee is the plaintiff, and claiming title through an execution sale, the onus is upon him to show the regularity of every step necessary to pass the title of the execution defendant, and that the record in this instance fails to show that the execution was levied while it was alive. Upon the other hand it is urged that, even if this were so, yet the law presumes that the officer did his duty, and acted correctly, it must be presumed that he would not have made a sale without a levy, or by virtue of one when the execution was not alive, and that, therefore, it rests with the party denying the validity of the sale to show such irregularity.

It is unnecessary to determine this question. It is the policy of the law to uphold judicial sales. If the return as entered by the officer be of doubtful import it should be construed so as to uphold his action.

The entry of the levy upon the execution in this instance does not expressly say when it was levied, but the entry as to when it reached his hands, although copied in the record after his endorsement of the levy should be read first. It shows that it came to his hands the day after it was issued, and then he endorses upon it: "Levied this execution," &c. These endorsements, when read in the order in which the events occurred, and fairly construed must, in our opinion, be regarded as substantially stating that the execution was levied the day it reached the officer's hands.

The objection mainly urged, however, to defeat the appellee is that when the Buckner execution was levied the legal title to the land was vested in Rogers and Robert J. Scott by virtue of the deeds to them, and not being in John D. Scott, it could not be levied on as his property.

If the levy and sale under this execution were valid, then, manifestly, the title acquired by Buckner related back and took effect as of the date of the levy; and when it was made the appellant had no suit pending to operate as notice to the execution creditor. The conveyance, to Rogers and Robert J. Scott were attacked as actually fraudulent, and so adjudged in the suit brought by Thomas B. Scott's executrix. It is true that neither R. A. Buckner nor the appellee were parties to it, and it is now urged that, as they were not bound by it, they can not, therefore, avail themselves of the result of it, and that the appellee must avoid those deeds by a direct attack upon them.

Waiving the question whether he has not in effect done so in this action, yet if the deed of a debtor to his land be actually fraudulent, then his execution creditor may disregard it, and, without attacking it, levy his execution upon and sell it for

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his debt. He has a right to treat it as a nullity. This is so because the law regards the title as still in the debtor, and will not consider it as having passed from him by means of a fraud. It is suggested, however, that while Buckner had the right to have his execution levied upon the land, and to sell it in disregard of the Rogers and Robert J. Scott deeds, that yet having done so, he himself or his vendee must then, by an action, attack them as fraudulent, and can not rely upon the fact that they were so adjudged in a suit to which he was not a party.

As against the fraudulent transferee, however, the creditor may seize the property as that of the fraudulent debtor, and the title that may be thus acquired is not a mere equity or right to control the legal title, and have the fraudulent sale vacated by an appropriate proceeding, but it is the legal title itself against which the fraudulent transfer is no transfer at all. The legal title remains in the debtor as to his creditors notwithstanding the fraudulent transfer, and possession of the fraudulent transfereee may properly be regarded as that of the debtor. (McConnell v. Brown, &c., 5 Monroe, 484.)

Both the appellee and Scott's executrix were creditors of John D. Scott, and in the suit by her these conveyances were decided to be fraudulent as to his creditors. The parties to this suit who are contesting the appellee's right were either parties or privies to that action. The executrix was the plaintiff in it; Robert J. Scott was a defendant, and he and Perry were the purchasers at the sale made under the decree obtained in it. Indeed the only party now complaining by this appeal is the very one who obtained that judgment.

The deeds being fraudulent, affected neither the title nor the possession. The grantees under them did not enter into the actual possession of the land, and the appellant, having procured a decree declaring them fraudulent as to the creditors of John D. Scott, is not in a position to deny the appellee's right to relief because they have not been set aside for a like reason at his instance in an independent proceeding.

The land may have been purchased by Buckner at a sacrifice. Mere inadequacy of price does not, however, authorize us to set aside the sale. It is our duty to ascertain the law and then declare its mandate, without regard to any seeming hardship.

There is no intimation of any fraud upon his part. The levy of his execution antedated any lis pendens of the appellant, and his title relates back to it; and the judgment below must be, and is, affirmed.

To a petition for rehearing, filed by counsel for appellant, Judge Holt delivered the following response of the court:

The case of White, &c. v. Cates, &c., 7 Dana, 357, is relied upon to support the appellant's claim that the deed from Buckner to the appellee should be set aside, and he allowed merely a lien upon the land for his purchase money and interest.

There are many points of difference between that case and this one.

There the execution creditor had purchased the land of his debtor for a very small portion of his judgment. He was not in possession of it. The debtor had previously conveyed it to a third party. The execution purchaser sued in equity for the possession, and to compel the fraudulent vendee to release in his favor.

The court said that it was not absolutely certain the prior conveyance was fraudulent; that the complainant had a remedy at law, but had chosen to resort to equity, and it would, therefore, in a doubtful case of fraud, and where the land had been obtained

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by the execution creditor at a ruinous sacrifice, leave him to his legal remedy by dismissing the action unless, as the price of obtaining the specific relief asked, he would consent to a resale of the land. Here the appellee does not sue to enforce any contract or to divest any possession, but to divide the land of which he is already in possession, and quiet his title and free it of a cloud put upon it through the instrumentality of the appellant, subsequent to the creation of Buckner's right. To do this he must go into equity. He is a purchaser for value. It is urged, however, that he purchased from Buckner at such a grossly inadequate price as to put him upon inquiry, and that he is, therefore, affected by any infirmity in Buckner's title. Even if this were so, yet when we get back to the latter there is no charge of fraud, and if there were there is no evidence whatever to support it. He purchased at a regularly conducted execution sale, and no fraud or wrong is imputed to him. The only objection urged is that the price paid was inadequate.

In cases where there has been ruinous sacrifice at such sales courts of equity will lay hold of small circumstances, that evidence fraud but slightly, to set them aside. But here there are none. As there was no fraud or wrong upon Buckner's part, there is, of course, none to affect the appellee.

Notice of inadequacy of price in the Buckner purchase can not affect the appellee. (Waller v. Tate, 4 B. M., 534; Blight's Heirs v. Tobin, 7 Mon., 618.) It is not per se ground upon which to annul a sale.

Public policy dictates that confidence should be had in judicial sales. The appellee being a purchaser for value, had a right to rely upon the sheriff's deed to Buckner, and the record fails to disclose a single circumstance upon which to afford the relief asked in the petition for a rehearing, save that the land did not bring its value. It is not even shown that the appellee is related to the debtor, John D. Scott. It is true that one asking equity must do equity; but it does not appear that either the appellee or his vendor, Buckner, have so acted or that the appellee occupies such a position as to prevent him, in good conscience, from asking the relief sought by him. Indeed the appellant does not appear in such a favorable light as to entitle her to peculiar equitable consideration. She knew of Buckner's execution lien, and yet she did not make him a party to her suit to annul the fraudulent conveyances made by their common debtor.

After the purchase at execution sale by Buckner she could have seized under execution the equity of redemption in the land for her debt.

Instead of doing so it is probable, from the circumstances, that she was expecting, through her equity suit, to consume the entire property, and leave Buckner, instead of herself, an unpaid creditor.

The petition for a rehearing is overruled.

DENNY v. CAMPBELL'S EX'OR.

(Filed May 10, 1887.—Not to be reported.)

Contracts—Consideration—An agent invested his principal's money in county bonds bearing 10 per cent. interest, which declined in value by reason of the county's failure to pay the interest on the bonds. The principal, for that reason, becoming dissatisfied with the investment, the agent executed to her this writing:

"For value received in twenty-two Missouri Lafayette county bonds, I

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agree and bind myself to pay Mrs. N. Campbell $2,200; to pay her 8 per cent. annually upon the bonds until collected: to be at the expense of collecting, if any expense is incurred. Not to pay the principal until collected."

This is an action to recover the principal sum agreed by this writing to be paid, several years having elapsed between the execution of the writing and the institution of this action. It is contended for the defendant that there was no consideration for the promise, and also that no action can be maintained because the bonds have not been, and can not be, collected.

Held—That as under the agreement the bonds, together with 10 per cent. interest thereon, were to belong to appellant, while he agreed to pay only 8 per cent. upon the principal sum he agreed to pay, the additional 2 per cent. was a sufficient consideration to uphold the contract: and as to the claim that the bonds can not be collected, the only test of that matter was an attempt to collect the bonds by suit, which the defendant failed to make.

[This case has been pending upon petition for rehearing, hence the delay in its publication.]

W. O. Bradley and John Bennett for appellant.

C. F. & A. R. Burnam for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Bennett.

Prior to 1872 the appellant, as the administrator of Nancy Campbell's husband, received a large amount of money, one-third of which, amounting to several thousand dollars, belonging to Nancy Campbell, which sum he was permitted to keep and control for her as her agent. He invested a portion of this money in twenty-two Missouri Lafayette county railroad bonds, of one hundred dollars each, which bore interest at the rate of ten per cent. per annum.

Nancy Campbell did not authorize the appellant to make this investment, nor did she know that he proposed doing so.

At the time of the purchase of these bonds they were regarded as worth their full value, and as a good investment. But not long after the purchase of the bonds the county of Lafayette ceased to pay the interest on them, and has not paid any interest on them since. In consequence of the cessation of the payment of interest on the bonds they fell in price to about fifty cents on the dollar.

Mrs. Campbell becoming dissatisfied with the conduct of the appellant in investing in those bonds, he executed and delivered to her the following writing:

"For value received in twenty-two Missouri Lafayette county bonds, I agree and bind myself to pay Mrs. N. Campbell $2,200; to pay her eight per cent. annually upon the bonds until collected, I to be at the expense of collecting, if any expense is incurred. Not to pay the principal until collected. This 16th of November, 1875.

"GEORGE DENNY."

The contention of the appellant is that, by reason of his general authority to control and manage Mrs. Campbell's money and invest it for her benefit at discretion; he had the right to invest her money in these bonds. And for that reason there was no consideration for the execution of the foregoing writing, and the same is not binding on him. We can not agree to this proposition.

By this writing the appellant agreed to pay to Mrs. Campbell $2,200 for value received in twenty-two Missouri Lafayette county bonds. The payment of the $2,200 was to be made as soon as the bonds were collected, and he was to pay eight per cent. interest on the $2,200 annually until the bonds were collected. This is a

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fair interpretation of the writing. The expression, "to pay her eight per cent. annually on the bonds until collected," was evidently used as equivalent to an agreement to pay her eight per cent. annually on $2,200, the agreed price of the bonds, until they were collected.

By this agreement the bonds, together with ten per cent. interest thereon, belonged to the appellant. He purchased them and agreed to pay for them $2,200 when he collected the bonds, and eight per cent. interest annually on said sum until he collected the bonds.

The advantage to him in the transaction consisted in obtaining title to the bonds, which bore two per cent. interest annually more than the interest he agreed to pay on the agreed price. That the consideration was sufficient to uphold this transaction is self-evident.

The appellant also contends that the said sum is not yet due because the bonds have not been collected, and can not be collected. This defense is not available because he has taken no legal steps to collect the bonds, which it was his duty to do, and which he has had ample time to do, and, in not doing, has been derelict. And the proper way to test the question as to whether or not the bonds could have been collected was to sue.

The writing executed by Mrs. Campbell on the 16th of June, 1882, which directs the appellant to retain $1,000 worth of said bonds with which to pay a debt that Josephine Campbell owed the appellant, Mrs. Campbell having loaned her that sum for the purpose of paying said debt, does not show, when considered in the light of all the facts in the case, that Mrs. Campbell regarded the bonds as hers. The record shows that Mrs. Campbell was old and feeble, which considerably weakened her mind, much so that she was scarcely competent to understand ordinary business transactions, and evidently did not understand the purport of said writing, which committed her to the proposition that the bonds belonged to her, when they in fact belonged to the appellant. It is evident that Mrs. Campbell understood the transaction as relating to the money the appellant owed her for the bonds, and that she was directing the appellant to appropriate $1,000 of the money due her on the bonds for the benefit of Josephine Campbell. The appellant himself shows that his claim of $250 is for services which he rendered for Mrs. Campbell, she being his sister, free of charge, and that he never intended to charge for the services. Nor did she understand that she was to pay for them.

Therefore, no implied assumpsit sprang up on the part of Mrs. Campbell, by reason of the rendering of said services and the reception of them, to pay a reasonable compensation for them.

The judgment of the lower court is affirmed.

POWER, &c. v. HAFLEY, &c.

(Filed June 2, 1887.)

Descent and distribution—Adoption—Where an adopted child, made capable by statute of taking and holding by descent the estate of the person adopting him, dies before such person, leaving children, those children inherit the estate of the person who adopted their deceased parent as if they were his grandchildren.

[This case has been pending upon a petition for rehearing, hence the delay in the publication of the opinion.]

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Harrison & Belden and Lewis Edelen for appellants.

Geo. Denny, Jr., for appellees.

Appeal from Casey Circuit Court.

Opinion of the court by Judge Bennett.

In 1842 Frederick Hafley, who was desirous of adopting Sylvania Floyd, his infant sister-in-law, who was living with him as a member of his family, induced the legislature of this State to pass an act, which read as follows:

"Whereas, It is represented to the present General Assembly of the Commonwealth of Kentucky, that Frederick Hafley, a citizen of Casey county, is desirous of having the name of Sylvania Hafley; and that said Sylvania should be adopted as his legal heir, and take his estate by descent, as though she had been his lawful child; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the name of the said Sylvania Floyd be, and the same is hereby, changed to that of Sylvania Hafley, by which name she shall hereafter be styled and known, and that she may be capable of taking and holding, by descent, the estate of said Frederick Hafley, real, personal and mixed, in as full and as complete a manner as if she was his lawful child.

"Approved January 22, 1842."

Sylvania Hafley, after her adoption, married —— Power. Several years after said marriage she died, leaving children, the appellants. After her death Frederick Hafley died intestate. The appellants, as the children of Slyvania, claim the estate of Frederick Hafley as his legal representatives, and as such brought suit in equity in the Casey Circuit Court for the purpose of establishing their right to Hafley's estate, and having same divided among themselves.

The appellee, Cynthia Hafley, the widow of Frederick Hafley, resisted the appellant's right to the estate, and demurred to their petition upon the ground that appellants had no right to the estate. The lower court sustained the demurrer, and dismissed the petition.

The contention of the appellees is that Sylvania Power, having died during the lifetime of her adoptive father, her children could not inherit his property because her relation to the adoptive father and her right to inherit his estate as his adopted daughter being purely personal, the right died with her. In other words, the relation of adopting father and adopted daughter which existed between Frederick Hafley and Sylvania was a purely legal relation, which was personal in its character; and that Sylvania's right to inherit his estate, by virtue of that relation, depended upon her surviving him; and she having died before he did, the legal relationship was wholly dissolved, and her children, therefore, could not inherit from the adoptive father in her stead.

The common law made no provision for adopting children, hence we get no light from that law to guide us in the present investigation.

Most of the States of the Union have, within the last few years, enacted general laws providing for the adoption of children and making them the legal heirs of the adopting parents, through the courts. Of course the laws of these States are not uniform in substance. The laws of each more or less limit and restrict the legal

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status of adopting parent and adopted child. And while the reported adjudications of these States construing the adopting statutes are sparse, yet they nearly all agree in fixing the legal status of the adopted child as follows: That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child, and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise. And when the statute authorizes a full and complete adoption, the child adopted thereunder acquires all of the legal rights and capacities, including that of inheritance, of a natural child, and is under the same duties. (Humphries v. Davis, 100 Ind., 280; Wagner v. Varner, 50 Iowa, 532; Barnes v. Allen, 25 Ind., 252; Wm. W. Burrage, &c. v. Francis D. Briggs, 120 Mass., 103; Ross v. Ross, 129 Mass., 243.)

By the request of Frederick Hafley the legislature made Sylvania his legal heir, and invested her with a full capacity to take and hold his estate by descent as if she were his natural child. Thus was her legal status fixed by a law operating directly upon her and Hafley, and which contained no restrictions or limitations whatever. She was made a full legal heir, and was put precisely upon the same footing, so far as taking and holding Hafley's property by descent was concerned, as a natural child. So it would seem to follow, as a logical sequence, that the children of Sylvania, she having died before Hafley, take under our laws of descent as her direct representatives.

As before stated, the common law made no provision in reference to adopting children. But the civil law made ample provision in that regard. And, presuming that the legislature in passing the act supra, and subsequently passing a general law upon the same subject, had in view the principles of the civil law, we have, therefore, deemed it proper to consult the principles of that law in arriving at the construction we have given said act. By that law, the civil, the adopted child was "assimilated in many points to a son born in lawful matrimony." The adopted child retained all of the family rights resulting from its birth, and there was secured to it all of the family rights produced by the adoption. (Sanders' Justinian, 103, 105, 109.) Also in the case of Vidal v. Commagere, 13 La., 516, it is said that by the civil law the effect of adoption was such "that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person." So, taking the logical sequence of the language of the act supra, aided, as it is, by the principles of the civil law, the conclusion is inevitable that the appellants are the legal grandchildren of Frederick Hafley, and as such are entitled to share in the distribution of his estate under our laws of descent.

The word "kindred" in section 1, chapter 31, of "Descents," General Statutes, is not necessarily confined to blood relations; nor is the word "children" in subsection 1 necessarily confined to children born in lawful wedlock, for these sections "must be understood as merely laying down the general rules of inheritance, and not as completely defining how the status is to be created, which gives the capacity to inherit." Section 1 does not undertake to define the word "kindred;" the word may include in its meaning a relation by blood and a relation in law. The word "children" may include in its meaning children born in lawful wedlock, and children made legitimate by the marriage

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of their parents, and children by adoption, for the latter are the legal children of their adoptive parents. So whenever the kindred, by blood or in law, have the right to inherit, either by general or special law, section 1, supra, includes them; and whenever the children have a right to inherit, either by general or special law, subsection 1 includes them. (2 Bush, 157; Ross v. Ross, 129 Mass., 267.) Therefore, there is nothing in the statutes of descent and distribution that militates against the construction we have given the act under consideration.

In reaching the conclusion that one, by adopting another, may make the other his own heir, with full capacity to inherit his estate, and that the children of the adopted may also inherit from him, we do not wish to be understood as deciding that the adopting parent can make the adopted child the heir of other people, so as to entitle such child to inherit property that does not come directly from the adopting parent. The case at bar does not involve that question, and we prefer to reserve any expression of opinion thereon until the question actually arises.

The judgment of the lower court sustaining the demurrer to the appellant's petition and amended petition is reversed and the case is remanded, with directions to overrule the same and for further proceedings consistent with this opinion.

ADAMS v. COMMONWEALTH.

(Filed September 10, 1887—Not to be reported.)

An official record of a sister State being offered in evidence in the courts of this State it must be presumed that the record was made pursuant to statutory authority and in accordance therewith, and that the statements therein are true.

A copy of articles of incorporation showing the incorporation of a company in accordance with the laws of the State of New York being certified and attested by the secretary of state of that State, was properly admitted in evidence, although there was no other evidence that the statutory laws of the State of New York were complied with or that the laws authorized the incorporation of the company.

Baker and Kinney & Kinney for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The indictment under which the appellant was tried in the Jefferson Circuit Court and convicted and sentenced to a term of three years in the penitentiary of this State charges him with the crime of embezzling a clock, the property of the Fowler Manufacturing Company, which company was at the time of the embezzlement an incorporated company by the laws of the State of New York, and that the appellant, at the time of the embezzlement, was an agent and servant of said company.

The only ground relied on for a reversal is that the trial court erred in admitting a certified copy of the articles of incorporation of the Fowler Manufacturing Company to be read as evidence.

The certified copy thus admitted as evidence is a copy of the record on file in the office of the secretary of state of the State of

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New York, which shows that the Fowler Manufacturing Company was incorporated and licensed in accordance with the laws of said State.

Section 13, chapter 37 of the General Statutes, provides as follows: "All records and exemplifications of the office books kept in any public office of the United States, or of a sister State, not appertaining to a court, shall be evidence in this State, if attested by the keeper of said records or books and the seal of his office, if there be a seal."

The record under consideration was certified and attested by the secretary of state in accordance with the foregoing requirement.

But it is contended that the record is not sufficient evidence that the statutory laws of the State of New York were complied with by the Fowler Manufacturing Company, or that the statutory laws of the State of New York authorized the incorporation of said company.

The paper is an official record of a sister State, and it must be presumed that the record was made pursuant to statutory authority and in accordance therewith, and that the statements therein are true.

The judgment is affirmed.

McGRATH'S ADM'R v. GRINSTEAD'S ASSIGNEE.

(Filed September 10, 1887—Not to be reported.)

1. Construction of contracts—While it is a general rule governing the construction of contracts that meaning and effect, if possible, must be given to every part of the contract, yet the rule of construction to which all others are subordinate is to ascertain and follow the intention of the parties.

2. A deed of assignment for the benefit of creditors, providing "that all such priorities and preferences as may exist by law as to any demand or debt shall be observed," is construed not to give priority to a debt due by the assignor as former executor to the estate of his testator.

H. M. Buford for appellant.

J. D. Hunt for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Holt.

When James A. Grinstead made an assignment for the benefit of his creditors he, as the former executor of H. P. McGrath, was indebted to his estate in a considerable sum. In this suit to settle the trust it is claimed that this indebtedness, under a proper construction of the deed of assignment, has priority over the general creditors, and that they are not entitled to recover anything until it is paid in full.

The third clause of the deed reads thus:

"The remainder of the proceeds shall be applied by said party of the second part (the assignee) to the payment of all the just debts and liabilities, then the said proceeds shall be divided amongst the creditors of said party of the first part pro rata and in proportion to the amounts of their respective debts: Provided, however, That all such porperties and preferences as may exist by law as to any demand or debt shall be observed and obeyed by said party of the second part in the distribution of said proceeds, and that as to any property which may be subject to any valid liens and encumbrances the proceeds thereof shall be first devoted to the satisfaction of such liens or encumbrances: And provided

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further, That as between the debts owing by said party of the first part individually, and such as may be owing by him as a partner, the distribution of said assets shall be made in accordance with the law of the State of Kentucky as to such cases."

It is somewhat difficult to state the position of the appellant, but as we understand it he bases his claim to priority solely upon the language of the first proviso, to-wit:

"Provided, however, That all such priorities and preferences as may exist by law as to any demand or debt shall be observed and obeyed by said party of the second part in the distribution of said proceeds, and that as to any property which may be subject to any valid liens or encumbrances, the proceeds thereof shall be first devoted to the satisfaction of such liens or encumbrances."

The argument in support of it, in brief, is that in construing a contract, meaning and effect, if possible, must be given to every part of it; that the clause which directs the observance of "all such priorities and preferences as may exist by law" must have, and should be given, some distinct meaning and effect, that it does not mean or refer to liens and encumbrances, since they are provided for in the words just succeeding; and that the only law and the only preference to which it can relate is that applicable to and existing in the case of an insolvent person, adjudged to have made an illegal preference.

In other words, that what is commonly known as the act of 1856 is the law to which the proviso refers, and under which a debt due by a debtor as an executor, administrator, guardian or trustee is given priority, and that the grantor had reference thereto when he used the words "priorities and preferences."

It is quite common in such instruments, however, to find not only the same idea repeated, but a statement of much unnecessary matter. This probably arises from the anxious desire of the draftsman to make the statement plain beyond question, a swell as a familiarity with old forms, which abound in redundancies and repetitions.

Therefore, we find the deed in question providing for the payment of the expenses of administering the trust, although the law would, without such provision, have required it; and after directing a pro rata distribution among the creditors, it says: "And in proportion to the amounts of their respective debts."

In our opinion neither the grantor nor the draftsman of it had in view the distinction now insisted upon between preferences and priorities upon the one hand and liens and encumbrances upon the other; but that they were used by way of emphasizing and repeating the same idea then in mind, although in point of fact a claim might have existed against the grantor which would have been a preferred one in law and yet not a lien or an encumbrance and not deriving its existence, either from the fact that the debtor had, under the act of 1856, been adjudged insolvent and to have made an illegal preference, or from the law governing the distribution of the estates of decedents.

Thus a debt owing by the insolvent person to the United States has, by law, a preference. (Revised Statutes of U. S., section 3466.) So that the words "priority" and "preference" could in fact have been properly used distinctively from the words "lien" and "encumbrance" without any reference to a preference, under the act of 1856, by an insolvent person.

In our opinion the language supra was not intended to, and did not, create any "liens" or "encumbrances" or "priorities" or

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"preferences," but only relates to those then existing, and such as the law would say already existed against the estate then placed in trust. It created no new ones, but merely directed the observance of existing ones.

The rule of construction to which all others are subordinate is to ascertain and follow the intention of the parties. The frequent repetition already alluded to in such instruments renders it impossible to give a distinct legal meaning to every clause or part of them. The grantor in this instance first directed equality of distribution; and then knowing that the law gave preference to certain debts, he recognized it as to those already existing against his estate. This was in fact unnecessary, but is an almost if not universal custom in such cases.

If a distinct legal meaning and effect must be given to every part or clause of such an instrument, then this must be done in this instance, as to that providing that the estate is to be distributed "in proportion to the amount of their respective debts," as distinguished from the direction that it shall be "pro rata." This is also true of the provision requiring the payment of the expenses attending the administering of the trust because the law would have effectuated this in the absence of such direction.

It is apparent that the rule thus applied would lead to endless confusion, and often defeat the intention of the grantor.

The judgment refusing payment in full of the appellant's debt is affirmed.

ROBINSON v. BLACKERBY.

(Filed September 13, 1887—Not to be reported.)

Homestead—At the time of the creation of the appellee's liability to the appellant he was a housekeeper with a family, residing on a tract of land owned by him. He afterwards sold that part of the land on which the residence was situated and removed to the unsold portion, upon which he was residing with his family when judgment was rendered upon appellant's claim and execution issued thereon and levied upon the land. Held—That appellee is entitled to a homestead.

Hill & Alcorn for appellant.

W. H. Miller and H. T. Harris for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Bennett.

The appellee sold to the appellant a lot of hogs. It turned out that the hogs did not belong to the appellee.

The true owner of the hogs instituted suit in the Garrard Circuit Court against the appellant and appellee to recover the value of the hogs; and judgment was rendered against them for their value.

The appellant paid off this judgment, and then instituted an action in the Lincoln Circuit Court against the appellee for the purpose of recovering judgment against the appellee for the damages he sustained, growing out of said transaction. The appellant also sued out an attachment against the appellee's property.

Before this last-named suit came to trial the appellant and appellee submitted the questions involved to arbitration. The appellee executed to the appellant a bond with security that he

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would perform the award. The award of the arbitrators was that the appellee should pay to the appellant the sum of $423.54.

The appellee failed to pay the sum awarded, and the appellant sued on the bond, which the appellee executed to perform the award, and obtain judgment thereon. And on the 18th day of May, 1882, execution was issued on the judgmeut and levied on a small tract of land belonging to the appellee, subject to his right of homestead therein. The land was worth more than one thousand dollars, but as the appellee's homestead could not be laid off without greatly impairing the value of the whole tract, the lower court (both appellant and appellee consenting) ordered the whole tract sold, and on final hearing the court allowed the appellee, out of the purchase price of the land, one thousand dollars in lieu of his homestead, and the balance of the purchase money was applied to the discharge of a balance of a debt which was secured by a mortgage upon the land.

The appellant contends that the lower court erred in not first aplying enough of the one thousand dollars allotted to the appellee in lieu of his homestead to the payment of his judgment, interest and costs.

Prior to the creation of the appellee's liability to the appellant he was the owner of a tract of land on which he and his family lived and kept house. And he sold all of this land except the portion about which this controversy arose. His residence was on the portion sold, and he continued to live on that portion for a short time after the sale, when he, with his family, moved on the unsold portion and took up his residence thereon. So at the time of the creation of appellee's liability to the appellant he was the owner of this land, and a housekeeper with a family; and at the time the judgment was obtained, and the execution issued thereon, he, with his family, lived on this land as his homestead.

The foregoing facts bring this case within the principles announced in the case of Bennett v. Baird, 5 Ky. Law Rep., 636, wherein the claimant's right to a homestead was sustained. That case has since been repeatedly approved by this court.

The appellant contends that the purchase price of that portion of the land sold by the appellee was more than sufficient to pay off the entire debt for which the whole tract of land was mortgaged, but that he failed to apply a sufficiency of said sum to the full payment of the mortgage debt; and by reason thereof the balance of the mortgage debt above mentioned remained a lien on the remaining portion of land, and that the appellee fraudulently withheld said money from the payment of said balance, and pocketed the same for the purpose of defeating appellant in subjecting any part of said land to the payment of his debt. It is sufficient to say, in answer to this charge, that the proof wholly fails to sustain it. The appellee's deposition is the only evidence in the case, and his evidence establishes the reverse of the charge.

The judgment of the lower court is affirmed.

RATLIFF v. FERGUSON.

(Filed September 13, 1887.)

A sheriff may sue his deputy to recover taxes collected and withheld by him without first having satisfied his bonds to the Commonwealth and county, and neither the county nor the Commonwealth is a proper party to

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such an action, the undertaking of the deputy being to pay or account to his principal.

Jas. E. Stewart for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Lewis.

In his petition and amended petition appellant states he was, during the years 1881 and 1882, the qualified and acting sheriff, and also collector of the State revenue and county levy taxes for Pike county; that during the same period appellee was his duly appointed and qualified deputy, and as such undertook and agreed to collect the revenue and county levy taxes within certain enumerated districts of the county, books containing lists thereof being placed in his hands for that purpose, and when and as collected to pay over the same to appellant.

He states that appellee, as deputy sheriff, did, during the two years mentioned, actually collect such taxes to the amount of $——. but though requested has failed and refused to pay or account to appellant for $2,082.84 thereof, which is the sum left in his hands and appropriated by him to his own use, after deducting from the whole amounts he so collected all the proper credits. He further states that during the year 1871 he was likewise sheriff of the county, and appellee, as his deputy, was entrusted with the collection of taxes, and did collect a large amount, $513.13, of which he has failed and refused to account for or pay over to appellant.

He files with his petition an itemized account of taxes collected by appellee as deputy sheriff, and the balance left in his hands each of the three years after making proper deductions, and asks for judgment against him therefor.

To the petition and amended petition a special demurrer was filed, the grounds thereof being:

1st. That the plaintiff has not the legal capacity to sue for the subject-matter in litigation set up in the amended petition relating to taxes, revenues and public dues for the year 1881.

2d. That "there is a defect of parties plaintiff, both to the original and amended petition."

And it was adjudged that the demurrer to so much of the petition as seeks to recover for taxes and dues for the years 1881 and 1882 be sustained.

Though it is not in terms so decided, the effect of the judgment on the demurrer was to overrule it as to that part of the petition and amended petition which relates to taxes collected by the defendant in 1871. And as the plaintiff alleged he had fully paid off all the revenue and public dues to the State for that year and obtained a quietus; but did not make the same averment in respect to the years 1881 and 1882, we infer that it was by the lower court deemed essential to maintain the action that the plaintiff first satisfy and discharge the revenue and county levy bonds executed by himself, for we can conceive of no other possible obstacle to a recovery upon the facts stated by the plaintiff in this action.

It is to the revenue and levy bonds required by law to be executed by the sheriff, before he enters upon the duties of tax collector, that the Commonwealth and county must respectively look for redress in case of his defalcation. And as the sheriff, after giving such bonds, may collect taxes with or without the aid of a deputy, it is obvious the latter is not a necessary or proper party to the contract with the Commonwealth or county,

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nor can he be held liable for his defalcation in a direct civil action or proceeding by either.

Whatever obligation to correct and pay over taxes the deputy may enter into is with the principal sheriff or collector. Consequently, if the latter can not recover from him taxes collected and illegally appropriated to his own use, no action can be maintained for such breach.

There being no priority of contract between the Commonwealth or county and the deputy as such, nor any agreement on his part to pay taxes collected into either the State or county treasury, but his undertaking being to pay or account to the principal, neither the Commonwealth nor the county of Pike is a proper party to this action. Nor do we perceive the justice or sound policy of requiring the sheriff or collector to first fully satisfy and discharge his bonds to the Commonwealth and county before suing his defaulting deputy, for as the ability of the sheriff or collector to comply with his contract may, and does, materially depend upon the promptitude and good faith of his deputy, to take from him the right to sue for and recover taxes collected and withheld by such deputy would, in many cases, cause his own defalcation.

The right of the sheriff or collector to sue his deputy for a failure to pay over money collected by him as such deputy, "without waiting to be sued himself, and without having first discharged the liability," has been distinctly recognized by this court in Kouns v. Davis, 2 B. M., 278; Colter v. Morgan, 12 B. M., 278.

In our opinion the facts stated by the plaintiff constitute a cause of action in his favor alone, for the taxes alleged to have been collected in the years 1881 and 1882 and withheld by the defendant, and the judgment sustaining the demurrer is reversed and cause remanded for further proceedings consistent with this opinion.

RADFORD v. COMMONWEALTH.

(Filed September 15, 1887—Not to be reported.)

1. Evidence—A witness can not be examined upon a subject not relevant to the issue for the mere purpose of contradicting him.

2. Prejudicial errors—A court should not assume, in a case involving life or liberty, that incompetent testimony has not operated to the defendant's prejudice. It must clearly appear that the defendant has not been prejudiced by such an error in order to authorize the court to so hold.

3. Self-defense—Under the facts of this case it was error in instructing the jury as to the defendant's right of self defense to add the qualification "he, the said Radford (the accused), not being himself the attacking party," and also error to so qualify the instruction as to allow the right of self-defense. He had the right to act in his own defense if he believed, and had reasonable ground to believe, that the danger was immediate and impending and "that there was no other apparent and safe means of escape."

No error appearing to the prejudice of the appellant's substantial rights the judgment is affirmed.

Fenton Sims and John Feland for appellant.

P. W. Hardin for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Miles G. Radford, stands convicted of man-

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slaughter for the killing of Henry D. Johnson. Unlike, as is usual, in such cases there is not much conflict of testimony. The deceased was the tenant of the accused. He had upon the farm of his landlord some corn, and was indebted to him for rent. A few days before the killing he, with his team, was passing by the house of the accused on his way to remove the corn, when the latter stopped him and told him that he wanted his rent out of it. Some conversation occurred between them about fighting, but, upon a suggestion from the accused that they both belonged to the church, they agreed that a neighbor should settle it, and the deceased turned back home.

The day before the killing, but at different times, each of them went to a certain neighbor, and he, at their instance, agreed to go to the farm the next day and settle the matter between them.

About sun-up, however, the next morning the deceased, with his team, and in company with his wife, was driving by the house of the accused, and on his road to get the corn. The attention of the appellant was called to it by some of his family, and, as he passed through the hall in going out of the house to where Johnson was, he picked up a gun, which, as the testimony shows, had been lately brought to the house by his grandson, and which, as the accused says, was there without his knowledge. He testifies that he did not take it with any purpose of shooting the deceased, and only upon the idea of protecting himself, if it became necessary, from violence at the hands of Johnson, who was a large, stout man in middle life, while the accused was crippled in his right hand, and then seventy-four years of age.

Upon getting out of the house he motioned to or told the deceased to stop, and the latter did so. Some conversation then occurred. the substance of which was that the deceased announced his purpose to get the corn, while the accused asked him to secure him in his rent or wait until their neighbor settled the matter between them as they agreed he should do. During this conversation the deceased made one or more unsuccessful attempts to get hold of the gun. He adhered to his purpose, saying that he had been advised that he could take all of the corn, and that he was going to do so. He then started in his wagon towards the corn field, the accused walking along in front of the team, while the two granddaughters of the latter, at his request, followed behind the wagon.

There is some evidence that the accused, while on the road to the field, tried to persuade the deceased to turn back. He says that he had no purpose in going to the field or in taking the gun to attack Johnson, but to forbid him from entering the field, and then if he still persisted in moving the corn to go and get an attachment when he began to do so.

When they arrived near the field the accused stopped upon the side of the road while the deceased drove by him and up to the cornfield fence, handed the reins to his wife, and at once jumped out of the wagon, and with his whip in his hand started back directly toward Radford. The latter warned him once or more not to come any nearer to him, but he persisted, and when within seven or eight feet of the accused he shot him.

There is some evidence tending to show that as Johnson so advanced he put one hand behind him as if to draw a weapon, and the testimony shows that he was a dangerous, determined man.

A reversal is asked upon two grounds, and we have stated the evidence in substance, but not in detail, because it is necessary to their consideration:

1st. Because of the introduction of incompettent testimony.

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2d. Because the jury were improperly instructed.

Upon the cross-examination of the accused, and also of his granddaughter, the Commonwealth was permitted, over the objection of the defendant, to ask him if the wife of Johnson did not, just after her husband was shot, go to him and smear her hands and arms with his blood, and an affirmative answer being given, the Commonwealth then introduced the widow, who testified that she did not do so.

This was an immaterial matter, and it is well settled that a witness can not be examined upon a subject not relevant to the issue for the mere purpose of contradicting him.

Mr. Starkie says:

"A witness is not to be cross-examined as to every distinct collateral fact for the purpose of afterward impeaching his testimony by contradicting him." (Starkie on Evidence, 200.)

This rule is supported by an unbroken line of decisions, among which are Nation v. People, 6 Parker's Criminal Reports, 258; Hildeburn v. Curran, 65 Pa. St., 59; Combs v. Winchester, 39 N. H., 13; Harper v. R. R. Co., 47 Mo., 567; Cornelius v. Commonwealth, 15 B. M., 539, and Kennedy v. Commonwealth, 14 Bush, 340.

The rule is admitted by the able attorney general in this case, but it is urged that the witnesses were otherwise contradicted by Mrs. Johnson, and that the accused could not have been prejudiced by the admission of the testimony.

A court should not assume, in a case involving life or liberty, that incompetent testimony has not operated to the defendant's prejudice unless this be clearly so. It is dangerous ground upon which to tread, and if it be the least doubtful the line should not be crossed.

It is true that Mrs. Johnson contradicted these witnesses in some other matters, but a careful reading of the testimony shows that in the main they agree as to the material facts of the case.

The contradicting witness was the widow of the deceased; the contradiction was of a peculiar character, and well calculated to create discredit and arouse feeling. Under such circumstances we can not undertake to say that it did not affect the accused prejudicially. Upon the contrary, it is reasonably probable that it did, and the action of the trial court in this respect was erroneous.

The third instruction given to the jury reads thus:

"If the jury believe from the evidence that at the time the accused, M. G. Radford, shot and killed Henry D. Johnson (if he did so shoot and kill him), he, the said Radford, not being himself the attacking party in said encounter, yet had reasonable gorunds to believe, and did in good faith believe, his life was in danger, or that his person was then in danger of great bodily harm from violence then about to be inflicted on him by said Johnson, then said Radford, under his right of self-defense, had the right to use such means as were within his power for his own protection, and this right may even extend to taking the life of his adversary when the danger, real or apparent, is imminent, impending, provided, however, the one so taking the life of his adversary has no other safe means of avoiding such danger and protecting his life or person—the danger to one's person may be either real or apparent."

This instruction is erroneous in two respects. The qualification —"he, the said Radford not being himself the attacking party"— was both abstract and misleading. The jury may have thought that the mere taking of the gun along by the accused amounted to an attack upon the deceased; and even if this were true, yet the jury might possibly, under the evidence and proper instructions,

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have believed that any intention to use it upon Johnson that may have existed in the mind of the accused when he left his house had been abandoned by him before the deceased advanced upon him and he shot him.

The evidence does not disclose any effort, however, upon the part of Radford to use the gun until Johnson advanced upon him. One was a man six feet in height, weighing over 160 pounds, dangerous and determined, and in the prime of life, while the other was a crippled old man. Under this state of case and the record, as presented, the word supra should not have been inserted in the instruction.

There is testimony in the record tending to support the claim that the act was done in necessary self-defense; and this instruction only allowed the accused to act in his own defense, provided there was no other safe means of avoiding the danger. The law does not thus limit this right. Such a restriction would be far from "the perfection of human reason." It would require one believing, and having reasonable grounds to believe, that danger was apparent and impending to know whether he could avoid it safely otherwise than by injuring the adversary. The rule, however, is that if one believes, and has reasonable ground to believe, that the danger to him is immediate and impending, and that there is no other apparent and safe means of escape, then he may strike in self-defense. (Coffman v. Commonwealth, 1 Bush, 495.)

The fifth instruction given to the jury correctly stated the relative right of landlord and tenant, but it was unnecessary to so instruct them in this case, and calculated, perhaps, to mislead them.

For the reasons indicated the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

NEELY v. COMMONWEALTH.

(Filed September 10, 1887—Not to be reported.)

No error appearing to the prejudice of the appellant's substantial rights the judgment is affirmed.

P. W. Hardin for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Lewis.

The appellant was tried under an indictment for grand larceny, found guilty and sentenced to confinement in the penitentiary for two years. From that judgment he appeals.

No bill of evidence accompanies the transcript of the record in this case, nor is there filed any brief in behalf of appellant, showing the grounds upon which a reversal of the judgment is asked. And, as, after an examination of the record, we preceive no error to the prejudice of appellant's substantial rights in the instructions of the court given on the trial, nor in any other respect, the judgment is affirmed.

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SCHNEIDER, &c. v. JACOB, &c.

(Filed September 22, 1887.)

Dedication of streets—Where the owner of land adjacent to a city exhibits a map of it, laying it out into building lots, streets and alleys, and sells the lots as bounded by such streets or alleys, this is an immediate dedication of the streets and alleys to the use of the purchaser and to the public, although they have not been actually opened, and where a lot thus sold fronts on a street and the deed calls for the street as the boundary, the title passes to the center of the street, subject to the right of the public to the use, and if the street is never opened the purchaser is entitled to hold to the center of the strip of ground thus described as a street

Brown, Humphrey & Davie, N. G. Rogers and J. W. McGee for appellants.

John B. Raskin for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

Prior to 1837 John I. Jacob and Garnett Duncan, preparatory to selling a piece of land which they owned adjoining the city of Louisville, laid the same off into lots, streets and alleys. They also prepared and recorded, in the county clerk's office, a map or plat, which designated the said lots, streets and alleys. On the plat this piece of ground was called "Jacob's and Duncan's Western Addition."

In this "addition" Main street was laid off, which was designated on the map as running east and west. And Twenty-fourth, Twenty-fifth and Twenty-sixth streets were laid off and designated on the map as intersecting Main street, and running north and south.

On the 28th of October, 1837, Jacob and Duncan sold, by deed duly acknowledged and recorded, to Jacob Marcell a lot of ground, which the deed describes as lying on the east side of Twenty-sixth street, and bounded by Main and Twenty-sixth streets and an alley.

On the 14th of October, 1837, Jacob and Duncan sold, by deed duly acknowledged and recorded, another lot of ground, which was included in their plat, to Jacob Marcell. This lot of ground is described in the deed as lying on the east side of Twenty-sixth street, and bounded by Main and Twenty-sixth streets and an alley. There was no reservation in either deed of Twenty-sixth street or the alley.

A portion of the appellants own these lots by a regular derivation of title from the original vendee, Marcell, and the boundaries of the lots in each conveyance are the same as those given in the deeds from Jacob and Duncan to Marcell.

In 1836 Jacob and Duncan sold, by deed which was duly acknowledged and recorded, a parcel of ground abutting on Twenty-sixth street and lying south of that sold to Marcell. In this deed Jacob and Duncan reserved Twenty-sixth street. The vendee, failing to pay for this parcel of ground, Jacob purchased it at commissioner's sale for the satisfaction of the purchase money. And this property having been allotted to some of Jacob's devisees in a division of his property, said devisees sold the same to F. and John Bogens, a portion of the appellants. In their deeds of conveyance the property is described as being bounded by Twenty-sixth street. But Twenty-sixth street is not reserved in either of said deeds.

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Many years after said conveyances by Jacob and Duncan the city of Louisville, said "addition" having become a part of the city, opened a street, which was designated as Twenty-sixth street, west of the strip of ground designated on the Jacob and Duncan map as Twenty-sixth street. The strip of ground, which was designated on the Jacob and Duncan plat as Twenty-sixth street, was never opened and used as a public street.

The appellee instituted suit in the court below against the appellants for the purpose of recovering the strip of ground designated on the Jacob and Duncan plat as Twenty-sixth street. The appellants contested the appellees' right to the strip upon the ground that, by virtue of the conveyances above mentioned, they owned to the center of said street.

The lower court decided in favor of the appellees. The appellants have appealed to this court.

The appellants resist the appellees' claim to the strip of ground in controversy upon the ground that, by the act of dividing said parcel of ground into lots, streets and alleys, adjoining the city of Louisville, with a view of making the same a part of the city of Louisville, and then selling the lots to purchasers, referring in the deeds made to them to the streets and alleys thus laid off, and making them the boundary of the lots thus sold and conveyed, Jacob and Duncan dedicated the streets and alleys to the use of the purchasers and the public.

It is well settled that where the owner of land lays out and establishes a town with various plots of spare ground, such as streets and alleys, and sells lots with clear reference to that plan, he thereby conclusively dedicates such streets and alleys to the use of the purchasers and the public. The owner, by his plat of the town, which defines the streets and alleys, and by his deeds of conveyance to the purchasers, which call for these streets and alleys as boundaries to the lots sold, covenants with the purchasers that the streets and alleys are dedicated to their use and that of the public. (Rowan v. Town of Portland, 8 B. Mon., 232 and 237; Wickliffe v. City of Lexington, 11 B. Mon., 163.)

And the principle is also well settled that where the owner of land lays the same out into building lots, streets and alleys, and exhibits a map of it, which defines the lots, streets and alleys, though the streets and alleys are not yet actually opened, and sells the lots as bounded by such street or alley, this is an immediate dedication of such street or alley to the use of the purchaser and to the public. (Notes to Dovaston v. Payne, Smith's Leading Cases, volume 2, part 1, 8th edition, page 160, and cases there cited.)

These principles apply primarily in the interest of purchasers of lots, who invest their money upon the faith of the assurances of the seller that the streets and alleys, which are defined in the plat or map, and which are called for in the deeds of conveyance, are dedicated to the use of the purchasers and to the public. The purchasers invest their money with the assurance that they shall have all of the advantages arising from the streets and alleys, as defined and dedicated in the plat, or plan of the newly-created town, and that these streets and alleys, as soon as lots are purchased, with clear reference to them, become irrevocably dedicated not only to the personal convenience and necessities of the purchasers, but to the use of the public. And although these streets and alleys may not be actually opened by the authority of the city or town, although they may be repudiated as public thoroughfares by the city, as in this case, and different streets and alleys opened up in their stead, yet the purchasers of

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the lots, with clear reference to the streets and alleys, as defined in the map or plan, are entitled, as between them and the seller, to the benefits of the dedication. The seller, for a valuable consideration, so covenanted with the purchasers, and by that covenant the seller is irrevocably bound, and no subsequent action of the town or city, which frustrates the plan of dedication, can relieve the seller of his covenant to the purchasers. Therefore, the fact that the city of Louisville, many years after the sale of said lots and the dedication of said street, located Twenty-sixth street at a different place from that indicated by the Jacob and Duncan map, whereby the same was never brought into use as a public street, can furnish no legal grounds for disregarding Jacob's and Duncan's covenant with the purchasers of the lots.

Having seen that the strip of ground in controversy was dedicated by Jacob and Duncan to the use of the purchasers of the lots and the public, and that, so far as the public is concerned, said strip of ground has been abandoned as a thoroughfare, it remains to be determined whether the appellants are entitled to any of the strip. They claim one-half of it.

Where land, as in this case, is laid out in town lots with streets and alleys, and the owner sells a lot which fronts on a street and the deed calls for the street as the front boundary of the lot, as in this case, he receives a full consideration for the street in the increased value of the lot. The purchaser of the lot doubtless would not have purchased it but for the usual benefits of the street; he, therefore, pays an increased price for the lot. He purchases the lot with the understanding that he may build houses fronting on the street, with windows, doors and doorsteps, and that the doorsteps may extend beyond the line of the street; also that he may construct vaults below the surface of the street. And vaults, in cities of considerable size, are nearly always constructed under the side-walks, and are sometimes extended to the center of the street. Their construction as depositaries for fuel and other necessaries is highly necessary. Shade trees, posts, awnings, etc., are also necessary protections and conveniences. If the grantor held a property right in the street up to the dividing line between the street and the lot he could deprive his vendee of the right of ingress from the streets into his house and exit from it, and of light and air, and of planting shade trees, and erecting posts and awnings, and of constructing vaults. In other words, if the vendor retained the right of property in the street up to the dividing line between the lot and the street he might prohibit the erection or construction of any of these necessary improvements, and thereby render the lot valueless to the purchaser. Suppose that the street belonged to the original grantor, and that it is vacated as a public thoroughfare, he is then the owner of a strip of ground just the width of the street, and which may be several miles long, and he has no access to it except at each end. This would certainly be a description of property that it is not probable that either party contemplated as remaining in the grantor. On the one hand he is hedged in by the adjacent lot owners; on the other he destroys a reasonable use of their property. Nothing could come of this state of things but mutual annoyance and inconvenience. For these reasons the correct rule seems to be that where the lot fronts on a street, and the deed calls for the street as the boundary, the title passes to the center of the street, subject to the right of public use. The street, in such a case, is regarded as a single line; and as a single line it becomes a boundary of the lot. It is as a tree or a rock which is called for as a boundary. And where a tree or rock is

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called for as a boundary, the terminus of the line is, ordinarily, the center of the tree or rock, unless the vendor's title to the property conveyed extends only to the edge of the tree or rock. And in the same manner the street is a monumental boundary; and if the vendor holds the title to the street he conveys to the center thereof as the dividing line. The fact that the description only brings the lot to the edge of the street can make no difference, for the description which thus brings the lot to the edge of the street must be merely understood as specifying the land that the purchaser may hold and use as exclusively his own, and as defining the line at which the public easement begins, the purchaser owning, subject to that easement, to the center of the street. (Taul v. Carver, 26 Penn. St., 293.)

Brizzalaro v. Senour and Noonan, 6 Ky. Law Rep., 253, does not conflict with the position taken in this case. In that case Arnold executed to Barbaro a conveyance to a certain lot of ground in the city of Covington. The deed designated one of the lines as follows: "Thence northwardly, with east line of said bridge company, 65 feet to a ten foot alley (which extends from the eastl ine of the said bridge property to Greenup street, running parallel with said Second street) eastwardly, &c." Afterwards Arnold conveyed to Mrs. Boyd the adjoining property, including the alley. The testimony showed that at the date of these conveyances "no such alley had been laid out on the ground." Nor was it indicated by any plat or map or survey made by Arnold or any one else. Therefore, this court held, first, that the recitals in the conveyance did not amount to a dedication of the alley, nor did they amount to a grant; second, that as between Arnold and his vendee, the recitals in the conveyance would estop Arnold and his privies from denying the existence of the alley; and, third, that in the absence of such privity of title the doctrine of estoppel did not apply.

Wilkins v. Barner, 2 Ky. Law Rep., 29, is also relied on by the appellees. In that case the appellee justified his entry upon the appellant's land upon the ground that the land was a public highway. The court held in that case that in order to constitute a dedication of a road or street to the public use the road or street must be accepted by the county court or town upon their records or by the continued use and recognition of the ground as a public highway for such a length of time as would imply an acceptance." So there is nothing in this case that conflicts with the principles announced in the case at bar.

The judgment of the lower court is reversed, with directions to dismiss the appellee's action.

LUKER v. COMMONWEALTH.

(Filed September 22, 1887—Not to be reported.)

1. In order to make dying declarations competent evidence of the act of killing and of the identity of the guilty party, it is not essential that there should be no other testimony relating thereto.

In this case the statement of the deceased, that the accused shot him, was not a mere expression of opinion, and was competent although there was no other testimony relating to the identity of the guilty party.

2. Dying declarations should be restricted to the act of killing and the circumstances immediately attending it and forming a part of the res gestæ.

In this case the statement of the deceased that he and the accused "had no fuss" was evidently intended to relate to the time and place he was shot,

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and was rather beneficial than otherwise to the accused, as it had the effect to negative the existence of malice which the Commonwealth attempted to show by other witnesses.

3. Prejudicial errors—Although it is unusual and somewhat informal for a jury to indicate in their verdict upon what hypothesis they find the accused guilty, still their statement thus made will be considered for the purpose of determining whether or not an error in the admission of testimony was prejudicial.

In this case a witness for the Commonwealth was permitted to state that an uncle of the accused refused to lend his horse to a brother of the deceased to ride for a physician. Held—That while the testimony may have authorized the inference of malice and of previous design, and may have been regarded as tending to show that the accused fired the shot, it was not prejudicial because, it the first place, it is stated in the verdict of the jury that they find him guilty of manslaughter, "according to the fifth instruction," by which the jury was charged to find him guilty if they believed he recklessly fired his pistol into the crowd; and, in the second place, the evidence places it beyond question that appellant did the shooting, and there is on intimation in the record that any other person did it.

4. There must be an objection made to evidence at the time it is given, or a motion made to exclude it, and a ruling and decision by the lower court to enable this court to pass upon the question.

W. O. Bradley, W. R. Ramsey and R. L. Ewell for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

The homicide of which appellant was convicted occurred at night, during a mock serenade of a newly-married couple, in which he, the deceased, and others participated, at the house of a neighbor, around which the party were marching.

The first ground relied on for reversal is that the statements of the deceased, in regard to the killing, were admitted as evidence. The witness who testified to them was his father, and his evidence on the subject is as follows: "I asked him," the deceased, "if he was much hurt? He said 'I am killed.' Asked him if he knew who did it? Said 'yes; Charlie Luker.' Said they had no fuss."

An indispensable condition of the admission of dying declarations as evidence is that they were made by the deceased with a full consciousness of approaching death. That condition, it seems to us, existed in this case, for not only was the wound given the deceased a mortal one, but he realized the fact and said he was killed.

It is also a rule that dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declaration; and that such evidence should be admitted only upon grounds of necessity and public policy, and be restricted to the act of killing and the circumstances immediately attending it and forming a part of the res gestæ. (Leiber v. Commonwealth, 9 Bush, 12; Collins v. Commonwealth, 12 Bush, 271.)

In the Leiber case the declarations of the deceased were held incompetent, so far as "they purported to disclose former and distinct transactions not relating to the particular facts constituting the subject-matter of the charge, or the identification of the defendant, but from which the jury might have inferred the existence of malice on the part of the appellant towards the deceased."

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In the Collins case the declarations were in substance "that Michael Collins killed me and killed me for nothing," and "I never carried anything to hurt any one."

It was there held that the statement that Collins killed the deceased "for nothing" was but the expression of an opinion, and clearly inadmissible, and that the statement that the deceased "had never carried anything to hurt any one" did not relate directly to the act of killing, and was not a circumstance immediately connected with it. It was thus held that each statement was incompetent, and tended to prejudice the rights of the accused.

In this case the statement of the deceased related directly to the act of killing, for it was that the appellant killed him; and the other statement, that they had no fuss, was obviously intended by the deceased to relate to the time and place he was shot, and could not be fairly understood otherwise, and was rather beneficial than otherwise to the accused, for it had the effect to negative the existence of malice which the Commonwealth made an effort to show by other witnesses, and to some extent did show.

It is, however, argued that inasmuch as other evidence in the case shows the accused was, at the time of the fatal shot, marching immediately in rear of the deceased, the latter could not know it as a fact, and his statement that the accused shot him was merely an expression of opinion, and consequently incompetent as evidence.

To give weight to this argument we have not only to assume that, though but a few feet from the accused, the deceased did not use his sense of hearing to detect the sound of the pistol, nor at any time turn his head to see what was going on behind him, but torture the explicit and emphatic declaration that the accused shot him into a mere expression of opinion by the deceased.

We do not understand the rule to have been heretofore so interpreted and applied by this court as to make dying declarations competent evidence of the act of killing and identity of the guilty party, only where there is no other testimony relating thereto, nor do we perceive any reason for such restriction, for it often occurs that the testimony of living witnesses is contradicted and discredited as was attempted in this case.

It appears one of the witnesses for the Commonwealth stated that Bill Lee, an uncle of the accused, refused to loan his horse to a brother of the deceased to ride for a physician. And it is contended this evidence tended, and the object of it was, to show that Lee did not wish the wounded man relieved, or that he kept the horse for his nephew to escape upon.

There might be, ordinarily, an inference of malice and of previous design to take the life of the deceased, drawn from such occurrence, and the evidence may have been regarded as tending to show the accused fired the shot, but we do not think the evidence in this case did or could, to any extent, have prejudiced the accused, for, in the first place, it is stated in the verdict of the jury that they find him guilty of manslaughter, according to the fifth instruction, by which the jury was charged to find him guilty if they believed he intentionally, wantonly and carelessly and recklessly fired his pistol into the crowd.

Though it is unusual and somewhat informal for a jury to indicate in their verdict upon what hypothesis they find the accused guilty, still their own statement, thus made, shows they did not believe the shooting was done in pursuance of previous design or from malice. In the second place, we think the evidence in this case places it beyond question that appellant did

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the shooting, and there is no suggestion or intimation anywhere in the record that any other person did it.

The competency of the evidence now objected to does not appear to have been passed on by the court, nor the objection made to it at the time. As has been held by this court, there must be an objection to evidence made at the time it is given, or a motion made to exclude it, and a ruling and decision by the lower court to enable this court to pass upon the question.

After a careful examination of the record we perceive no error to the prejudice of the rights of appellant, and the judgment is, therefore, affirmed.

KELLAR, &c. v STANLEY, &c.

(Filed October 29, 1887.)

[In overruling a petition for rehearing, filed by counsel for appellants, the court substituted the opinion now published for the original opinion, delivered June 7, 1887.]

1. An action is not commenced until a summons is issued or a warning order is made.
2. An attachment issued before a summons is issued or a warning order is made is void, and confers upon the court no jurisdiction to sell the land of defendants constructively summoned after it is issued.
3. A summons to be valid must name the defendants to be summoned, therefore, a writ commanding the officer to summons "the unknown children" of certain persons is not a valid summons, and the issual of such a process does not have the effect to commence the action.
4. A purchaser pendente lite is always treated as a purchaser with notice, and is, therefore, not a purchaser in good faith.
5. Lis pendens—Property obtained by the plaintiff in an action against a defendant constructively summoned can not, in contemplation of section 417 of the Code, be regarded the subject of pending litigation until such defendant has entered his appearance and moved for a retrial of the action, and consequently another person may, before that is done, buy it of the plaintiff and be a purchaser in good faith.
6. Estoppel—One can not question the validity of a will under which he claims.
7. Action to quiet title—Identification of property—The defendant in an action to set aside an attachment sale and deeds made by the purchaser to his vendees, and to quiet the plaintiff's title, can not defeat the action upon the ground that the property is not sufficiently identified, it being described in a deed filed, in the return of the officer upon the attachment and in the judgment for its sale.
8. Limitation—The owner of the fee in remainder may maintain an action against the life tenant to quiet his title at any time before the termination of the life estate. Limitation does not run against the remainderman during the existence of the particular estate.
9. Same—An action to set aside a judgment upon the ground that it was fraudulently procured is barred after the lapse of ten years from the rendition of the judgment, regardless of the time when the fraud was discovered.

C. B. Seymour and Young & Trabue for appellants.

John Stites, Lane & Burnett and F. T. Fox for appellees.

Appeal from Louisville Law and Equity Court.

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Opinion of the court by Judge Lewis.

By will admitted to record in 1843, in the State of Mississippi, and subsequently recorded in the Jefferson County Court clerk's office, William Cotton devised to Mary Bryant, for life, remainder in fee to her children, the lot of land in controversy situated in the city of Louisville.

In 1847 Mary Bryant, her husband joining in the deed, conveyed her interest in the lot to Henning, who conveyed the same to Delph; and in 1846 the latter conveyed the same interest to Michael Fillion, there being in the deed to him the following recital: "The estate hereby conveyed being an estate for life of Mary Bryant and no more." (Will book No. 3, page 357, Cotton to Bryant, and book 68, Bryant and wife to Henning, and book 69, Henning to Delph.)

February —, 1863, Fillion filed in the Louisville Chancery Court a petition in equity against "the unknown children of Mary Bryant and Charles Bryant, her husband," asking judgment for an alleged debt against them and the enforcement of a pretended lien on the lot to satisfy it.

He stated in the petition the lot in question had been devised by William Cotton in the manner mentioned; that he had paid for Mary Bryant and her children, at her request, the sum of $129.02 State and city taxes thereon, and for curbing and paving in front of it, whereby a lien thereon was created, but concealed from the court the fact he was the owner of the life estate therein and his own consequent liability for the taxes and assessments.

February 27, 1863, the clerk of the court attempted to issue a summons against the defendants directed to the marshal of the Louisville Chancery Court, and on the same day issued, or attempted to issue, an order of attachment upon the property of the defendant directed to the same officer.

February 28, 1863, the officer made return on the order of attachment that he had executed it by delivering a copy of the same to the "tenant in possession, and by attaching a lot of ground on north side of Walnut street, 26¼ front, extending back same width to alley, being same property devised by Cotton to Mary Bryant for life and to her children, by will recorded in will book 3, page 357."

March 6, 1863, upon proof made in open court that "Charles Bryant and Mary Bryant, children and heirs of Mary Bryant, party defendant hereto, are nonresidents of this State," an order of warning was made, and June 26, 1863, judgment was rendered in that action for a sale of the whole estate in the lot as well as the interest of the plaintiff himself, though not so specially recited as of the children of Mary Bryant, in order to satisfy the alleged debt and costs. And the sale having been made was, October 16, 1863, confirmed and the deed directed to be made to the plaintiff, who was the purchaser.

But it appears that in 1868, within five years from rendition of the judgment, there was the following proceeding: "Came the defendants, Charles and Mary Bryant, Mary B., Sarah A. and John W. Bryant, by counsel, and filed their answer herein with notice executed on the plaintiff, and said defendants moved the court to retry the case." It further appears that at the same time the defendants executed and filed the bond for costs required in such cases.

With their answer they filed written evidence of title, and the several conveyances by which the plaintiff had become, and was, in 1856, before the taxes and assessments mentioned in the petition accrued, owner of a life estate in the lot. They denied in their answer they were liable as owners of the interest in remain-

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der for such taxes and assessments, or that the plaintiff was requested by Mary Bryant to pay therefor, and prayed for judgment in their favor and all proper relief.

April, 1870, final judgment was rendered in that action setting aside the judgment of 1863 and the sale made in pursuance of it, and dismissing the petition of the plaintiff, Fillion.

This action was instituted in 1883, by Mary Stanley and others, children of Mary Bryant and devisees of the will of William Cotton, against I. H. Kellar and wife, L. V. Kellar.

In their petition the plaintiffs, after reciting the history of their title to the lot and of the action of Michael Fillion against them, allege that the judgment rendered therein in 1863 was fraudulently obtained by him; that in July, 1864, he attempted to convey the entire estate in the lot to one Bensinger, and he, in September, 1864, attempted to convey the same to L. V. Kellar, who, with her husband, claims she is the owner of the fee thereof, and holds the lot adversely to the plaintiffs, whereby there exists a cloud upon their title, and the market value of their estate in the lot is impaired.

The relief prayed for in the petition is that the deed from Fillion to Bensinger and the one from him to the defendant, L. V. Kellar, be set aside and held for naught so far as either of them purports to convey an estate in the lot greater than for the life of Mary Bryant; that the plaintiffs be adjudged the owners thereof, subject only to such life estate, and that their title be quieted. And the judgment rendered is that they are the owners of the remainder in fee; that the deeds mentioned operated to invest the defendants, L. V. Kellar, with only such life estate, and the judgment of 1863, in favor of Fillion, and sale under it are void, and divested the plaintiffs of no interest.

From that judgment Kellar and wife have appealed.

1st. As appellant claims under the will of William Cotton it does not seem to us she is in a position to call in question its validity, or deny it has been in due form of law probated and admitted to record in this State.

2d. Nor can she defeat the action upon the ground the lot in controversy is not sufficiently identified, for it is described in the deed from Delph to Fillion, in the return of the officer upon the order of attachment, and in the judgment for the sale of it.

3d. The right of the owner of the fee in remainder to maintain an action during the tenancy for life and against the life tenant to establish his claim to real property, or to quiet his title, was recognized by this court in Simmons v. McKay, 5 Bush, 25, and is not denied by counsel for appellant. But it is contended that as it is an action not specially provided for in chapter 71, General Statutes, it can, according to section 9, article 3 of that chapter, only be commenced within ten years next after the cause of it accrued.

It has been repeatedly held that limitation does not, during the existence of the particular estate, run in favor of the tenant for life against the owner of the estate in remainder. And that being so, it would seem that an action to quiet his title might be maintained by the latter at any time before the termination of the life estate, for it is difficult to understand how the right to quiet title or establish a claim to land may be barred by limitation, while the right to recover the same land may exist for an indefinite period afterwards.

4th. It is alleged by the plaintiffs in this action that the judgment of 1863 was fraudulently procured by Fillion. But as more than ten years elapsed from the time it was rendered until the commencement of this action, it is clear that section 6, article 3, chapter 71, General Statutes, applies, and the relief can not be given upon that ground.

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5th. The two main questions are these: Whether the judgment of 1870, setting aside the one rendered in 1863 and dismissing the action of Fillion, had the effect to divest appellant, Kellar, of title. And if not, whether there exists any ground for the judgment rendered in this case.

By section 445 of the former, substantially the same as section 414 of the present Civil Code, a defendant constructively summoned in an action might, within five years after judgment, appear in court and have the action retried, as if there had been no judgment, etc. But section 448 of the old, the same as section 417 of the present Code, is as follows:

"The title of the purchaser in good faith to any property sold under an attachment or judgment shall not be affected by the new trial permitted by section 445, except the title of property obtained by the plaintiff, and not bought of him in good faith by others."

By "good faith," as judicially interpreted, is meant a purchase made, not merely for a consideration, but also without notice to the purchaser of an adverse claim to the property by others, for "the taking an estate, after notice of a prior right, makes one a mala fide purchaser," hence a purchaser pendente lite is always treated as one with notice. (Owings v. Myers, 3 Bibb, 278.)

But, obviously, property obtained by the plaintiff in an action against a defendant constructively summoned can not, in contemplation of section 417 of the Code, be regarded the subject of pending litigation until such defendant has entered his appearance and moved for a retrial of the action; and consequently another person may, before that is done, buy it of the plaintiff and be a purchaser in good faith. And as before the defendants in that action did actually enter their appearance and make the motion, Fillion, the plaintiff, sold and conveyed the lot to Bensinger; and it is not shown the latter had, at the time of his purchase, any notice of their claim, he must be considered a purchaser in good faith, and whatever title he or his vendee, Kellar, had acquired remain unaffected by the judgment of 1870.

If, then, the court had, when the judgment of 1863 was rendered, jurisdiction of the persons of the defendants, and of the subject of the action, the sale to Fillion was legal, and the title acquired by appellant as his remote vendee is valid; otherwise not.

By the warning order made in the case jurisdiction of the persons of the defendants may be conceded as having been acquired, but whatever jurisdiction of the subject of the action there was, if any at all, existed alone in virtue of the attachment, for there was no other lien upon the lot.

Section 221 (194) of the former Civil Code provides that the plaintiff may, at or after the commencement of an action, not before, have an attachment against the property of the defendant. And in Hall v. Grogan, 78 Ky., 11, it is held by this court "there is no lis pendens until a summons is issued or a warning order made," and that the attachment in that case was void because there was no summons or warning order when it was issued.

Section 65 (39) is as follows: "An action is commenced by filing in the office of the clerk of the proper court a petition stating the plaintiff's cause of action * * * and * * * by causing a summons to be issued, or a warning order to be made thereon."

As before stated, no warning order was made until March 6, 1863, which was after the order of attachment was issued and after the date of the levy, as shown by the officer's return, made

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Feburary 28. The single inquiry then is whether a summons was issued before or at the time the order of attachment was issued.

The record does not show the precise day the petition was filed, but it may be assumed it was previous to or on February 27, the date of the attempt to issue the summons and of the order of attachment.

What purports to be a summons in this case is merely a command to the marshal "to summon the unknown children of Mary Bryant and Charles Braynt, her husband, to answer," etc.

Whereas, section 40 (66) of the Code requires that "the summons shall command the officer to whom it is directed to summon the defendant named therein to answer the petition filed by the plaintiff, giving his name, at a time stated therein, under the penalty of the petition being taken for confessed," etc.

Independent of the plain language of the law requiring the summons to contain the name of the defendant, it is manifest it never was intended to leave the officer the discretion, or to impose upon him the duty, of identifying defendants, whose names are not given in the summons or known even to the plaintiff.

It seems to us the paper issued by the clerk in this instance as a summons can not be regarded as such, but is fatally defective. As, therefore, there was neither a summons nor warning order against the defendants when the attachment was issued, it must, in obedience to the clear requirement of the Code, and following the case of Hall v. Grogan, be held void. And being so, the court had no jurisdiction of the subject of the action, and the judgment and sale under if of the lot in question conferred no title upon Fillion, the vendee of appellants.

Wherefore, the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

HARRIS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed Spetember 21, 1887.)

Railroads—Carriers of freight—Duration of liability—Fifty barrels of whisky consigned to H. at Louisville reached there in due time. He had notice of its arrival, November 8, about 9 o'clock, a. m., and that day removed thirty-two barrels and could, under ordinary conditions, have removed all, but was hindered in the use of his dray by unusual crowds of people obstructing the streets, and eighteen barrels were left in the depot and burned that night. No negligence is charged on the company as to fire, and the action assumes its liability as a common carrier, and not as a warehouseman.

Held—1. Peremptory instruction to find for defendant was proper.

2. Contract of affreightment, in the absence of special provisions, is to be construed as insuring for such time as is ordinarily needed at the place of destination for the removal of such goods from the depot, and not for such time as the particular consignee may, under compelling circumstances, require.

3. Where circumstances prevent the removal of goods in such time as is usually required, it is the company's duty to keep them under the responsibility of a warehouseman.

4. The company is liable to a carrier for such time as "would be ordinarily required by a diligent man, at the given place, provided with adequate facilities, acting according to the usual course of business there" for the removal of the goods.

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5. The company's liability as a common carrier can not be prolonged by a consignee beyond such time as is unsually required for the removal of such goods at that place, even though the consignee is unable to remove and though this inability may have resulted from causes that consignee did not produce and could not avoid, if such causes be not the result of the company's procurement or negligence.

E. F. Traube for appellant.

H. W. Bruce and Wm. Lindsay for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Presiding Judge Bowden.

It appears from the pleadings that fifty barrels of whisky, consigned to Harris, at Louisville, arrived there in due time, and that Harris received notice of the arrival November 8, about 9 o'clock a. m. That day he removed thirty-two barrels, and the remaining eighteen were destroyed by fire that night. Negligence is not charged upon the company in regard to the fire; the action assumes its liability as a common carrier, and not as a warehouseman.

The only witnesses were the plaintiff and Peter Tevelin, his drayman. The plaintiff testified that, having ordered the whisky, he instructed his drayman to watch for it and to deliver it immediately on its arrival; that he received the company's notice of its arrival about 9 o'clock, November 8, 1884, and sent his porter to notify the drayman; but before his return, and about half after nine or ten o'clock, the drayman came to his place of business with a load of the whisky, and during the balance of the day diligently kept at work removing the whisky from the depot to the plaintiff's business house, which was in the city, and succeeded in removing only thirty-two barrels. He was hindered and obstructed by multitudes of people that day thronging the streets celebrating the election of Cleveland as president. the streets being crowded to such an extent that it was almost impossible for the drayman to cross them. He testified that he used every effort in his power to remove the whisky from the depot, and endeavored to get other draymen to assist, but could not do so because nearly every person in the city was celebrating; it was impossible for him, in the usual course of business, to remove more than he did because of the obstruction of the streets.

Tevelin testified that he was a drayman and had, for a long time prior to November, 1884, hauled plaintiff's whisky to and from the depot; that plaintiff was accustomed to employ no other drayman; that, under directions from Harris, he had kept a lookout for the whisky; had been to the depot several times for it, and had inquired after it; that early in the morning of November 8 he was there, and ascertaining that it had arrived he began and continued hauling until about four or about half past four o'clock that afternoon. He said he could have hauled all the whisky that day with his dray but for the interruption caused by the procession in the streets, and had frequently hauled 75 to 80 barrels in a day. He said there were very few drays at work after 12 o'clock that day, and after that hour assistance could not well have been obtained, but that no effort was made to get other conveyances; there were idle drays on the street before 12 o'clock, and he supposed they could have been employed. He paid the freight bill for the plaintiff.

On this case the jury, under a peremptory instruction, found for the defendant.

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The witnesses agree that the obstruction of the streets prevented the removal by the use of one dray; they differ as to whether other drays could have been gotten, and as to whether there was any effort to get them. As it is the rule in this State that when there is any evidence tending to sustain the plaintiff's contention, the case must go to the jury, we think the plaintiff's evidence must be assumed to be true, where it differs from that of the other witnesses. The jury might have accepted the plaintiff's statement that he had endeavored to get other draymen, but that they refused to work, concluding that Tevelin did not know so well as the plaintiff what efforts he had made, or what was the result of these efforts. They might have been of the opinion that though Tevelin saw idle drays on the street, and inferred that they could have been employed, the actual fact was better attested by a fruitless effort to hire them. The conclusion was also possible that as one dray could, under ordinary circumstances, haul the fifty barrels in about two-thirds of a day, the provision made by Harris was adequate, and that his failure to get all of it hauled was due solely to the obstruction of the streets during at least two-thirds of the day, and that such obstruction for so long a time could not have been foreseen in time to provide help otherwise unnecessary.

The case then would be that immediately upon the arrival of the whisky the plaintiff put to hauling it a drayman who, under ordinary circumstances, could and would easily have removed all of it that day; and that finding the streets obstructed by an unusual throng of people, he made all the effort he could to employ other draymen to assist, but could not do so. If it is a question of personal diligence, the jury might have been satisfied that the plaintiff exhausted every means which was open to him. If that is the question the peremptory instruction should not have been given. But if the question is whether, under ordinary conditions, the whisky could have been removed that day, rejecting as irrelevant the obstruction which prevented it, the evidence showed conclusively that it could have been done; and the instruction, in that event, was correct.

It is the undertaking and it is the duty of a common carrier using wagons and similar vehicles to deliver goods to the consignee in person, or at his place of business. If he does not know where the consignee is, he must make diligent inquiry; he must find him, if he can. During the search his liability as insurer of the goods remains; but "when he has done all that the law requires of him towards accomplishing a delivery, and for any cause fails to effect it, and the goods are of necessity continued in his possession, he, from that time, becomes responsible only as a depositary." (Hutchison on Carriers, section 356.) This necessity may not result from the consignee's negligence; it may be merely a misfortune, either personal to himself or affecting many others. It is the fact that it exists, and not the nature of the cause that produced it, which concerns the carrier, and disables him from making an actual delivery. It may be that the consignee is not responsible in any degree for the fact, if it was a vis major, which he did not evoke and could not escape. It is his personal misfortune preventing him from being where he may be found, the consequence of which can not justly be shifted to the carrier, prolonging his severe liability as insurer. Everyone must bear his own calamity. It should always be in the power of a carrier to know when he has done all that a prudent law requires of him; yet if, having done all that exacting anxiety could suggest, he may be still liable by reason of that which no diligence could ascertain, or which he had no reason to suspect,

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he can never know when he ceases to be an insurer until the preventing facts transpire; his liability would continue as long as the preventing force prevailed, and it would depend, not on his own care and diligence, but on facts operating upon the consignee.

As to what constitutes a delivery by a railorad company the authorities are in conflict. In some States it is held that the carrier's liability is at an end when the goods are unloaded from the car and are deposited in the company's freight house; and that thereafter it is liable only as a warehouseman. In other States the liability as carrier is protracted for such time as will enable a consignee, by reasonable diligence, to receive and remove the goods. "It is not time varying with the distance, convenience or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, and in the usual hours of business, to inspect and remove." (Leavenworth, &c. R. R. Co. v. Maris, 16 Ks., 333.) As the company has done its entire duty when it has put the goods in its warehouse and has waited a reasonable time for the consignee to come and get them, it is no more responsible than the carrier by wagon for the failure of that personal presence which is necessary to an actual delivery. The failure of the wagoner to find the consignee is the exact equivalent of the failure of the company to procure his presence; the failure of the consignee to be where the wagoner could find him is the exact equivalent of his failure to be at the freight house. The cases are analogous, and the results should be the same. If the wagoner having done all the law requires him to do to gain the presence of the consignee that he may deliver, ceases to be liable as an insurer, it is not easy to see why the company's liability as carrier should be protracted by causes that would not affect the wagoner.

2d. The contract of affreightment, in the absence of special provisions, should be presumed to have been made with reference to ordinary conditions, and not with reference to those which are rare and exceptional. It is known that the company does not propose to carry beyond its depot. In several States it is held that the contract for carriage is fully discharged when the goods are delivered in the depot and stored. In other States, including Kentucky, it is held that the contract includes the continued liability of the carrier after such storing, and till the owner or consignee has had reasonable opportunity of receiving and removing them." (Jeffersonville R. R. Co. v. Cleveland, 2 Bush, 473; L., C. & L. R. R. Co. v. Mahan, 8 Bush, 186.) In some of the cases it is said the consignee has a reasonable time to receive and remove, but the meaning is the same; the "opportunity" is one which the company is to offer, and which it may not deny; but it is not one which it guarantees shall availably exist, whatever happens; the "time" is such as would be ordinarily required by a diligent man, at the given place, provided with adequate facilities, acting according to the usual course of business there. It does not seem probable that the parties to the contract would have in mind a retained possession beyond that which usually occurs, and which results from the common course of business, including its methods and facilities. While a carrier is an insurer of goods against everything except the act of God and the public enemy, he does not insure against calamities that may happen to the consignee, and it is not probable that it was the intention of the parties that the company's liability as insurer should depend on such calamities, or should continue so long as they might keep the consignee from coming to get the goods. There is no case, as far as we know, in which it was held that the

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carrier is to be understood as having contracted to give not only time in which the removal could be made by a person ready, unobstructed and prompt, but as having further extended its perilous holding so long as the consignee might be prevented, by circumstances beyond his control, from getting his goods. There is no reason to distinguish between preventing circumstances, if the consignee does not cause them and can not escape them. A sudden pestilence or a gala day may prevent as effectually as a mob, houses tumbled in the street, or any other obstruction; one deprives him of servants, the other of the means of using them. If prevention comes from streets closed by fallen walls; by a mob; or by rejoicing multitude; by a sudden refusal of all laborers to render service; or by a calamity personal to the consignee, against which he could not guard, he can not be considered negligent; all that can be justly said is that it is a misfortune which prevented him from doing an act required by his interest. We think the contract should be understood as providing for such time as is ordinarily needed, and not for such time as the particular consignee may, under compelling circumstances, require.

3d. A proper regard for the rights of shippers does not require so strained a construction. If contingencies arise which prevent a removal within such time as is usually required for the removal of such goods, it is the duty of the company to keep them under the responsibility of a warehouseman, and if greater security is desired by the consignee, thus precluded from going after the goods, it may be found in a policy of insurance. It is conceded everywhere that after a reasonable time the carrier is liable only as a warehouseman, and as the danger of loss by theft or other evil practice is no greater the moment after this liability begins than it was the moment before it began, the claim for the more extended liability as carrier can not be put on the ground on which the liability itself rests, for as long as the company has the actual custody there is danger of theft and robbery; and if the common law reason for the rule that makes the carrier an insurer is to be invoked at all, it would hold the carrier responsible as such as long as it retains actual custody.

We have not been able to find any decision of the precise question under consideration. It is held in many cases that the time will not be extended because of any vicissitude, personal to the consignee, against which he could have provided, as because of his absence, whether temporary or permanent, for he could have had an agent. But in Mahan's case, 8 Bush, 186, there is an obiter dictum which, we think, recognizes the proper rule. After stating that the record showed that the owner of a trunk "found it impossible to remove it," but did not show what circumstances rendered it impossible, the court said: "But there is nothing to indicate that the railroad company was in any degree responsible for their existence, and unless such was the case it seems to us that the reasonable rule is that the passenger had no right to prolong the strict and rigid liability of the company as a common carrier by leaving his baggage in the possession of its agent during the night." This is apposite only on the assumption that the liability can not be prolonged, even though the consignee is unable to remove, and though his inability may have been the result of a cause which the consignee did not produce and could not avoid, for if such cause may in any case excuse the consignee, the circumstances that made it impossible to remove the trunk may have been such as would themselves prolong the

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time, and not merely such as influenced the consignee to let the trunk remain because of the very great trouble it might give him to have it removed, or because he had failed to get the means of removing it.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

PRICE v. WILLS' ADM'R.

Filed October 5, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Appeals—Schedule—Where an appeal was granted by the lower court, but the schedule for a partial transcript was not filed in time and that appeal was abandoned, and an appeal was afterward granted by the clerk of this court, the appellant filing, when the appeal was granted, a partial transcript in conformity to the schedule filed in the former appeal, and no notice was given as required by section 737, subsection 7 of the Code. Held—

1. This is not sufficient for a prosecution of the appeal on a partial transcript.

2. This court, however, independent of this, is of opinion that the evidence would not justify a reversal.

J. P. Norvell for appellant; Kennedy & Kennedy for appellee.

CHARLES, &c. v. BAIN.

Filed October 5, 1887. Appeal from Knox Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Pleading—An allegation that defendants "believe, aver and think" that rent sued for has been paid, and that on a settlement a sum of money agreed to be paid for "stock in shop" will be paid, raises no issue.

2. Same—But an averment that a provision in a bond for the payment of a sum of money for stock in shop is an interlineation, "of which defendants have no knowledge, and that said interlineation was done without their knowledge and consent, and deny that they so obligated themselves," is sufficient to put in issue plaintiff's right to recover the sum on the bond.

3. Bankruptcy—Practice—Where the plaintiff, after the institution of the action, had been adjudged a bankrupt and an assignee had been appointed for him, Held—He had no right to prosecute the action further. Section 20 of the Code does not apply to cases where, in consequence of the plaintiff's being adjudged a bankrupt, his estate is by operation of law vested in the assignee for the benefit of the bankrupt's creditors.

Dishman & Mayhew for appellants; J. H. Tinsley for appellee.

FLAHIFF v. LOUISVILLE & NASHVILLE R. R. CO.

Filed October 5, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Peremptory instruction—When the evidence conduces in any degree to prove a right to recover, a peremptory instruction to find for the defendant is improper.

2. Master and servant—Where a servant, in obedience to the order of his superior, and relying upon his superior knowledge and assurances of safety, places himself in a position of danger, the master is liable for any damage he may suffer unless the danger was so obvious that no prudent man would have entered into it, even when, like the servant, he was not entirely free to choose.

3. Limitation—Where an amended petition was filed more than a year after the accrual of the cause of action, but the original petition was filed before the year had elapsed and contained a good cause of action, although defectively stated, the plea of limitation is insufficient.

Anderson, Fulton & Atkinson for appellant; Wm. Lindsay for appellee.

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ATKINS v. LACKEY.

Filed October 5, 1887. Appeal from Lawrence Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Bankruptcy—Sued on a note, in form joint and several, signed by both members of a late firm, Atkins pleaded a discharge in bankruptcy obtained on his individual petition, alleging that the note was given by the members of the late firm, then dissolved, and that neither then, nor when he filed his petition in bankruptcy, were there any firm assets, and that he had set out all the firm debts in his schedule, which allegations were denied. On a former appeal this court held that the discharge was a defense even if the note was given and accepted as a firm obligation, if it was true that there were no firm assets and the firm debts were set out in the schedule. On a second trial the court instructed the jury that if they believed from the evidence that the note sued on was given as a firm obligation, they should find for plaintiff; if they did not so believe they should find for defendant. Held—

1. This court is bound by the former opinion, which became the law in this case.

2. The instruction was erroneous, as it ignored the question whether there were assets and whether the firm debts were set out in the schedule, but permitted a verdict against the defendant, though they believed both of these facts.

William Lindsay for appellant; T. R. Brown and A. Lackey for appellee.

MERRIFIELD v. TYLER, &c.

Appeal from Nelson Circuit Court. Opinion of the court by Judge Ward, affirming as to Farmers and Drovers Bank, and reversing as to Tyler, Wilson and Guthrie.

1. Res judicata—Where a judgment, upon which a claim was founded, was appealed from and reversed, with direction to dismiss the petition, this was a determination of that cause of action and demand

2. Same—Though the fact that the appeal was without a supersedeas was sufficient ground for the court to render the judgment sustaining a report allowing the demand as a just claim against the defendants therein, the judgment of this court deciding there was no claim necessarily renders the judgment allowing it erroneous.

3. Liens—Where one has a contract lien upon two funds he may look to both for the full amount of his debt until it is satisfied.

J. A. Fulton and C. T. Atkinson for appellant: Wm. Johnson and Richards & Hines for Farmers and Drovers Bank; J. D. Wickliffe for other appellees.

RIFFE v. ROBERTS.

Filed October 5, 1887. Appeal from Lawrence Circuit Court. Opinion of the court by Judge Barbour, dismissing appeal.

Judgments—A commissioner filed his report in the lower court, at the August term, 1884, and there being no exceptions the report was confirmed at the February term, 1885, when a final judgment, disposing of all the issues involved in this case, was rendered. Held—

1. There being no grounds alleged for setting aside or vacating or modifying that judgment, the court had no power, after the adjournment of the term at which it had been rendered, to allow the defendant to file exceptions to the commissioner's report, or to render another and different judgment.

2. This latter judgment, being void, can not, on appeal, be reversed or modified by this court until a motion to set it aside or modify shall have been made and overruled in the inferior court.

A. Lackey for appellant; W. M. Fulkerson for appellee.

MEADE, &c. v. STAIRS.

Filed October 5, 1887. Appeal from Carroll Circuit Court. Opinions by Judges Ward and Bowden, concurring in reversing. Dissenting opinion by Judge Barbour.

Husband and wife—Wife's land was sold and conveyed, and the proceeds,

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amounting to over $4,000, came to husband's hands on his oral promise to invest in land for the wife. With her knowledge he used the money in his business for two years, then bought a mill, taking the title to himself, using the proceeds in paying for it and in the purchase of wheat. When the wife learned he had taken the title to himself she insisted that he should buy her a home, which he did at the price of $2,250, of which he paid $750, and notes were given for the residue, which were not paid. She joined with him in a mortgage on the mill for $1,500. Finally, being insolvent, he sold the mill for $4,500, orally agreeing with her to give her $2,000 of the proceeds, and after the sale he assigned to her two of the purchase notes, each for $1,000. Her creditors assailed the assignment as a preference. Held—

1. Under General Statutes the proceeds were her separate estate, the conveyance not showing she otherwise intended; that her husband received the money as hers to be invested for her; and if the fund could be followed and identified she could assert an equitable right to property in which it was invested.

2. The majority of the court hold that it was identified by the evidence; but that it shows she acquiesced in his use of it for his own purposes, thus consenting to become a mere creditor, and that the assignment to her was a preference. Judge Barbour holds that the fund was identified sufficiently, and that she was entitled to hold the notes.

A. Duvall and J. A. Donaldson for appellants; Masterson & Gaunt and J. W. Rodman for appellee.

GROSS v. PADUCAH LUMBER CO.

Appeal from McCracken Circuit Court. Opinion of the court by Judge Barbour, reversing.

Husband and wife—Caroline Gross sued Louis Gross for divorce and alimony, attaching all his property. In consideration of a final separation and his release from her further maintenance, he conveyed her all his visible property. The divorce was granted, and the decree confirmed to her, by way of alimony and maintenance, the property deeded by her husband. Shortly afterward she sold and conveyed all the real estate to Michael. Appellees afterwards instituted their action against Louis and Caroline Gross and Michael for debts Louis Gross owed them before the conveyance to Mrs. Gross, and before the institution of her divorce suit, alleging that both conveyances (to Mrs. G. and to M.) were made to defraud Gross' creditors. The lower court sustained the attachments, applied the proceeds of the notes held in bank subject to the court's order, and rendered a personal judgment against Mrs. Gross for $750. On this state of case, Held—

1. Where a deed recites that certain estate of the wife came to the husband's hands, and was converted to his use and used by him, and in consideration thereof and for the further consideration of final separation, and his release from her maintenance, a conveyance was made to the wife by the husband, this will not avail to defeat his creditors.

2. The husband can not, to the prejudice of his creditors, settle his property upon his wife. The fact of their separation gives him no greater right.

3. But as creditors of the husband do not assail the judgment in the divorce suit as having been obtained by fraud, and as it stands unreversed, her right to the property is determined by it.

W. D. Greer for appellant; Henry Burnett, P. D. Yeiser and J. W. Bloomfield for appellee.

RACKERS v. NATIONAL BANK OF COVINGTON.

Filed October 5, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Accord and satisfaction—Sued on a note executed by him and Vonderheide, the appellant answered that the payee had agreed to release him from further liability in consideration of the payment by him of half of the debt, and the assignment to payee of all his interest in the estate of Vonderheide, who had assigned for the benefit of creditors, with the proviso that the payee

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should pay to him whatever might be gotten from the estate beyond the residue of the debt, there being no allegation that he had any interest in the estate or that he was a creditor of Vonderheide. Held—That there was no defense, and a demurrer to the answer was properly sustained.

Jesse Arthur and E. W. Hawkins for appellant; O'Hara & Bryan for appellee.

REISERT v. VANCLEVE, &c.

Filed October 2, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Reisert sued Burt to recover judgment for money alleged to have been lent, and obtained an attachment, which was levied on a lot of tinware. Other creditors, suing in the quarterly court, obtained subsequent attachments, which were levied on the same property or its proceeds. Held—

1. Practice—Transfer of suits—The circuit court properly ordered all of the cases pending in the quarterly court to be transferred to the circuit court. (Civil Code, section 210.) When cases are so transferred the circuit court acquires complete jurisdiction, and may proceed to a final judgment, even though the attachments, by reason of which they were transferred, should be discharged. Such cases are not in any event to be remanded to the inferior court.

2. Attachments—When property attached is insufficient to pay the amount of the senior claim, junior attachment creditors have the right to assail the senior attachment, it being alleged that the senior claimant and the defendant are in collusion, and that the latter will not defend. The junior creditors may dispute the existence or justice of the alleged debt, the existence of the grounds for the attachment and the validity of the levy.

3. Same—Where the defendant borrowed of plaintiff's wife a part of the sum claimed, and the money lent by her was her separate estate, the husband had no greater claim than the sum borrowed of him, and his attachment secured no more than that.

4. Same—Where a plaintiff relies alone, as ground for an attachment, on the allegation that the defendant has not sufficient property liable to execution to pay his debt, his claim must be regarded as it really is, and not as what he alleges it to be.

W. H. Marriott for appellant; James Montgomery for appellees.

TUCK v. FUQUA.

Filed October 12, 1887. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Vendor and vendee—A grantee of land, under a conveyance with general warranty, holding an undisturbed possession, can not resist the collection of the purchase money if the grantor is a resident of the State, is solvent, and has been guilty of no fraud.

Landes & Clark and McPherson for appellant; E. P. Campbell for appellee.

BROMLY v. VINSON.

Filed October 12, 1887. Appeal from Boyd Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Reversible errors—Mere doubts in the mind of this court as to the correctness of conclusions reached by a commissioner and the lower court will not justify a reversal.

2. Attachments—The effect of a bond given, according to section 221 of the Civil Code, before the clerk, with security approved by him, in vacation, is to discharge an attachment and release the property taken thereunder, but it also prevents the defendant from controverting the grounds of the attachment or showing that the property was not liable to the lien.

3. Same—Though it is error for the court to make an order sustaining an attachment after it has been discharged by the execution of a proper bond, yet when no property was levied on under the attachment, but it was a

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mere garnishment of money, and no order was made or steps taken against the defendant and garnishee, and the order was not hurtful or prejudicial to the defendant, except as to the costs of the order, this is insufficient to justify a reversal.

K. F. Prichard and Hargis & Eastin for appellant; W. C. Ireland, Moore & Brown and Wm. Lindsay for appellee.

CLARK v. MILLER.

Filed October 12, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Husband and wife—Exemptions—A widow, being a housekeeper and having personal property exempt from execution, and no other, marries a man who immediately becomes a housekeeper and who receives the personalty his wife owned, but had no other such property. He was sued on a debt which his wife owed before she married, less than the value of the property he received. Held—

1. A personal judgment against him was proper.
2. The personalty, because he was a housekeeper, and while he is such, is exempt from execution.

Charles Carroll for appellant; F. P. Straus for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. CECIL.

Filed October 12, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Passenger carriers—Contributory negligence—Cecil was a passenger on a mixed train, composed of one baggage car, eight freight cars and two passenger cars, the latter being in the rear. As the train, going north, was descending Muldraugh's hill, a front wheel of the last car, in which Cecil was riding, was broken. The car kept on the rails, after the wheel broke, about seven hundred yards, when it was derailed, and ran about one hundred and seventy yards further before the train was stopped. After it was derailed Cecil leaped from the car while it was moving at a decreasing speed, and was injured. He sued for damages. This instruction was given: "If the jury believe from the evidence that the plaintiff was injured by his own want of proper care and caution in jumping from the train, then he can not recover unless the jury believe the defendant, in the operation of the train, was guilty of willful neglect, in which place the plaintiff should recover, whether he contributed to his own injury or not." Held—

"If by the carrier's default the passenger is placed in such a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the car, he may leap at the carrier's risk, and may recover for an injury received by the leap. The rule is the same, though it appears he would not have been injured had he remained on the car, if the carrier's default created an apparent imminent peril. Nor is the passenger required to delay his effort to escape till the exact nature and measure of the danger is ascertained. But, on the other hand, the right to leap from the car does not arise out of the mere fact of the carrier's negligence; it does not exist till that negligence has resulted in a condition which has such an appearance of danger as would justly excite alarm in a man of ordinary prudence and fortitude. Whether that condition of fact existed or not is a question for the jury to decide."

2. The general rule is that contributory negligence of the party injured can not be relied on where the wrongdoer, by willful negligence, inflicts an injury on one who has been careless. But in this case the passenger was not injured by the negligence of the defendant, whatever its kind or degree, unless it had produced a condition of real or apparent peril, out of which the plaintiff might lawfully seek to escape. This condition is the fact which connects the defendant with the injury.

Wm. Wilson and Wm. Lindsay for appellant; H. T. Wilson and John C. Hardin for appellee.

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BRYAN v. MOREDECK.

Filed October 12, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Pleading settlement—An answer, alleging there had been atempts at a settlement, does not plead a settlement, and where each party set up his claim in detail, and contested items in the other's claim, the court properly decided the case on the merits, and no reversal can be had by reason of the casual reference in the answer to attempted settlements.

Owen & Ellis for appellant; Haycraft & Slack for appellee.

CORNWALL v. FLETCHER, &c.

Filed October 12, 1887. Appeal from Louisville Chancery Court. Response by Judge Barbour, overruling motion for damages.

Damages on the affirmance of a judgment superseded will not be given when the contest was over a fund in court. The judgment must be one that may be enforced by an execution.

B. F. Buckner for appellant; Brown, Humphrey & Davie for appellees.

FRAZER v. CLARK.

Filed October 12, 1887. Appeal from Logan Circuit Court. Opinion of the court by Judge Ward, reversing.

The petition alleges that defendant employed plaintiffs to saw into lumber all the timber on a certain tract of land that would make merchantable lumber; that in order to comply with their undertaking they purchased a mill and made arrangements to perform the contract, and offered to perform it, but that defendant prevented them from doing so. Held—

1. A contract is not within the statute of frauds if it could have been performed within a year, although its performance may have been extended to a greater length of time.

2. Breach of contract entitles the plaintiff to nominal damages, at least, and consequently to costs; the question whether more is proper or within the power of the jury to assess does not arise on motion for peremptory instruction.

3. Pleading—Where the answer denied that any contract was made with the plaintiff, this is a denial of the whole contract, and it is error to instruct the jury that "it is not denied in the pleadings that said lot of timber would have produced two million feet of lumber," and by subsequent instructions to tell them that if they found for the plaintiff the damages should be computed on that basis.

4. Allegations concerning value or amount of damage, not accompanied by an allegation of an express promise or by a statement of facts showing an implied promise to pay such value or damage, must be proved though not traversed. A statement in a pleading as to the amount of lumber a lot of timber would make is either a mere expression of opinion or an allegation concerning value or damage, a denial of neither of which is required.

5. The measure of damage is the contract price less the actual cost of doing the work, which includes value of work, wear and tear of machinery and the value of the usual hazard incurred in such work during the time necessary to perform it.

(Presiding Judge Bowden concurred in the reversal, but not for the reasons given in the opinion.)

W. W. Lyle and R. S. Revier for appellant; Browder & Edwards for appellee.

RASH v. CHEATHAM.

Filed October 12, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. New trial—Affidavits, on motion for new trial, showed that defendant's attorney asked a juror if he was related to either party, and he answered "No." He was a second cousin to plaintiff, but this fact was unknown to defendant or his attorney. Held—This was sufficient ground for new trial.

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2. Measure of damages—Defendant, as part consideration for land sold to him, agreed to have twenty-five acres cleared by a fixed date and let plaintiff have the use of it for two years. Held—This was not a contract for labor; it was entire, and for failure to have the land ready by the fixed time, plaintiff could sue and recover damages for the breach, which was the value of the use for the two years.

T. E. Ward for appellant; Montgomery Merritt and A. T. Dudley for appellee.

HIGGINS v. TOWN OF CRAB ORCHARD.

Filed October 12, 1887. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. A peremptory instruction for the defendant is wrong if his evidence conduces in any degree to sustain his contention.

2. Liability of town for burning of house by mob—In this action, under section 5, chapter 1 of the General Statutes, to recover the value of a house burnt by a mob, the evidence was that there were three attempts to set fire to the house, and that about an hour after the third, the fourth, and successful, attempt was made about 9 o'clock, and before people generally had retired; that the former attempts were accompanied by yells and firing of pistols and guns, such as could have been heard all over the small town; the town marshal was on the street, and knew of the attempts; one trustee lived near the burnt house and was seen in the street just after the fire.

Held—As no formal notice is required, this evidence was sufficient to go to the jury on the question of notice.

Welch & Saufley for appellant; Hill & Alcorn for appellee.

CITY OF NEWPORT v. RINGO'S EX'OR.

Filed October 12, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Repeal of statutes—The "act to revise and amend the charter of the city of Newport," approved February 17, 1874, designates what property shall be subject to taxation for city purposes, and under the rule adopted in Broaddus v. Broaddus, 10 Bush, 299, it repeals the prior amendments to the city charter, approved February 16, 1860, in so far as the latter act conferred upon the city the right to tax notes, bonds and choses in action.

2. Municipal taxation—The act of February 17, 1874, designates the property to be taxed as "the real, personal and mixed estate within the limits of said city, subject to taxation by the city under the laws of the State. Held—1. The word "personal," as used here, does not include choses in action. (Johnson v. City of Lexington, 14 B. Mon., 648; City of Covington v. Powell, 2 Met., 228.) 2. "Mixed" estate is such as partakes of the nature of both real and personal property, and does not include choses in action. 3. The words "within the limits of said city," were used to emphasize, as the subject of taxation, such estate as was actually within the city, and which was visible in its character. 4. The words "subject to taxation by the city under the laws of the State," were not intended to confer power to tax all property taxable under State laws, but to exempt from taxation such visible personal property as by State law is exempted.

3. Recovery of taxes paid—No obligation rests on a citizen to pay a wrong assessment; when he pays an unauthorized tax he has the right to believe there has been no abuse of the power to tax, and when so believing he pays a tax there is no legal or moral obligation on him to pay, he may recover what he has paid.

E. W. Hawkins for appellant; Charles J. Helm for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. SMITH'S ADM'R.

Filed October 19, 1887. Appeal from Bullitt Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Commencement of action—The filing of a petition and the direction in

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good faith to the clerk to issue a summons whether it is issued or not, commences the action and prevents the running of the statute of limitation.

2. Willful neglect—Damages—In an action alleging willful negligence on the part of the defendant it was not error to instruct the jury that if they failed to find the defendant guilty of willful negligence, but found it guilty of ordinary negligence, they were confined in the assessment of damages to such an amount as would fairly compensate the person injured for the mental and physical suffering experienced by him from the time of injury to his death resulting from it.

3. Pleading—When the petition alleges that the person injured was a passenger on a company's train and paid the usual charges to be carried, it is not necessary to state in terms that he was not in the employ of the company.

4. Railroads—It is the duty of a railroad company to keep its platforms and depot grounds in such condition that persons getting off and on its trains and others having business there can, by the exercise of, ordinary care use them with safety. A failure to do so, resulting in injury, renders the company liable in damages to the person injured.

Chas. Carroll, Wm. Lindsay and Wm. R. Thompson for appellant; F. P. Straus for appellee.

BALLARD v. BALLARD.

Filed October 9, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Ward, affirming.

The property exempted from distribution under section 11, chapter 31, General Statutes, is not a part of the surplus of the decedent's estate for distribution, and can not be charged to the widow and infant children in the distribution of the surplus.

C. T. Atkinson for appellant; William Johnson for appellee.

MAKIBBEN v. WHITE.

Filed October 19, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Ward, affirming.

Abatement—M. was sued as surety on a contract whereby he agreed to pay W. whatever the allowance of a fee by the Campbell Chancery Court might fall short of $350. M. answered that the court refused to allow any fee, but that an appeal, prosecuted from that judgment, was still pending. Held—This was a good plea in abatement.

Nelson & Washington for appellant; Chas. J. Helm for appellee.

SMITH v. BAYLEY'S ADM'R.

Filed October 19, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Chancery practice—In an equity action the judge can not be required to state separately the conclusions of law and of fact.

2. Same—Where no reference to the master is asked complaint can not be made that the chancellor tried the whole case on the evidence, and from it stated the account.

James Montgomery for appellant; J. P. Hobson for appellee.

CINCINNATI NATIONAL BANK v. SILVA.

Filed October 19, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Practice—The evidence can not be considered unless it is all contained in the bill of exceptions.

2. Same—In an ordinary action, in which the law and facts are submitted to the court, the conclusions of law can not be considered unless there are exceptions to them.

3. Same—The pleadings were such as to admit evidence that would have sustained the judgment. It is, therefore, affirmed.

Nelson & Washington for appellant; Charles J. Helm for appellee.

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COMMONWEALTH v. CROWDUS.

Filed October 19, 1887. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, dismissing.

Appellate jurisdiction—This court can not reverse a judgment of acquittal if for the offense charged imprisonment may be inflicted.

P. W. Hardin for appellant.

SIMMONS v. WILLIS.

Filed October 19, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

Introduction of testimony—Regularly he who has the burden of proof should introduce all his evidence tending to maintain his contention; then the other party should introduce his; thereafter each should be confined to rebutting evidence. But a trial court has a discretion, and there can be no reversal because the court permitted either party to present evidence out of time unless it appears to have been prejudicial to the other party.

Petree & Downer for appellant; Breathitt & Stites for appellee.

GAITHER v. SMITH'S ADM'R.

Filed October 19, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Construction of justice's order—"Courts will exercise an indulgent genius in ascertaining from the record of a justice what his order means," but oral evidence can not be heard for the purpose of giving the order a meaning which a liberal construction and interpretation can not find in the order itself.

EDMONSON v. BIRD.

Filed October 19, 1887. Appeal from Webster Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Appellate jurisdiction—The appellant sued for $50; the appellee set up a counterclaim for $75. The court dismissed the petition and gave judgment for $25 in favor of appellee. Held—This court has no jurisdiction, the amount in controversy being only $75.

G. H. Towery for appellant; F. M. Baker for appellee.

COMMONWEALTH v. ANDERSON.

Filed October 19, 1887. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Local option—To be good an indictment under the "local option" law (approved January 26, 1874) must allege facts showing that law to be in force in the district in which the sale in violation of it is charged to have been made.

2. Same—The "local option" law, being made applicable to a district, supersedes the operation of other laws theretofore applying to that district and providing different penalties for unlawful selling of whisky, etc.

3. Same—Evidence that a defendant indicted under the "local option" law had a license from the United States authorizing him to sell whisky is incompetent.

4. Same—While a certificate of the examining board is prima facie evidence that the election was held, and that the vote was stated, it does not show that the county court was authorized to order, or did order, the election as required by the statute.

P. W. Hardin and Finley Shuck for appellant.

SPRINGFIELD FIRE AND MARINE INS. CO. v. HEAVERIN.

Filed October 19, 1887. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. New trial—Section 342 of the Civil Code, before the amendment of May

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15, 1886, requiring that a motion for a new trial shall be made within three days after the verdict is rendered, except for the causes mentioned in subsection 7 of section 340, applies where the verdict is special as well as where it is general.

2. Insurance—The failure of an insurance company to deny that it, on its own investigation, refused to pay, is a waiver of the right to demand proof of loss, and to have a delay of sixty days in which the proof can be looked into.

3. Where appearance is entered merely for the purpose of contesting its jurisdiction, the court does not acquire jurisdiction by the act of appearing; but when the defendant appears generally, and does not restrict the appearance to the special purpose of disputing jurisdiction, the court acquires jurisdiction by the act of appearance, even if it did not have it by force of a service of summons.

Hill & McHenry and H. P. Taylor for appellant.

GEOGHEGAN v. BEELER.

Filed September 21, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. In order to prosecute an appeal upon a partial transcript the appellant must file his schedule in the clerk's office of the lower court within ninety days after the granting of the appeal, and where an appeal granted by the lower court is dismissed and a new appeal is granted by the clerk of this court a schedule filed upon the former appeal will not authorize the prosecution of the new appeal upon a partial transcript.

2. Where an appeal is prosecuted upon a partial transcript without a schedule and the transcript does not show affirmatively that the judgment must be erroneous, it will be presumed that it is correct, and it will be affirmed.

James E. Gaither and Richards & Hines for appellant; J. P. Hobson and S. H. Bush for appellee.

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KENTUCKY COURT OF APPEALS.

RAILEY, &c. v. MILAM.

(Filed September 29, 1887—Not to be reported.)

Construction of devise—Remainders—A devise of an estate to E. for life, and after her death "to be vested in and belong to" her daughter, created a vested remainder in the daughter of the life tenant. The words "to be vested in and belong to" were used by the testator to indicate the time when the daughter of the life tenant should have the possession, and not the time when, or the contingency upon which, the title should vest in her. Therefore, upon the death of the remainderman before her mother (the life tenant) the latter, as her heir-at-law, became invested with the fee.

M. O. Allen for appellants.

John G. Craddock for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Lewis.

In 1844 John Railey, having made a will, died leaving a widow, Elizabeth, two children, John W., Caroline E. Wilson, then a widow, and a grandchild, Elizabeth M. Wilson.

This action was brought by the children and heirs at law of John W. Railey, now dead, against W. E. Milam, second husband of Caroline E., also dead, to recover of him a tract of land mentioned in the will, and which he claims under a deed of conveyance by his wife.

Whether the plaintiffs are entitled to recover depends upon the construction of the will of John Railey, the fifth clause of which, bearing particularly upon the question, is as follows:

"'I give and bequeath unto my daughter, Caroline E. Wilson, the following slaves, to wit: * * * To have and to hold from and after the death or marriage of my wife, Elizabeth, for and during her natural life, and after her death to be vested in and belong to her daughter, Elizabeth M. Wilson. I also give and bequeath to her the tract of land on which I now live to be vested in her at the death of my wife, Elizabeth, and if she should marry that then she shall have and enjoy such part as

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may not be embraced in the sixty acres of cleared land and fifty acres of woodland to be set apart by my wife, Elizabeth, as aforesaid, for and during her natural life, and at her death the same to be vested in and belong to her daughter, Elizabeth M. Wilson."

To explain the apparent obscurity of the testator's meaning in regard to the land devised to his daughter for life, it is proper to state that in a previous clause of the will he devised his entire real estate to his wife during her life or widowhood, but restricted the quantity in case of her marriage to the sixty acres of cleared land and fifty acres of woodland mentioned.

It is contended for the plaintiffs that as Elizabeth M. Wilson, the granddaughter of the testator, died childless and intestate, upon the death of her mother the estate never vested in her, but fell back and became a part of the estate of John Railey, and the plaintiffs being, at the death of Caroline E. Milam, his only heirs, are now entitled to the land in dispute, notwithstanding her attempted conveyance of the fee simple title, under which the defendant, Milam, claims.

The simple inquiry thus presented is whether, according to a proper construction of the will, the interest devised to Elizabeth M. Wilson was a vested or contingent remainder. If the former, then at her death her mother, as heir at law, became invested with the fee, and the deed operated to pass the title to the defendant. If the latter, the plaintiffs, as the heirs at law of Caroline E. Milam, as well as of John Railey, are invested with the title.

"The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

Testing the question before us by that rule, which has been repeatedly applied by this court, it seems to us the interest which Elizabeth M. Wilson took under the will must be held a vested remainder unless the language used be regarded as explicitly and clearly indicating a different intention on the part of the testator, for she was, at the death of the testator, in being a determinate person, capable of taking upon the death of her mother, the life tenant, so that there was no uncertainty as to either the person appointed to take the interest in remainder nor as to the event upon which she was to take.

The case of Williamson v. Williamson, 18 B. M., 366, has no application to this case, for there the estate in remainder had been given to the heirs of the same person who was the devisee for life, and although if the estate had been given to the heirs of some other person than the life tenant the rule would have been applicable and the remainder contingent, as then held, it would have been so because of the uncertainty of there being heirs of such other person at the death of the life tenant, but in this case the devisee was in being and acquired the vested and transmissible right to enjoy the estate in remainder upon the death of the life tenant.

The language of the will is: "I give and bequeath to Caroline E. Wilson the tract of land to be vested in her at the death of my wife * * * for and during her natural life, and at her death the same to be vested in and belong to her daughter, Elizabeth M. Wilson."

The words "to be vested in and belong to" were, in our opinion, used by the testator to indicate the time when the grandchild should have the possession, and not when or the contingency upon which the title should vest in her.

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The same word "vest" is applied to the estate in remainder for life given to his daughter, and to the estate given his son which he provides "is to be vested in him" at the marriage or death of his, the testators,' wife.

We think the interest of the grandchild was a vested remainder, and at her death, which occurred after that of the testator, it passed to her mother, and consequently appellee, Milam, acquired under her deed a complete title.

Wherefore, the judgment is affirmed.

BUCHANNON v. COMMONWEALTH.

(Filed September 29, 1887.)

1. Drunkenness no excuse for crime—Drunkenness as a fact may be proved by the defendant in an indictment for murder as bearing upon the existence or nonexistence of malice, but not upon the ground that it in and of itself excuses or mitigates the crime.

In this case the court properly refused to allow a witness to state, without detailing the words, the acts, and behavior of the accused, that just before the killing he had not mind enough to know right from wrong or sufficient will power to control his actions, there being not even a pretext that he was insane, and it being evident that, if his mind was affected, it was the result of temporary intoxication. Nor should an instruction as to insanity have been given.

2. Instructions—It would not have been proper to have singled out from the evidence the one fact of drunkenness and told the jury why they were allowed to hear evidence as to it.

Wood & Day for appellant.

P. W. Hardin for appellee.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Holt.

The imposition of the death penalty in this case has led to a careful inspection of the record.

The performance of this unpleasant duty has, however, satisfied us beyond all question that the killing was not only inhuman, but utterly devoid of excuse.

The accused, without warning, cruelly shot down the deceased when he was performing neighborly and kindly acts for him.

Drunkenness, that by far the most fruitful source of crime in our State, was the cause of it. The wisdom of the common law held this to be no excuse. Our statute makes it an offense, and one crime should not privilege another. Intoxication often, indeed usually, excites the homicidal passions, and makes one hostis humani generis, and if it could serve to excuse or mitigate a greater offense it would be a shelter for the bad element in society, and an invitation to the commission of crime. Such a rule would endanger the very existence of the social fabric, and is forbidden by every consideration of public policy. Counsel earnestly urge two reasons for a reversal of the sentence: First, that the accused was not allowed to prove the condition of his mind at the time of the killing; and, second, because the court not only did not inform the jury why evidence of drunkenness was admitted, and failed to define manslaughter to them, but virtually told them that they must convict the accused of either

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murder or manslaughter, and yet in another instruction said to them if he did not know that the act was wrong, or did not have sufficient will power to refrain from doing it, that then they should acquit him upon the ground of insanity.

Without having the witness detail the words, acts and behavior of the accused, she was asked by his counsel whether at the time, or just before the killing, he had mind enough to know right from wrong, and sufficient will power to control his actions? This evidence, upon the facts of this case, was properly rejected. It is evident if his mind was affected that it was the result of his temporary intoxication. There is not even a pretext that he was insane. It clearly appears that he was not, but that his condition arose from his then voluntary drunkenness. Not only was the testimony, therefore, inadmissible, but the accused was not entitled to an instruction as to insanity and none should have been given, nor would it have been proper to have singled out from the evidence the one fact of drunkenness and told the jury why and for what purpose they were allowed to hear evidence as to it. Such testimony is incompetent, not because intoxication per se either excuses or mitigates crime, but because, in connection with other facts, an absence of malice may appear. A deliberate intent to toke life is an essential element of murder. Drunkenness as a fact may, therefore, be proven as bearing upon its existence or nonexistence. It is not admissible upon the ground that it, in and of itself, excuses or mitigates the crime, because one offense can not justify or palliate another, but because, under the circumstances of the case, it may tend to show that the less and not the greater offense was committed.

It may be said that to allow it to be proven, and yet deny that under the law it either excuses or mitigates the offense, involves an absurdity. Not at all. It is a sufficient reply to it to say that in some cases the offender, although intoxicated, may be guilty of murder, while in others he may be guilty of manslaughter only. The question depends upon all the circumstances of the case, and in connection with them evidence as to the condition of the accused at the time of the killing, whether intoxicated or not, should be permitted to go to the jury as bearing upon the question of malice.

In this case the jury were in substance told that they should find the accused guilty of murder if the killing was attended with deliberate malice, but of manslaughter only if done without malice.

It is not pretended that it was accidental or done in self-defense. If it were the testimony shows otherwise, and under the circumstances of the case there was no escape from a conviction for either murder or manslaughter, and the distinction between the two was sufficiently and properly indicated to the jury.

The protection of human life and public peace and safety dictate an adherence to the rule above indicated, and the views herein expressed in support of it are sustained by the case of Shannahan v. Commonwealth, 8 Bush, 464, to which we adhere.

Judgment affirmed.

SCALF v. COMMONWEALTH.

(Filed September 29, 1887—Not to be reported.)

Indictment—Misjoinder—Appellants were jointly indicted for willfully and maliciously shooting and wounding another with intent to kill, the indictment also charging them with conspiring together to commit the crime.

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The jury found them guilty of willful and malicious shooting with intent to kill. It is contended that an unlawful confederating to commit a felonious act and the crime of willful and malicious wounding are separate offenses, and can not be joined. Held—That the verdict of the jury renders a determination of this question unnecessary.

A. P. Settle for appellant.

P. W. Hardin for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Bennett.

The appellants were jointly indicted in the Jackson Circuit Court for unlawfully, willfully and maliciously shooting and wounding Felix Harrison with the intent to kill him. They were tried and convicted, and their punishment fixed at confinement in the State penitentiary for the term of three years each. The indictment also charged them with conspiring together to commit the crime.

From the evidence it is clear that the appellants are both guilty of the crime charged, and that they had no excuse whatever for committing it.

The appellant's counsel contends that the case should be reversed because the instructions given by the court were "too numerous and perplexing to present a clear view of the law to the jury."

There were only five instructions given, and each one of them related to a matter germane to the case, and each one fairly presented the law to the jury.

It is contended that an unlawful confederating to commit a felonious act and the crime of willful and malicious wounding are separate offenses, and can not be joined.

By the verdict of the jury an inquiry into that matter is rendered unnecessary because the appellants were convicted of the crime of willful and malicious shooting and wounding with intent to kill, and the proof is overwhelming that they did it.

The judgment of the lower court is affirmed.

DISNEY v. COMMONWEALTH.

(Filed September 29, 1887—Not to be reported.)

1. Criminal law—Arraignment—The court in a felony case may defer calling on the defendant to plead to the indictment until the jurors are selected, after which they are sworn to try the issue made by the plea.

2. Former jeopardy—Where the jury is selected and sworn and then discharged for the reason that it is discovered that the defendant has not pleaded, this will not constitute a bar to the further prosecution of the defendant.

3. Case—By an oversight the defendant was put upon his trial before he was required to plead. The court, discovering the oversight during the progress of the trial, called upon the defendant to plead, and, upon his refusal to do so, the court entered a plea for him and had the jury resworn, the defendant protesting. Held—That the rights of the defendant were not prejudiced by the action of the court.

H. C. Eversole for appellant.

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P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted in the Laurel Circuit Court for the murder of George Tetters. He was found guilty of the charge and his punishment fixed at confinement in the State penitentiary for life. The trial court overruled his motion for a new trial, and he has appealed to this court.

The jurors were selected and sworn to try the issue of guilty or not guilty, without the appellant having entered any plea to the indictment and without the court having called upon him to plead and without having arraigned him, or called upon him to waive the arraignment.

While matters stood thus one witness was examined for the Commonwealth and cross-examined by the appellant. Upon the conclusion of the examination of this witness the appellant moved the court to discharge him from custody upon the ground that he had been put upon trial illegally, and that the jury could not be reorganized and be put upon another trial because he had once been in jeopardy for the same crime. The court overruled the motion, but offered to discharge the jury with the appellant's consent, which he declined to give. Thereupon the court requested him to plead to the indictment, which he declined to do. The court then caused him to be arraigned, and the plea of not guilty entered for him, whereupon the jurors were resworn and the witness who had been examined was resworn and re-examined, and the case progressed to its conclusion.

The court in a felony case may defer calling on the defendant to plead to the indictment until the jurors are all selected, and then the clerk will arraign him and enter his plea, after which the jurors are sworn to try the issue made by the plea. Thus far the defendant can not complain because he has the perfect right to participate in the selection of the jurors that are to try him, and it is presumed, for there is nothing appearing to the contrary, that the appellant exercised that right, and that the jurors were of his own selection, but by an oversight the appellant was put upon his trial before he was required to plead. The oversight was discovered and corrected before the case had progressed far, by entering the appellant's plea and reswearing the jury. This was done, it is true, against his protest, but what right of his was prejudiced? The jurors had just been selected and chosen by him in the manner pointed out by law. His rights in that regard were in no manner abridged by the subsequent fact of putting him upon trial and progressing with the trial for a short time without his plea having been entered; he was deprived in fact of no right that he would have been entitled to in the progress of the trial had it been properly begun, therefore, it is clear, very clear, that his rights were not prejudiced by the action of the court, or was the appellant, by the facts above stated, put twice in jeopardy, for it is well settled that where the jury is selected and sworn, and then dischargd for the reason that it is discovered that the defendant has not pleaded, this will not constitute a bar. (United States v. Riley, 5 Blatch., 204.)

The evidence in the case is conclusive that the appellant cruelly and wantonly committed the murder with which he was charged, with scarcely a mitigating circumstance in his favor.

The judgment of the lower court is affirmed.

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FORWOOD, &c. v. FORWOOD, &c.

SAME v. SAME.

(Filed October 1, 1887.)

An antenuptial agreement whereby the woman relinquishes her right of dower and distributable share in her intended husband's estate is a legal contract, and the intended marriage alone is a sufficient consideration to uphold it.

In this case the charge of fraud and unfairness on the part of the husband in the procurement of such a contract is not established by the evidence, and the contract is enforced.

Wm. Lindsay, A. Duvall, James Harlan, S. M. Bernard and J. Barbour for appellants.

A. Burnett and C. B. Seymour for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

William H. Forwood died in Jefferson county in 1883. After his death his will was duly proven and admitted to record in the Jefferson County Court.

In 1884 the appellee, Nancy Elizabeth Forwood, as the widow of Wm. H. Forwood, deceased, instituted suit in the Louisville Law and Equity Court against the executors and devisees of William H. Forwood for the purpose of having his estate settled and her dower in the realty allotted, and her distributable share in the personalty set apart to her.

In the second paragraph of appellees' petition and the amendment thereto she discloses the fact that she and William H. Forwood were married in Shepherdsville, Bullitt county, Ky., on the 4th day of March, 1880. In that day, but before the marriage cermony was performed, she and William H. Forwood entered into a written marriage contract, by which it was agreed that she was to retain her right to all of the property that she then owned or might thereafter acquire; to contract and be contracted with in her own name; to sue and be sued in her own name, and that he was to have no right to any property that she then owned or might thereafter acquire, nor any interest therein, nor in anywise control the same. It was also agreed that she was to have no right to any property that he then owned or thereafter acquired, nor was she to have dower in any of his real estate after his death, nor any distributable share in his personal estate after his death.

She alleges in said second paragraph and amendment thereto that at the time said contract was signed and acknowledged by her she and William H. Forwood were already engaged to be married. "and the contract, while it was signed in contemplation of marriage, was not made in consideration of marriage, but that they had previously mutually agreed and promised to marry one another for the sole consideration of each other's promise to marry, and not for any other consideration whatever; that at the time of signing the contract William H. Forwood was a man of sixty years of age and of large business experience and skill, and owned about $70,000 worth of property, mostly real estate, and that she was only twenty-two years of age and of no business

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experience, and owned no property and had no expectation of inheritance, except from her father and mother, whose estate, which consisted of real estate, did not exceed $15,000 in value, to be divided among five children; that the contract was presented to her for her signature while they were on their way to Shepherdsville to be married, and that the same was signed and acknowledged by her after her arrival at Shepherdsville; that she and William H. Forwood, at the time said contract was signed, both resided in the city of Louisville, she residing with her father and mother; that he induced her to keep their intention to marry a secret from her family and friends, and to go with him to Shepherdsville and to be married there; that she had no acquaintances or friends in Bullitt county with whom she could consult about the propriety of signing the contract, and that William H. Forwood induced her to sign it without having any of her friends to consult except himself so that she could act intelligently and advisedly in reference to the propriety of signing the contract; that his conduct was planned and carried out with the intent to overreach her; that the contract was unreasonable, unfair, unjust, and was obtained by coercion and misrepresentation."

In order to settle the rights of the parties to this controversy it is first necessary to determine the nature of the antenuptial agreement made between the appellee and her husband, William H. Forwood.

At common law by the marriage the wife acquired the right to be endowed of one-third of the lands of which her husband was seized in fee at the time of marriage or during coverture.

There is a class of cases which hold that a woman can not, by antenuptial contract, legally dispose of her right to dower in her intended husband's lands because, first, she can not contract away or release a right before it has accrued; second, that no right or title to a freehold can be barred by a collateral satisfaction. This class of cases, therefore, holds that such a contract is not enforcible at law because it has no legal existence, but it is an executory equitable agreement which a court of equity will enforce a specific performance of as against the widow, provided the agreement is reasonable, fair and upon an adequate consideration; but if it appears that the agreement is unreasonable, unconscientious and without an adequate consideration, a court of equity will not enforce a specific performance of it. Such are the cases relied upon by counsel for the appellee.

There is another class of cases which hold that while such a contract is not binding at law because the parties can not contract away or release a right that does not exist, yet its enforcement does not rest upon the doctrine of specific performance, but the contract constitutes an equitable bar to the widow's right of dower. This class of cases does not regard an adequate consideration as essential to uphold the contract. Any valuable consideration is deemed sufficient.

The question involved in both of these classes of cases was that of a jointure or settlement upon the intended wife in lieu of her dower or distributable share in her intended husband's estate.

There is another class of cases that holds (and with which we agree) that an antenuptial contract is a legal contract, the consideration of which may be, first, that of the intended marriage alone, or, second, that of a jointure or settlement upon the intended wife in lieu of her dower or distributable share in her intended husband's estate, and that either of these considerations, if both parties are sui juris, is sufficient to uphold the antenuptial agreement on the part of the woman to relinquish her right of dower and distributable share in her intended husband's estate. By such a contract the parties do not in fact contract

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away a right that does not exist, but they do what is done every day—namely, provide a rule by agreement, to be applied to their property rights in view for the relation that they are about to enter into, instead of the rule that the law would furnish in the absence of the agreement. (Bishop on the Law of Married Women, volume 1, sections 418, 425 and 427.)

Also this court virtually held in the case of Crostwaight v. Hutchinson, 2 Bibb, 408, that an antenuptial contract which was not to take effect until after coverture was a legal contract.

To the same effect is the case of Mitchell's Adm'r v. Mitchell, 4 B. Mon., 380.

We have seen that marriage alone is sufficient consideration to uphold an anteuptial marriage contract.

Bishop (volume 1 on Married Women, section 775), says: "To say, therefore, that it is to be regarded, when it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth. What this utterance lacks is, in our books, not unfrequently expressed by the adjective highest, as marriage is the highest consideration known to the law."

In the case of Nail v. Maurer, 25 Md., 538, the court says: "The contract was in contemplation of marriage, and, as clearly appears, was intended to bar or prevent the acquisition thereby of any right by either party in the property of the other in order that the marriage proposed might take place. The main object in view was the consummation of the marriage, and it was to that end that the contract was executed. It seems almost impossible to view the contract as founded on any other consideration, although the reciprocal character of the stipulations might be held to constitute one sufficient to make the contract binding and effective, but whether the marriage they proposed be expressly mentioned as a consideration or not we think it must be regarded as such within the purview and meaning of the contract."

The consideration of marriage is not only regarded as sufficient to uphold an antenuptial marriage contract, but the consideration may be regarded by the woman as of inestimable value to her—a value that would by far outweigh her property rights in the estate of her intended husband.

The appellee's marriage contract with her husband, William H. Forwood, therefore, must stand unless he overreached and defrauded her in the making of it.

The allegations of the second paragraph of her answer and the amendment thereto, of which we have given the full substance, were denied, except the allegations that the marriage agreement filed with the appellee's answer was signed and acknowledgd by her on the day of her marriage, and that she and William H. Forwood lived in Louisville and went to Shepherdsville to get married, and not one of the allegations denied was proven.

If it appeared that the appellee was inveigled into making this contract by unfair means, such as taking advantage of her ignorance, her affections are concealing the truth from her, we would not hesitate to set it aside as a fraud upon her, but such a state of case does not appear. On the contrary she does not allege that she did not know the nature and legal effect of the contract, or does she allege that she did not make it freely and voluntarily. It is true she says that when she signed the contract she was deprived of the advice of her friends as to the propriety of making it. This may be true, but she does not allege that she desired the advice of her friends, or that her purpose would have been changed by their advice. In addition to her failure to deny that she signed the contract with a full knowledge of its scope and legal meaning it is clear that she understood its meaning, for the

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proof is clear that she was a woman of intelligence and possessed a clear and cool judgment; that she knew that her intended husband was a man of reputed wealth; that some three years after the marriage she, by a solemn writing, drawn by herself, stipulated that she was not entitled to dower in her husband's real estate because she had relinquished the same by antenuptial marriage contract; also the preponderance of the evidence shows that several days before the marriage a written marriage contract, which embodied the same terms as the one under consideration, was agreed on and signed by the appellee and William H. Forwood.

For these reasons we conclude that the appellee made and signed the contract in question with a full understanding of its scope and legal effect, and that she signed it freely and willingly, and was not overreached or defrauded by William H. Forwood.

We are also of the opinion that the marriage agreement was a sufficient consideration to uphold this antenuptial contract, and that the appellee is not entitled to dower or distributable share in William H. Forwood's estate.

The judgment of the lower court, to the extent that it set aside this contract, was final, and the appellants had the right to appeal from it.

The judgment of the lower court setting aside the marriage contract is reversed, and the case is remanded for further proceedings consistent with this opinion.

HAMLET v. COMMONWEALTH.

(Filed October 1, 1887—Not to be reported.)

1. Reversible errors—A judgment of conviction can be reversed only for an error of law which, upon a consideration of the whole case, appears to have prejudiced the substantial rights of the accused.
2. It was not necessary to define to the jury the word "feloniously" as used in an instruction telling them that, in order to convict of larceny, they must believe that the defendant "did feloniously steal, take and carry away" the property he was charged with stealing.
3. All the instructions must be considered together in determining whether or not there was error in any one of them.

Thos. E. Moss for appellant.

P. W. Hardin for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Holt.

It was the province of the jury to judge of the weight of the testimony. This court will not reverse a verdict in a criminal case upon the ground that it is unsustained by the evidence.

Section 334 of the Criminal Code authorizes a reversal of a judgment of conviction only for any error of law which, upon a consideration of the whole case, appears to have prejudiced the substantial rights of the accused.

It was not made a ground for a new trial that the giving of instructions one and three was error. It is true it is not necessary, in the grounds for a new trial, to identify each instruction objected to, but in this instance the failure of the court to give two instructions asked by the accused is specifically named as

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a ground for a new trial, and this is the only objection to the instructions named in the grounds for a new trial, save that the court failed to give the whole law of the case. Waiving the question, however, whether this precludes the appellant from now questioning the instructions given in the case, we will consider them.

The jury were told in the first one that if they believed from the evidence, to the exclusion of a reasonable doubt, that the accused, before the finding of the indictment and in McCracken county, "did feloniously steal, take and carry away" the property, they should find him guilty. It is urged that the use of the word "feloniously" renders the instruction objectionable, inasmuch as its meaning was not explained to the jury. It is true that in pleading this word is a technical one, but as used in this instruction we do not see how the jury could have been misled by it, or have failed to understand its meaning.

As well might it be claimed that the word "maliciously," as used in an instruction relating to murder, must be explained to the jury. Moreover, the word, as here used, was calculated to aid the accused.

It is also insisted that the third instruction given by the court, and the one also given, but at the instance of the appellant, and identified by the letter "A," are inconsistent and conflicting. The latter was given upon the hypothesis that a state of case, attempted to be shown by the accused as a defense, might be true, and to enable the jury to pass upon it, the former, upon another state of fact also attempted to be presented by him in his defense, there being some evidence tending to support each of them, both were, however, as much in his favor as he had a right to ask, and when all the instructions are considered together, as they must be, we fail to perceive any error authorizing a reversal.

Judgment affirmed.

JOHNSON v. COMMONWEALTH.

(Filed October 1, 1887.)

The offense of bigamy consists in the act of marrying again while the wife by a former marriage is still alive and the former contract of marriage is still in force, and where that act is committed in another State the courts of this State have no jurisdiction of the offense.

C. W. Lester for appellant.

P. W. Hardin for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

The offense of which appellant has been convicted is bigamy, alleged in the indictment to have been committed July 31, 1886, by becoming married in the State of Tennessee, having previously married another in this State, who was at the time and still is alive, and the marriage with whom had never been annulled or adjudgd to be void.

The offense of bigamy is committed by the act of marrying one woman while the wife by a former marriage is still alive, and the first contract of marriage is still in force. That act, as stated in the indictment, was committed in the State of Tennessee, and to

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try and punish it the courts thereof alone, at the common law, have jurisdiction. (1 Hawkins, Pleas of Crown, 686, section 7.)

In some of the States it is by statute made punishable for a person who, being married, shall marry another person, the former husband or wife then living, or continue to cohabit with such second husband or wife without regard to the State or country where such second marriage may have been contracted, but in this State the legislature has never enacted such statute, and consequently the offense consists alone of the second marriage, and like any other criminal act must transpire here in order to be subject to indictment and punishment by the courts of this State.

It seems to us the lower court erred in overruling the demurrer to the indictment, and the judgment of conviction must be reversed and cause remanded.

SULLIVAN v. COMMONWEALTH.

(Filed October 1, 1887—Not to be reported.)

Under an indictment for robbery the accused may be found guilty of simple larceny.

Jas. H. Mulligan for appellant.

P. W. Hardin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and two others were indicted in the Fayette Circuit Court for robbing R. C. Drake of his money. The appellant alone was put upon trial, and the jury found him guilty of the charge and fixed his punishment at confinement in the State penitentiary for the term of three years. His motion for a new trial having been overruled by the trial court, he has appealed to this court.

As there is no brief in the case for the appellant, we are at a loss to know upon what grounds he relies for a reversal of the case.

The evidence of R. C. Drake is clear and to the point that the appellant and two others robbed him of his money, and his evidence, notwithstanding the evidence in behalf of the appellant to the contrary, was, in the opinion of the jury, decisive of the appellant's guilt.

The court gave the jury two instructions, one in reference to the crime of robbery, and one in reference to the crime of grand larceny. Each instruction correctly presented the law to the jury, so there can be no reversal on the ground of erroneous instructions.

If it is supposed that the court erred by instructing the jury that if they found the appellant not guilty of robbery, but guilty of larceny, they should find him guilty of that crime, then it is settled that robbery is larceny, accompanied with the aggravating circumstances of taking the goods from the owner by force, or by putting him in fear, and that under an indictment for robbery the accused may be found guilty of larceny—the lower degree of the crime. (Commonwealth v. Perry Prewitt, 82 Ky., 240.)

We discover no error in the record prejudicial to the rights of the appellant.

The judgment of the lower court is affirmed.

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HOUSTON v. DUCKER, &c.

(Filed October 4, 1887.

Rule against clerk to furnish transcript—The court will not, even if it has power to do so, require the clerk of a circuit court to furnish a transcript of a record to the appellant except upon payment of his fee therefor where it appears that the appeal was improperly granted by the clerk of this court more than two years after the right to appeal first accrued, and that the transcript, even if furnished, will not avail the appellant, or give to this court jurisdiction of the case.

A. Duvall, W. J. Perrin and C. H. Lee for appellant.

Leslie T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Lewis.

At the April term, 1883, of the Pendleton Circuit Court, verdict and judgment were rendered against the appellant in an action in which he was plaintiff, but the motion for a new trial duly made by him was not acted on until the November term, 1883, when judgment was entered overruling it, from which he prayed an appeal to the Court of Appeals.

At the same term he tendered a bill of evidence and exceptions, but from some unexplained cause it was not signed by the judge and made part of the record until the April term, 1885.

August 17, 1886, a memorandum was filed with the clerk in which he was directed to copy the judgment rendered at the April term, 1883, and all the subsequent orders made in the case, which was done, and that copy being filed in the office of the clerk of the Court of Appeals August 20, 1886, an appeal was granted by him.

September 5, 1887, the appellant, upon grounds filed, made a motion in the Court of Appeals for a rule against the clerk of the Pendleton Circuit Court to show cause why he had not made out a transcript of the record of the case and delivered it to the appellant as demanded of him. To that rule the clerk has responded in substance that a copy of the judgment was not filed with the clerk of the court for more than two years after appellant's right to appeal first accrued, and there is no appeal pending in this court, and for that reason he moves this court to set aside the order awarding the rule against him.

In the case of Collins v. Cleveland, 17 B. M., 459, it was held that "it is the duty of the clerk to make out a transcript for the unsuccessful litigant in the circuit court without previously demanding payment or security for the fee." And in Bates, &c. v. Foree, &c., it was held that "It is part of the official duties of the clerk to make out complete and perfect transcripts of record for parties litigant, and the law has defined and regulated his fees therefor."

In the case of Duncan v. Baker, 13 Bush, 514, this court said: "We entertain no doubt of the power of this court to compel clerks of courts to make out and deliver to unsuccessful litigants in such courts transcripts of the records of cases over the judgments in which we have jurisdiction without the payment or security for the payment of the fees therefor," but it was in that case distinctly intimated that this court was not bound in every such case to exercise that power without regard to the facts and circumstances which have led to the application for its exercise, and it appearing the appellant, though legally insolvent, was

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able to pay for the transcript and refused to do so only because, as he assumed, he had the legal right to the services of the clerk without paying him therefor, before the delivery of the transcript, the rule was refused, the court using this language: "We will not aid him by summary process to enforce his legal right, but will leave him his legal remedy in the courts of original jurisdiction, where any grievance he may have can be adequately redressed."

Section 745, Civil Code, provides that an appeal shall not be granted except within two years next after the right to appeal first accrued unless the party applying therefor was then a defendant in the action and an infant, not under coverture, or of unsound mind, or a prisoner who did not appear by his attorney, in which cases an appeal may be granted to such parties or their representatives within one year after their deaths, or the removal of their disabilities, which ever may first happen."

In this case the appeal was granted by the lower court at its November term, 1883, but no transcript was filed in the office of the clerk of the Court of Appeals twenty days before the first day of the second term of said court next thereafter, as required by section 738, nor was a copy of the judgment filed in the office of the clerk of the Court of Appeals, and an appeal granted by him until August, 1886, more than two years after the right of appeal first accrued, nor has there been a motion made in the Court of Appeals to extend the time of filing the transcript, which might have been granted in view of the delay of the lower court to sign and make the bill of exceptions part of the record, which was, however, done before the expiration of two years.

The language of the Code is plain that an appeal shall not be granted except within two years next after the right to appeal first accrued, and as the appellant was the plaintiff in the action the saving clause of section 745 does not apply to him, and consequently the appeal was improperly granted to him August 20, 1886.

In the application for the rule against the clerk, made by the appellant September 5, 1887, more than a year after the appeal was granted by the clerk of this court, it was not stated that two years had expired when the appeal was granted, but simply that a copy of the judgment had been filed "sometime last summer," which was not true, and the clerk had failed and refused to make out a transcript of the record in the case.

In the response by the clerk the attention of this court has been for the first time called to the date when the right to appeal first accrued, and to the fact the appeal was improperly granted, and although the refusal of the clerk to furnish the transcript is not placed upon the ground that appellant did not tender him the legal fee for his services, but upon the ground the time had expired within which he had the right to prosecute the appeal, still we think he has presented a state of case where he has the right to require the payment of his fees before furnishing the transcript, and as it does not appear, nor is stated by appellant, he has offered to pay the clerk for his services, we are satisfied this court, even if it had the power to do so, should not enforce the rule which might invoke fine and imprisonment, but leave appellant to seek redress for any wrong done him by suit upon the official bond of the clerk, for, as the record before us stands, a transcript, even if furnished, would not avail him or give to this court jurisdiction of the case.

The rule against the clerk is, therefore, discharged.

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HAMPTON v. BAILEY, &c.

(Filed October 4, 1887—Not to be reported.)

1. Depositions—It is too late to object for the first time in this court that the deposition of a party to the action is incompetent because he took other depositions in his behalf before he gave his own. The deposition having been read on the trial without objection or exception, it will not be considered on appeal.
2. Limitation—Neither the fifteen nor the thirty years' statute of limitation applies to an action by "a vendee of real property, in possession thereof, to obtain a conveyance."
3. The thirty years' statute of limitation need not be formally pleaded where the petition shows that thirty years has intervened between the time of the accrual of the right of action and the bringing of the suit. The court will apply the statute upon demurrer to the petition.

J. L. Scott and H. B. Hampton for appellant.

S. B. Dishman for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Bennett.

The appellees instituted suit in the Harlan Circuit Court against the appellant for the purpose of compelling him to execute a deed to thirteen hundred acres of land lying in Harlan county, pursuant to a title bond, which the appellees alleged that the appellant executed to the appellee, D. S. Lyton, by which he covenanted to convey to Lyton said land. It is also alleged that Lyton sold said land to the appellee, Bailey, and it was sought to have the title made to him. It is also alleged that the bond was lost, and, therefore, could not be filed.

The appellant denied that he sold to appellee, Lyton, the land in controversy, or that he executed a bond for a title to it.

The lower court rendered judgment sustaining the appellees' contention, and directed its commissioner to convey the land, etc.

The appellant, Hampton, has appealed to this court.

The appellee, Lyton, gave his deposition in the case after he had taken the depositions of two other witnesses in his behalf. On the motion of the appellant these depositions were all suppressed. They were afterwards retaken by the appellee, Lyton. His was taken first.

The appellant now contends that by reason of Lyton having taken depositions in his behalf before he gave his own, notwithstanding they were all suppressed on his motion, the last deposition of Lyton, although taken before he retook the depositions of his other witnesses, is incompetent. The record shows that Lyton's last deposition was read without objection or exception, and it is too late to raise the question here for the first time.

It is also contended that the statute of fifteen and thirty years' limitation bar the appellees' right of action.

The appellant failed to plead either statute as a bar to appellees' action, but rested his defense on the merits of the case, to wit: Contract or no contract, bond or no bond. If, however, the thirty years' statute applied to this case, and the petition showed that thirty years had intervened between the time of the accrual of the right of action and the bringing of the suit, the court, as has been often decided, would apply the statute upon demurrer without a formal plea in bar, but neither the statute of fifteen

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years nor the statute of thirty years' limitation applies to this case.

Section 20, chapter 71 of the General Statutes provides: "The provisions of this chapter shall not apply in the case of a continuing trust, nor to an action by a vendee of real property in the possession thereof, to obtain a conveyance."

The fifteen years and thirty years' statutes of limitations are in chapter 71, and precede the section quoted above.

The proof is clearly sufficient to justify the chancellor in holding that the appellees were in the possession of the land in controversy.

The appellee, Lyton, swears positively that he bought the land from the appellant by title bond and paid him for it. Another witness, the county judge of Lee county, Va., swears that he drew up the bond, and that it included the appellant's land in Harlan county. Another witness swears that he was present at the time the contract was made, and that the Harlan county land was included. Other witnesses swear that they heard the appellant say that he had sold to the appellee, Lyton, all his lands in Harlan county. It also appears that the appellee, Lyton, paid taxes on the land for years, and held possession of it, and that the appellant did not pay taxes on it. These are corroborative facts under the circumstances of this case.

On the other hand the appellant swears positively that he did not sell to the appellee these lands; that the bond that he executed to the appellee, Lyton, related alone to a tract of land in Lee county, Va. Witnesses also swear that they were present at the time the bond was drawn up, and that the Kentucky lands, according to their best recollection, were not included.

But from all the circumstances in the case we are inclined to the opinion that the judgment of the lower court is in accordance with the weight of the evidence.

The judgment is affirmed.

NORTON'S ADM'R v. MARKSBERRY.

(Filed October 4, 1887—Not to be reported.)

1. Jurisdiction—C. was appointed by the Grant Circuit Court as administrator of G., and made his final settlement with that court. He afterwards died resident in Pendleton county, and his widow qualified in that county as his administrator. Each of the several distributees of the estate of G. then brought his separate action in the Grant Circuit Court against the administrator and heirs of C. to recover his share of the amount shown by C.'s settlement to be due. Defense was made without objection to the jurisdiction, and judgments rendered in favor of the several plaintiffs. Held—That as the Grant Circuit Court had general jurisdiction of the subject-matter the judgments are valid, although a serious question might have arisen, if it had been made, as to whether the Grant Circuit Court or the Pendleton Circuit Court had jurisdiction of the actions.

2. Action by distributees—An administrator by his settlement with the county court, which was final, became liable to an action by each distributee for his share of the amount reported in the settlement.

3. Limitation—A judgment having been rendered against the administrator and children of a decedent to be levied of the assets in the hands of the administrator, and, if not satisfied out of the assets, then to be levied on the estate in the hands of the children descended from their father, a subsequent action against the widow and children to subject real estate descended to the children to the satisfaction of the judgment was not barred by limita-

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tion, only three years having intervened between the rendition of judgment in the former action and the institution of the latter.

W. J. Perrin and C. H. Lee for appellant.

Collins & Fenley and J. T. Simon for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bennett.

In 1860 the Grant County Court appointed C. J. Norton administrator of Geo. Norton, deceased.

On the 9th day of January, 1864, C. J. Norton made a settlement of his accounts as administrator before W. T. Simmons, a commissioner appointed by the Grant County Court. The commissioner reported the settlement to the court, and after it had remained open for exceptions the usual length of time it was confirmed by the court. By this settlement C. J. Norton was found to be indebted to the estate of Geo. Norton in the sum of $1,307.56

Shortly after this settlement C. J. Norton died intestate, a resident of Pendleton county, Ky., and in 1865 the Pendleton County Court appointed his wife, Hanna Norton, administrator of his estate.

The children of Geo. Norton were twelve in number, C. J. Norton being one of them. The interest of each of them in the $1,307.56 reported in said settlement amounted to $108.63.

On the 7th day of April, 1877, each of the appellees, as the children and heirs of Geo. Norton, instituted a suit in the Grant Circuit Court against Hannah Norton, as the administrator of C. J. Norton, and the children of C. J. Norton and their statutory guardian, Hannah Norton. In each suit the plaintiff sought to recover judgment against the defendants for the sum of $108.63, together with interest thereon from the date of the settlement. The defendants, Hannah Norton, as the administrator of C. J. Norton, and the children of C. J. Norton, by their statutory guardian, Hannah Norton, appeared and filed an answer to each suit controverting the plaintiff's right of recovery.

On the 7th day of December, 1878, the cases coming to a trial, the circuit court rendered judgment against the defendants in each case for the sum of $198.86, the amount of the principal and interest thereon down to that date, and costs. The judgment in each case was to be levied, first, of the assets in the hands of the administrator; and, second, if not satisfied out of the assets, then to be levied on the estate in the hands of the children, descended from C. J. Norton.

Execution was issued on each judgment, and returned "no property found."

In 1881 the appellees, who recovered said judgments, instituted suit in the Pendleton Chancery Court against Hannah Norton as the administrator of C. J. Norton and his children—the same persons against whom the judgments were rendered—for the purpose, among other things, of subjecting a tract of land which the children inherited from C. J. Norton to the satisfaction of said judgments. The lower court adjudged the sale of the tract of land which C. J. Norton's children inherited from him, and which they then owned, to satisfy said judgments. They have appealed to this court.

The Grant Circuit Court had general jurisdiction of the amount claimed in each of the above-mentioned actions.

C. J. Norton, by his settlement (which was final) with the

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county court, became liable to an action by each distributee for his share of the amount reported in the settlement.

And by virtue of section 66 of the Civil Code of Practice it is clear that the Grant Circuit Court, had C. J. Norton been alive, would have had jurisdiction of the action against him, although he at the time lived in Pendleton county.

But C. J. Norton having died in Pendleton county—the county of his residence—and Hannah Norton having qualified therein as his administratrix before the appellee's actions were brought, a serious question might have arisen, had been made, as to which circuit court—the Grant or Pendleton—had jurisdiction, but the question was not raised. On the contrary, Hannah Norton, as administratrix, and the children, through her as their statutory guardian, appeared in each action and contested the plaintiff's right to recover upon the merits, and sought counter relief by cross action.

As before stated the Grant Circuit Court had general jurisdiction of the subject of the actions, and if Hannah Norton, as administratrix, and the children, had the right to have said actions localized as a personal right under the provisions of the Code, they certainly had the right to waive, and did waive, that right by appearing without objection and defending the actions upon their merits, and seeking personal relief by cross actions. Therefore, the judgments rendered in these actions are valid.

The statute of limitation relied on by the appellants does not bar the appellee's action as against the children of C. J. Norton, because personal judgment was rendered against them in the actions above mentioned, and the time intervening between the rendition of these judgments and the institution of the present action is not sufficient to constitute a bar to the latter action, but it is contended that there is no proof that the Grant County Court appointed Simmons to make the settlement with C. J. Norton. It is a sufficient answer to this contention to say that the appellants, in their answers to the actions in the Grant Circuit Court, expressly admitted that Simmons was appointed by the Grant County Court to make the settlement, and that the same had been approved by that court and that it was correct.

It is also contended that the appellee's claims were not sufficiently proven. We think they were.

Hannah Norton having died during the pendency of the present action, the appellant, T. N. Norton, her administrator, was made defendant, but no judgment was rendered against him as administrator, so he has no right to complain of the want of proof of the appellee's claim, and as against the other appellants the claim was sufficiently proven.

As to the cross appeal by the appellees we think the lower court committed no error to their prejudice.

The judgment of the lower court is affirmed on the appeal and cross appeal.

JONES v. DEAN.

(Filed October 6, 1887—Not to be reported.)

1. Void patents—In this action of ejectment by appellee against appellant, as it appears that the patent under which appellee claims is older than that under which appellant claims, appellant's patent is void, and affords him no protection whatever.

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2. Boundary—In determining the true location of a line the testimony of witnesses who have known the land for many years and have been familiar with the line all that time, both by tradition and personal observation, is entitled to more weight than the opinion of the surveyors who surveyed the land under order of court in this action.

N. McC. Mercer and David R. Murray for appellant.

Kincheloe & Eskridge for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, Henry R. Dean, instituted an action of ejectment in the Breckinridge Circuit Court against the appellant, W. W. Jones, and others.

By the issue joined the controversy involves the right of the appellee to the strip of ground lying between two parallel lines, which are designated on the surveyor's plat as line "G" and "N" and line "F" and "A." The line "G" and "N" is called by the witnesses the upper line, and the line "F" and "A" is called the lower line.

The appellee claims that this strip of land is a part of a survey of over three thousand acres, patented by the Commonwealth to Sampson Matthews. He claims to be the owner by title regularly derived from the patentee of over eight hundred acres of this survey, and that the strip of land in controversy is a part of it. He also claims title to said land by possession.

The appellant contends that the line "G" and "N," or the upper line, is not the line to the Matthews survey, but that the line "F" and "A," or the lower line, is the true line to the Matthews survey, and that he owns the intervening strip by virtue of a patent which was issued by the Commonwealth to John L. Wheatley in 1872 (of which he is the assignee), for one hundred and eighty-eight acres of land, which patent covers the land in controversy. Appellant also contends that if this patent does not invest him with title to the strip of land, then the same is covered by a patent which issued from the Commonwealth to ——— Fitzhugh for over three thousand acres of land, under which he proposes to shelter himself for the purpose of defeating the appellee's right to recover. The lower court adjudged that the appellee was the owner of this strip of land, and entitled to the possession of it. The appellants' codefedants abided the judgment of the lower court, but he has appealed to this court.

The Matthews patent, under which the appellee claims, is older than the Fitzhugh patent, and both are older than the patent under which the appellant claims, and one or the other of the older patents certainly covers the land in controversy. It follows, therefore, that the patent under which the appellant claims is void, and affords him no protection whatever.

The question then arises: First. Is the line "G" and "N" the Matthews line? Second. Does the appellee own the land claimed by him up to that line? If both of these questions are answered in the affirmative the judgment of the lower court must stand.

It is shown by a number of witnesses that they have been acquainted with the line in controversy a great many years. One witness goes as far back as 1837. He swears that he then knew the line "G" and "N" as the Matthews line; that the line was indicated by trees marked as corner trees and line trees, and

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that the corner trees are now standing; that he assisted in running the line. Other witnesses swear that they saw the line "G" and "N" run as the Matthews line as far back as 1842 or 1843, and it was a well-marked line by both corner and line trees. Another witness swears that he surveyed the line "G" and "N' over twenty years ago as the Matthews line, and that it was then an anciently-marked line.

It is almost conclusively established by the evidence that the appellee and those under whom he claims, have owned the land claimed by the appellant for more than thirty years, and that he and those under whom he claims have been in the actual possession of it during all that time, and that they owned and claimed to the line "G" and "N," and that the strip of land in controversy is a part of it, and there is no pretense that the appellant and those under whom he claims have acquired any right to the land in controversy by adverse possession.

It is true that the surveyors who surveyed the strip of land in controversy, under the order of court in this case, give it as their opinion that the line "F" and "A" is the true Matthews line, but we think that the evidence of the other witnesses, who have known the land for so many years and have been familiar with the line "G" and "N" as the Matthews line all of the time, both by tradition and personal observation, is entitled to more weight than the opinion of these surveyors.

The judgment of the lower court is affirmed.

MANNING v. ANCIENT ORDER OF UNITED WORKMEN.

(Filed October 6, 1887.)

Benefit societies—Change of beneficiary—A provision in the charter of a benefit society, to the effect that a new direction as to the payment of a beneficiary certificate shall be valid only when made in a certain way, is for the protection of the society, and does not govern as between claimants to the benefit. Therefore, if the society chooses to waive the failure to comply with that provision and pay the fund to the new beneficiary named, it may do so, although the change of beneficiary was not made as required by the charter.

Guy C. Sibley and Richards & Hines for appellant.

B. F. Camp for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Holt.

The appellee, The Ancient Order of United Workmen, issued to Robert K. Manning through its supreme lodge on January 18, 1879, a certificate of membership as a master workman, entitling him to an interest in its beneficiary fund to the extent of $2,000, it, by the terms of the certificate, to be paid at his death to his brother, the appellant, Delly J. Manning.

By the regulations of the order this insurance was obtained through the subordinate lodge. The certificate was sent to it for the insured, but for some reason not disclosed by the record he left it in its charge.

He was then unmarried, but remained so but a short time, and

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before June 5, 1879, united his fortune in life with that of Josie A. Brown.

At the date last named, and when living distant from his subordinate lodge, he wrote to one of its officers, known as its "financier," as follows:

"Please find enclosed my dues of lodge No. 2, A. O. U. W., $3, and in return please send my policy made out to Mrs. Josie A. Manning, and oblige very respectfully, etc..

"R. K. MANNING."

He was killed on July 25, 1879.

The law of the order provides: "Any member holding a beneficiary certificate desiring at any time to make a new direction as to its payment may do so by authorizing such change in writing on the back of his certificate in the form prescribed (see form No. 6), attested by the recorder, with the seal of the lodge attached, and by the payment to the supreme grand lodge of the sum of fifty cents, but no change of direction shall be valid or have any binding force or effect until said change shall have been reported to the supreme or grand recorder, the old certificate, if practicable, filed with him, and a new beneficiary certificate issued thereon, and the said new beneficiary certificate shall be numbered the same as the old certificate."

The above quoted letter was referred by the "financier" of the lodge to its recorder, and the fee of fifty cents above named not having been forwarded by the insured with the direction to change the beneficiary in his policy, the last-named officer wrote to him requesting him to furnish it. His death probably prevented his doing so. In any event it was not done, and nothing further appears to have been done in the matter prior to Manning's death. After it occurred the recorder of the subordinate lodge certified the letter to the grand lodge of the State of Kansas, it then having power to issue beneficiary certificates, with an endorsement of its genuineness, and it issued a new certificate, payable to Josie A. Manning.

It is dated July 10, 1879, and countersigned July 12, 1879, but in fact it was not issued until after Manning's death, and on September 16, 1879.

Shortly afterward the benefit was paid to the widow.

The appellee now sues for the fund, claiming that it was paid to the widow without authority, and that in point of fact no change in the beneficiary was ever made.

It is shown that the appellee paid the insurance to the widow shortly after the issual of the new certificate. It evidently did so in good faith, and without any notice of any claim to it by the appellant.

It is evident that the first object of the beneficiary feature of the order is to aid the family of the assured. The claim of the widow should not, therefore, be viewed with disfavor. He may, however, direct the benefit to be paid to any person whom he may name.

The appellee's charter says:

"Such beneficiary fund as the corporation may deem suitable and proper may be set apart and provided to be paid over to the families of deceased members, or to such persons as such deceased members may, while living, direct."

It is a rule of the law of insurance that when a policy is issued the right to the benefit at once vests in the beneficiary. The person procuring the insurance has subsequently no power over it. The policy and the money to be paid upon it belong, the moment it is isued, to the person named in it as the beneficiary.

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This rule, in the absence of anything in their charters, applies to mutual benefit associations like the appellee. (Weisert, &c. v. Muehl, 81 Ky., 336.)

The organic law of the appellee, however, allows the assured to change the direction of the benefit. The only question presented, therefore, is whether the letter supra so operated.

The appellant had but a contingent right to the benefit—not a vested and absolute one. It was subject to be defeated at the will of the assured. The law of the order above cited provides how this shall be done. The regulation is a reasonable one, but the question arises whether it shall govern, as between claimants to the benefit, if the order has seen fit to waive it. We think not. Its object, beyond a doubt, was to prevent the appellee from becoming involved in litigation with outside claimants. Upon this idea it was held, in the case of the National Mutual Aid Societyv. Lupold, 101 Pa. St., 111, that where the certificate provided: "This certificate may be assigned and transferred only by and with the consent of the association endorsed thereon," and it was done without such approval, that it was a part of the contract, and that the society had a right to insist upon the protection which it was intended to afford.

The direction by the insured to change the benefit was, in the case now under consideration, given through the proper channel. The subordinate lodge referred it to the proper authority, and it saw fit to waive the regulations, intended for its benefit, and comply with the direction, although made in an informal manner and without the payment of the fee.

The intention of the assured was to change the benefit. He so directed in writing, and now because he did not do so in the formal manner prescribed by the law for the benefit of the order it is asked by a third party, whose interest in the insurance was liable to end at any time, at the will of the assured, that his intention shall be defeated, although the party for whose benefit the form was prescribed has seen proper to waive it.

Such a rule would sacrifice substantial justice to mere form. It would tend to defeat the benevolent aim and purpose of the organization and the desire and intention of the assured.

Members of the order may be remote from their lodge; they may not have their certificate with them, and, therefore, be unable to make the endorsement thereon as directed, or to have it attested by the recorder of their lodge, or its seal attached thereto. If the appellee chooses to waive these formalities it does not lie in the mouth of a third party to complain. The order is entitled to know who is entitled to the benefit fund, and the formal mode of changing its direction is for its benefit, while upon the other hand the right of the beneficiary rests in the mere will of the assured.

It has been repeatedly held that a transfer of the stock of a corporation is valid as to the parties to the transfer, although not made upon the books of the corporation as required by its charter or by-laws, provided it be done in any mode known to the law for the transfer of like personal property.

In our opinion the letter of June 5, 1879, operated to change the direction of the benefit; inasmuch as the appellee saw fit to waive its informality, and as the assured had, therefore, done all that was needed on his part, the fact that the appellee issued the new certificate after his death does not affect the right of the parties.

If the appellee were in court with the fund asking that the conflicting rights of claimants to it be determined, and was

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silent as to the informality of the direction to change the benefit, it seems to us that the widow ought to prevail.

Judgment affirmed.

LOGSDEN v. COMMONWEALTH.

(Filed October 8, 1887—Not to be reported.)

1. Reversible errors—There can be no reversal for error in an instruction to which there was neither objection nor exception.
2. Error in overruling a motion for a new trial is not ground for reversal.
3. Same—The court has no power to reverse a judgment of conviction for any error unless upon a consideration of the whole record it is satisfied that the substantial rights of the accused have been thereby prejudiced.

Upon the trial of appellant for an offense for which the punishment prescribed by the statute is confinement in the penitentiary for not less than five nor more than twenty years, the court instructed the jury if they found him guilty to fix his punishment at confinement in the penitentiary for not less than two nor more than ten years. There was neither objection nor exception to the instruction. The jury fixed the confinement at two years. Held—That the error in the instruction was not prejudicial and would not authorize a reversal, even if it had been objected and excepted to.

H. C. Martin for appellant.

P. W. Hardin for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Holt.

Section 4 of article 4, chapter 29 of the General Statutes, provides:

"Whoever shall attempt to commit a rape upon the body of an infant under twelve years of age shall be confined in the penitentiary not less than five nor more than twenty years."

Upon the trial of the accused upon an indictment based upon this provision of the statute the jury were instructed that if they found him guilty "they should fix his punishment in the penitentiary for not less than two nor more than ten years." They fixed it at two years.

It is now urged that there is no statute to support such conviction, and that the punishment inflicted is unauthorized by law.

Undoubtedly the instruction was erroneous, and the verdict also objectionable. The trial judge has, of course, no power or right to authorize a punishment different from that prescribed by law.

Section 19, article 1, chapter 29 of the General Statutes says:

"The jury by whom an offender is tried shall fix by their verdict the punishment to be inflicted within the periods or amounts prescribed by law."

There is not, however, in this record a single objection or exception by the accused to any action of the lower court, save in overruling the motion for a new trial, and by section 281 of the Criminal Code this is not subject to exception, and, as has been repeatedly held by this court, is not, therefore, ground for a reversal.

No objection was made or exception taken to the instruction. This was necessary to enable the accused to now complain of it. The statute provides that in a felony case the jury shall be in-

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structed in writing, but if it be done verbally, without exception by the party upon trial, he can not afterwards urge it as a reason for reversal.

This court has no power, however, to reverse a judgment of conviction for any error unless upon a consideration of the whole record it is satisfied that the substantial rights of the accused have been thereby prejudiced. Here the punishment awarded is less than that provided by law.

It is said inasmuch as the verdict of the jury was for the shortest time named in the instruction, that if they had been told that the minimum punishment was for five years they probably would have acquitted the appellant, and that this court can not, therefore, say that he has not been prejudiced.

The jury, however, found him guilty. This was the first question for them to determine, and when they so found they ought, under the statute and guided by a proper instruction, to have fixed his punishment at confinement for some period of time, not under five nor over twenty years. By an error, to which no exception has been taken, they have said that he should not be imprisoned so long. This certainly is not prejudicial to him when he has been found guilty. The law provides for his imprisonment for not less than five years if guilty. He is deprived of this liberty by law, but by an error to his advantage not for so long a period as the law prescribes.

Judgment affirmed.

COMMONWEALTH v. HOPKINS.

(Filed October 8, 1887—Not to be reported.)

Concealing birth of bastard child—Under the statute providing for the punishment of the mother of a bastard child who attempts to conceal its birth, it is not material to the question of guilt whether the child was born dead or alive, or whether that matter might have been determined by an examination or test.

It was, therefore, error in this case to instruct the jury to find the defendant not guilty "if it was shown, or with reasonable examination or test could have been known by those examining the child, whether it was born dead or alive."

P. W. Hardin for appellant.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

The offense for which the defendant, now appellee, was indicted and tried is described in section 14, article 3, chapter 29, General Statutes, which is as follows:

"If any woman be delivered of any issue of her body, which being born alive would be a bastard, shall endeavor privately, by drowning or secretly burying the same, or in any other way, directly or indirectly, to conceal the birth thereof so that it may not be known whether it were born alive or not, she shall be confined in the penitentiary not less than one nor more than five years."

The evidence in the case tended to support the charge contained in the indictment and the lower court ought to have instructed the jury as to the law contained in the section quoted, but instead the following was given, which authorized the jury to acquit upon a hypothesis not provided or contemplated by the

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legislature: "Though they may believe to the exclusion of a reasonable ——— that she gave birth to a bastard child, and willfully or intentionally concealed its birth, yet if it was known, or with reasonable examination or test could have been known by those examining it, whether it was born dead or alive, they will find her not guilty."

The evidence in the case discloses the fact that issue was born of the defendant, which if born alive would have been a bastard, and the further fact that she privately attempted to conceal its birth by putting it into a privy vault so that it might not be known whether it was born alive or not. It was, therefore, not material to the question of guilt under the statute whether it was born dead or alive, nor whether the matter might have, by an examination or test, been determined one way or the other.

For the Commonwealth two instructions were asked, both of which were refused, but as there is no material difference between them we quote only one, which is as follows: "The court instructs the jury if they believe * * * that the accused * * * feloniously did conceal the birth of a child, the issue of her body, which if born alive was or would have been a bastard, by secreting or placing said child in a privy vault or sink, so that it might not be known whether it was born alive or not, they will find accused guilty as charged, though they believe that afterwards it was ascertained that said child was born alive."

This instruction is substantially in accordance with the statute, except that it does not affect the guilt of the accused one way or another whether the issue was born dead or alive, much less can her guilt be made to depend upon whether or not others may have used proper diligence in ascertaining as to that fact.

The court erred in respect to giving and refusing the instructions quoted, but as this is an appeal by the Commonwealth the verdict and judgment of acquittal remain unaffected by the action of the court.

LOUISVILLE SCHOOL BOARD v. BANK OF KENTUCKY.

(Filed October 13, 1887.)

1. Constitutional law—Escheats—The legislature has no power to authorize a corporation or private citizen to sue for and recover money or property of one in the rightful possession thereof because it has no real owner, or upon the presumption, by reason of the lapse of time, that no owner exists, and to hold it as a gift from the State, leaving the bailee responsible to the real owner, if he should appeal, and requiring both to look to the donee of the State for its value. Such legislation changes the legal status of the parties without their consent, and is in violation of the Constitution. The act of April 22, 1882, amending article 1, chapter 36, General Statutes, is, therefore, unconstitutional in so far that it vests certain bank deposits in the board of trustees of the public schools, and the defect in that act is not cured by the act of 1884, amending the general law of escheats.

2. Same—While there is no objection to the validity of the statute authorizing the presumption of death, and the nonexistence of heirs or devisees to take the estate, where no claim has been asserted or heirs heard of for the period mentioned in the statute, the presumption may be overcome by testimony showing that persons are living who are entitled to the estate, or who have been or are asserting claim to the property as the lawful heirs of the decedent, and where there are such claimants they should at least be brought before the court.

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3 Issue triable at law—If the statute were valid and the title to the money sued for vested in the appellant by reason of the lapse of time, and the presumption arising from the facts mentioned in the statute, there would be no reason why the issue could not be tried at law.

R. H. Blain for appellant.

Goodloe & Roberts for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

The case of the Bank of Louisville against the Trustees of the Public School of that city, 83 Ky., 219, involved a question similar to the one raised in this case, and the act under which the school board asserted its right to the money was held to be unconstitutional.

The passage of an act amending the statute of escheats, that was not in force when the case referred to was disposed of in the court below, creates the distinction, if any exists, between that case and the one now being considered.

The original act, that was local in its character and applied alone to the city schools of Louisville, compelled the bailee or the bank that had received the money on deposit to pay the same over to the trustees of the school board in the event the real owner had not been heard of for eight years, and released the State from all responsibility to the real owner or to his heirs or the bailee in the event the owner appeared to assert his rights. The State had in fact, under the statute, vested the title to property belonging to another in the schools of Louisville without regard to the rights of the bailee, and with no remedy by the latter or the owner against any one except the corporation in which the title was by the statute attempted to be vested. The general law with reference to escheats was amended in April, 1884, reciting that "when any person owning property lying or found in this Commonwealth is not known to be living for seven successive years, and no account can be given whatever of such owner, his heirs, devisees or distributees, such person shall be presumed to have died without heirs, devisees or distributees, and his property shall vest in the Commonwealth without office found, subject to the right of the owner, his heirs or devisees to be reimbursed for such property, where such claim is established as provided by the law of escheat." By section 3 of the act it is to take effect and be in force from its passage, and all acts or parts of acts in conflict with it are hereby repealed.

Under the original statute of escheat, as well as the amendment, the State is compelled to refund to the owner the amount of money paid into the treasury by reason of the escheat, but when passing the act for the benefit of the schools of Louisville, that corporation known as the school board was made responsible to the owner and not the State, and the effect of the amendment of April, 1884, was doubtless to make the State responsible, although the money had never gone into the treasury.

The act of 1884 was an amendment to the general law of escheat, and did not affect the local act applicable to the city of Louisville. If it did the effect would be a repeal of the local law, and, therefore, the right to institute the action would be in the State and not in the trustees or corporation. That act (the local act) stands unrepealed, and requires the bank and the owner to look to the city and not the State for the money to which they are or might be entitled.

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While the high schools of the city or the trustees of the board may assume the responsibility, the State has no power to make these trustees the debtors of either the real owner or the bailee, and we find the same obstacle in the way of a recovery here that existed in the case heretofore decided.

Besides, while under the ancient rule of practice the remedy for the sovereign who claimed the profits because there was no heir or devisee was in a court of equity, if by the statute the presumption arises that the party is dead and left no heirs or devisees after the lapse of seven years without being heard from, the title vests in the State. We see no reason why an action at law may not be maintained for its recovery by the State or the party authorized to bring the action. If the title to the money or the right to it was vested by the lapse of time, and the presumption arising from the fact mentioned in the corporation known as the Louisville School Board, then we see no reason why the issue could not be tried at law, and, therefore, the transfer from the chancellor to the common pleas court was not improper.

When it reached the common pleas court the right to a jury was waived, and the case heard on the law and facts.

There was conflicting testimony as to the existence of those who might claim or were in fact the heirs of the persons whose property the State claimed, and on a special finding the court determined that the proof was not satisfactory on that subject, and, therefore, refused to render the judgment for the appellant.

While we perceive no objection to the validity of the statute authorizing the presumption of death and the nonexistence of heirs or devisees to take the estate, where no claim has been asserted or heirs heard of for the period mentioned in the statute, the presumption may be overcome by testimony showing that persons are living who are entitled to the estate, or who have been or are asserting claim to the property as the lawful heirs of the decedent. Under such a state of case they ought at least to be brought before the court, where they may assert their claims before a judgment is rendered giving their property to a stranger. The judge below was of the opinion that the (two) decedents left those entitled as heirs at law to the money in controversy, and we would not be disposed to disturb his finding even if the validity of the statute was not involved. When the money is paid into the treasury and becomes a part of the State's finances it may be disposed of under legislative authority when not in violation of the organic law, but to authorize a corporation or private citizen to sue for and recover of one in the rightful possession that character of money or property because it has no real owner, or on the presumption, by reason of the lapse of time, that no such owner exists, and to hold it as a gift from the State, leaving the bailee responsible to the real owner if he should appear, and requiring both to look to the donee of the State for its value, is changing the legal status of the parties without their consent, and a character of legislation in plain violation of the Constitution.

The judgment is, therefore, affirmed, first, because the act is unconstitutional; second, because the court below has adjudged that there are those living who are entitled to the estate.

To a petition for rehearing Chief Justice Pryor delivered the following response:

We can only say that no action can be prosecuted by the city schools against a stranger or a third party to recover property-

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subject to escheat, because the property is held by the schools on the condition that the owner or the bailee is to look alone to the trustees for indemnity. The contract rights of the parties are affected by such legislation, and it must, for that reason, present an insuperable barrier to the recovery, whether in the name of the board or in the name of the Commonwealth for their benefit; that the money is claimed by a department of the State government affords no argument for the right to maintain the action, but it does authorize a recovery against the treasury when the money becomes a part of the finances of the State. The controversy in the case of Board of Trustees of Male High Schools v. The Auditor, 80 Ky., 336, was between the State and the board of trustees. The donation had been made by the State and no constitutional question was raised or could have been made, the only question being "to what department of the State government the money should be applied, leaving the owner or bailee to assert their rights under the general law of escheat."

Petition overruled.

KENTUCKY SUPERIOR COURT.

HILL v. GUDGELL.

(Filed October 12, 1887—Not to be reported.)

Contracts in partial restraint of trade if reasonable, and founded upon a good consideration, are valid and will be enforced.

A physician sold his good will and agreed not to practice again at the same place. In six months he returned and resumed the practice. In this action to recover damages for breach of the contract, Held—That the plaintiff is entitled to recover.

Hart and Kennedy & Son for appellant.

R. Gudgell & Son for appellee.

Appeal from Clark Circuit Court.

The appellant, a practicing physician in the town of Morefield, sold to appellee his good will, agreeing not to practice again at that place. In about six months he returned and resumed the practice. Appellee thereupon instituted this action to recover damages for a breach of the contract, and upon the trial the jury returned a verdict for plaintiff for $468. From the judgment upon the verdict this appeal was prosecuted. The judgment having been affirmed, counsel for appellant filed a petition for rehearing, which the court overruled, delivering the response now published.

Response of the court by Judge Barbour to petition for rehearing:

In view of the fact there was upon the original hearing no brief in for the appellee, we have given to the petition for rehearing a most carful consideration, and have also carefully re-examined the record. We, however, feel constrained to adhere to the opinion.

We can discover no available error to the appellant's prejudice

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during the progress of the trial. The only question for our consideration is as to whether the contract upon which the appellee relied was valid or not, and we do not regard this as an open question. The general principle of law may be stated to be that while contracts in total restraint of trade are void, yet if the restraint imposed be partial, reasonable and founded upon good consideration, it is valid, and will be enforced. Under the contract relied upon by appellee the appellant, for sufficient consideration, agreed to quit the practice of medicine in the town of Moorefield and its vicinity. Numerous cases have arisen where physicians have sold their good will, and agreed not to practice medicine within certain distances of their former location. Cases of this kind fall within the general principles governing contracts in restraint of trade. (Butler v. Bruleson, 16 Vt., 176; Luin v. Seigsbee, 67 Ill., 73; Hill v. Mooney, 30 Ga., 413; Doty v. Martin, 32 Mich., 462; Dwight v. Hamilton, 113 Mass., 175.)

The petition for rehearing is overruled.

COMMONWEALTH v. HOLSAPPLE.

(Filed October 26, 1887.)

A distiller is not subject to a penalty for selling at his residence, not to be drunk on the premises, whisky of his own manufacture in quantities not less than a quart, section 3 of article 2, chapter 106 of the General Statutes not being repealed by the act of May 17, 1886.

P. W. Hardin for appellant.

J. A. Brents for appellee.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge Ward.

Our attention has not been called to any law, and we know of none, prescribing a penalty against a distiller for selling whisky of his own manufacture in quantities not less than a quart at his residence, but not to be drunk on the premises unless it could be maintained that he was liable under the provisions of section 4 of the act of May 8, 1884, Acts 1883-4, volume 1, page 90, but this court has decided in the cases of Webb v. Commonwealth and Robinson v. Commonwealth, 7 Ky. Law Rep., 299 and 453, that a distiller who sold in the manner referred to above was not liable under that act.

It is entirely unnecessary to this case to decide whether, under the provisions of section 1 and 2 of article 5 of an act, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, the several county courts of this State are authorized to grant a license to all persons, including a distiller, to sell whisky, vinous and malt liquors, in any quantities less than five gallons, who may give notice of an intended application for such license in the mode named in the statute unless the granting of the license be protested against by a majority of the legal voters of the neighborhood. If such be the law, a man is not bound to apply for a license, and incurs no penalty for not doing so.

Whether he incurs a penalty for selling without procuring a license is the only important question.

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Nor is it necessary to decide whether section 4 of the act of May 8, 1884, was repealed or saved by the provisions of section 5 of article 12 of the act of May 17, 1886, since we are clearly of the opinion, if that section be still in force, that it denounces no penalty against the distiller under the named conditions above referred to.

Section 3 of article 2 of chapter 106, conferring upon a distiller the right to sell spirits of his own manufacture at his residence, is not in conflict with any of the provisions of the act of May 17, 1886, and not being a part of the system of our law to which that act relates, is clearly saved by the repealing section above referred to. The fact that the legislature defined what should be a sale by wholesale and a sale by retail, instead of showing an intention to repeal the distiller's privilege conferred by section 2 of article 3 of chapter 106, is proof almost conclusive that it did not so intend. The provisions under consideration show that the legislative mind was directed to the subject of selling whisky by retail and wholesale, and it could not, therefore, be unmindful of the fact that under the laws of this State since 1854 the distiller had been allowed a certain privilege with regard to spirits of his own manufacture, and this was a privilege which eliminated the question as to whether he sold at retail or by wholesale. As to wholesale transaction, they had never been defined by legislative enactment in this State, and it was, therefore, a question of fact to be determined in each case as to whether there was a sale by wholesale or retail. The law, as applicable to two classes of persons, recognized by our laws for many years as distinct occupations, must, therefore, have been recognized by the legislature, and that it should legislate specifically as to the one and omit the other must be conclusive that there was no intention to interfere with the then legal status of the one not referred to.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

COMMONWEALTH v. O'BRIEN & BUNCH.

Filed October 26, 1887. Appeal from Taylor Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Appellate jurisdiction—This court has no jurisdiction over misdemeanor cases where no fine exceeding $50 and no confinement exceeding thirty days can be imposed. That if convicted on an indictment for furnishing liquor to an inebriate a defendant would have been adjudged to have forfeited license, does not confer jurisdiction in such case.

P. W. Hardin and Finley Shuck for appellant; Charles Patterson for appellees.

COMMONWEALTH v. THOMPSON, &c.

Filed October 26, 1887. Appeal from Taylor Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Bail—The surrender of a principal to the court by his sureties on a bail bond in one case does not operate as a surrender in another case. That the State had temporary custody of the principal after the execution of the bond, and before the day he was to appear, does not discharge the sureties.

P. W. Hardin and Finley Shuck for appellant; J. M. Wood for appellees.

OWENSBORO & NASHVILLE R. R. CO. v. TAYLOR.

Filed October 26, 1887. Appeal from Logan Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Where a defendant filed in vacation its bill of exceptions, having been given until that time to file it, and it was signed by the judge, but there is no subsequent order to court in regard to it, Held—It is not a part of the record, and this court can not consider either the evidence or the instructions.

2. Pleading—Negligence—In an action for neglect it is not necessary for the plaintiff to allege that he was not guilty of contributory negligence.

R. S. Bevier for appellant; S. R. Crewdson and E. W. Hines for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. CABLE.

Filed October 26, 1887. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, reversing.

Master and servant—"When servants are in the same field of labor and the same grade of employment, the one not superior or subordinate to the other, neither can recover of the master for an injury caused by the neglect of a co-laborer."

Hill & Alcorn and William Lindsay for appellant; Welch & Saufley for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. CONNELLY.

Filed October 26, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Contributory negligence—In an action against a railroad company to recover for injuries received by plaintiff by reason of the collision of a hand car, upon which he was riding, with one of the defendant's trains of cars, alleged to have been caused by defendant's negligence, the defendant pleaded contributory negligence, and the evidence conduced to show its existence. For the plaintiff the court instructed the jury to find for the plaintiff if they found he sustained the injuries complained of by reason of the negligence of the employes of the defendant in the management of its locomotive and

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train of cars. Held—This was erroneous in not precluding the concurring negligence of the plaintiff as a co-operating cause, and in not requiring the jury to find that the defendant's negligence was the sole cause.

2. Same—An instruction for the defendant, based upon the hypothesis that the defendant was using due care, and that the plaintiff alone was negligent, did not supply the omission in the plaintiff's first instruction. It did not tell the jury what they should do if they found both parties negligent.

2. Negligence—The third instruction for plaintiff erroneously fixed on the time when the defendant's servants saw the hand car, or, by the use of ordinary care could have seen it, at which the peculiar duty of the defendant arose to prevent an injury. The liability should have been predicated on the failure of the defendant to use care after seeing the perilous condition of those on the hand car, and not on the failure to use care after actually seeing the car itself.

Wm. Lindsay for appellant; O'Hara & Bryan for appellee.

ANDREWS v. HAYDON'S ADM'R.

Filed October 26, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Practice—Where the law and facts are submitted to the judge, his judgment must be treated as the verdict of a properly-instructed jury would be, and no reversal can be had upon the ground of the insufficiency of the evidence to support the judgment unless the judgment is palpably against the weight of the evidence.

2. Burden of proof—"The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." Upon a plea of non est factum by the defendant the burden of proof is on the plaintiff, and upon the plea of no consideration it is upon the defendant. These pleas being made, the plaintiff should first introduce all his evidence in chief.

3. Evidence—In an action upon a note purporting to have been executed by a decedent, the defendant, the administrator, having, under a plea of no consideration, proved statements of the plaintiff as to where and how he got the money professed to have been loaned by him, it was competent for the plaintiff to testify in rebuttal of such testimony, but not as to the actual consideration given by him to the decedent for the note, nor that the decedent signed or delivered the note to him.

4. Same—In testifying as to conversations with plaintiff in regard to the note plaintiff wished him, as administrator, to pay, it was competent for defendant to refresh his memory by reference to memorandum made by him at the time of the conversation, speaking, after the inspection, from his own recollection as to the facts.

J. W. Lewis and G. S. Fulton for appellant; J. D. Wickliffe for appellee.

SMITH v. SMITH, &c.

Filed November 2, 1887. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Bowden, dismissing.

No appeal can be taken from an order sustaining a demurrer to a petition when there is no judgment dismissing it.

P. F. Edwards for appellant.

COMMONWEALTH v. BANTA.

Filed November 2, 1887. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Reversible errors—This court can reverse only for errors of law. No reversal can be had where the record does not show whether the error, if any, was one of law or of fact, or, if of law, what the particular error was. Overruling a motion for new trial is not a reversible error.

P. W. Hardin, Ross & Owen and B. H. Robinson for appellant; Kennedy & Son for appellee.

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BURNS v. McGIBBEN.

Filed November 2, 1887. Appeal from Harrison Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Grounds for new trial—A complaint in grounds for new trial, that the court gave "certain instructions as the law of the case prejudicial to plaintiff's claim," does not imply that he complained of all that were given, and does not point out the particular error complained of, so as to call the attention of the trial court to it, or to authorize this court to consider it.

2. Same—That a verdict is contrary to law means it is not justified by the law as declared by the court, and not as it should have been declared.

Forman & Cason for appellant; A. H. Ward for appellee.

HOWARD, &c. v. DIETRICK.

Filed November 2, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Ward, reversing.

1. All sales of personal property, to be valid against creditors, must be accompanied by a transfer of the possession to the vendee, if the property is capable of manual delivery. That the vendor and vendee reside together does not alter the rule.

2. Evidence—Statements made by the defendant about a sale, not in the presence of the party to be affected thereby, are incompetent.

T. M. Hill and W. R. Lockhart for appellants.

MILLER v. MANSFIELD MACHINE WORKS.

Filed November 2, 1887. Appeal from Laurel Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Pleading—Jurisdiction—When the petition does not allege that the defendant corporation has an office or place of business in this State, or a chief officer or agent residing in this State, and the defendant wishes to rely on the fact that it has none as a plea to the jurisdiction, it should require the petition to be made specific as to these points, or should file a special plea to the jurisdiction, stating facts sufficient to show that the court has no jurisdiction over the defendant.

2. That there was no valid injunction, nor ground for one, nor any attempt to sue out an attachment, was not cause for dismissing the petition.

R. L. Ewell for appellant; J. A. Craft for appellee.

KITCHEN & CO. v. WHITT, &c.

Filed November 2, 1887. Appeal from Elliott Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Liens—Assignment—Where several notes secured by lien on land are assigned to different persons at different times, all have an equal lien without regard to date of the assignments.

2. Practice—Where "two persons are claiming money or property by way of interpleader, the amount of the money, or value of the property, determines the jurisdiction." But where the effect is the same, whether the judgment is affirmed, or the appeal dismissed, this court will consider the judgment on its merits and affirm it, if that can properly be done, although the amount may not be sufficient to give jurisdiction.

J. E. Cooper for appellants; J. G. Whitt for appellees.

RINGOLD & CO. v. SMITH, &c.

Filed November 2, 1887. Appeal from Scott Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Debtor and creditor—Preferences—Where at the time of his making a mortgage to a pre-existing creditor the debtor knew he was insolvent, the act is within the statute against preferences to one or more creditors to the exclusion of others.

2. Same—That the mortgagor was a witness for the attaching creditors,

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and stated that he thought he was solvent; that he did not contemplate insolvency and had no design to prefer the mortgagees, can not alter the facts which he proved and which are admitted.

3. Same—A debtor is presumed to know the amount of his indebtedness, and his statements as to his belief that he owed less than he did owe is of no avail.

4. Same—The execution of a mortgage to prefer creditors is not of itself such fraud as will ipso facto render it void, but it is merely voidable at the election of the creditors, made by petition filed within six months. When the act of preference is attacked within that time it operates to annul and make void any voluntary assignment made by the debtor subsequent to the act of preference.

5. Same—Limitation—The appellants made no objection to the petition until after all the issues had been made and six months had elapsed from the date of the mortgages, when they filed a general demurrer to the petition. Held—A judgment then, that the petition was insufficient, could not have prejudiced the creditors, who had attacked the mortgages by cross petition within six months after their execution.

6. Same—Where plaintiff, by the consent of the appellants and other creditors, acted as assignee in selling the property, and with appellants' knowledge employed an attorney, whom they had to advise as to the sale. Held—Plaintiff should be paid for his services and allowed a reasonable fee for his attorney, although the effect of the judgment declaring the mortgages to operate as an assignment was to annul plaintiff's authority as an assignee.

Owens & Finnell for appellants; J. E. Cantrill and J. F. Askew for appellees.

COMMONWEALTH v. NEFF.

Filed November 2, 1887. Appeal from McCracken Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. The power of reversal on an appeal by the Commonwealth, conferred by section 349 of the Code, is not taken away by the amendment of March 4, 1880, to section 353 of the Criminal Code.

2. Keeping tippling house—Section 3, article 35, chapter 29, General Statutes, in reference to tippling houses, is not repealed by the act of May 8, 1884. The act of May 8, 1884, repealed section 6, article 35, chapter 29, General Statutes.

3. Same—Indictment—The mere charge that the defendant had, before the finding of the indictment, been guilty of keeping a tippling house is sufficient.

4. Same—Defendant owned and controlled a covered and enclosed barge, which was towed by a steam towboat, and in which was a saloon where whisky was kept and sold and a variety show was exhibited. While the barge was anchored in Tennessee river, and within the corporate limits of Paducah, the defendant, without license to do so, sold thereon, to people taken on board at Paducah, whisky, which they there drank. Held—The barge was a "house" within the meaning of the statute against keeping tippling houses without license.

P. W. Hardin and E. W. Bagby for appellant; Jas. Campbell and Chas. Wheeler for appellee.

BURKHARDT & CO. v. THE MADDOX CO.

Filed November 2, 1887. Appeal from Kenton Chancery Court. Opinion of the court by Judge Barbour, reversing.

1. Principal and agent—Although agent does not disclose the capacity in which he acts, a contract made with him is a contract with the principal, and in such case both the agent and principal are liable.

2. Judgment—Where the court had jurisdiction of the defendant's person, and the answer raised an issue as to the personal liability, a personal judgment is proper.

3. Attachment—The sheriff, having levied the attachment by plaintiff's direction, left the attached property in defendant's custody. Held—This did

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not discharge the attachment, but merely made defendant the sheriff's bailee; as between the parties the lien was valid, and the attached goods remaining undisposed of at the time of judgment were subject to the order of court.

4. Same—Nor did the defendant's delivery to plaintiff of other property as security for the attached property discharge the attachment, thhough the delivery was made and the property kept in plaintiff's possession in Ohio, where he lived.

Collins & Fenley for appellants; Cleary & Hamilton for appellee.

ERRATUM—On page 423, in fourth line of syllabus, "will not" should be "will."

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KENTUCKY COURT OF APPEALS.

JOPLIN v. CORDREY.

(Filed October 11, 1887—Not to be reported.)

1. Partnership—Failure to keep books—The widow of a deceased member of a firm took her husband's place in the firm, and the business was conducted for several months under the same firm name, the widow, during that time, drawing from the firm assets considerable sums of money. It being ascertained that the widow could not legally take her husband's place, this action was brought by the widow against the surviving partner for a settlement of firm matters. The defendant says the firm was insolvent at the death of plaintiff's husband, and that the plaintiff must refund what she has received, although he told her when he paid it to her that there was that much and more coming to her. This claim, however, rests upon his own statements, as he took no invoice and continued the business without keeping any books. Held—That the defendant's claim can not be allowed, as the trouble, if any, arises from his own laches, and the doctrine of equitable estoppel applies.

2. The refusal of a continuance was not an abuse of discretion, as the defendant's affidavit merely says that if time is given he can make a material fact appear, but does not disclose how it can be done, or that he has any additional testimony.

Montgomery & Poston for appellant.

Wilson & Hobson for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

In March, 1874, the appellant, F. M. Joplin, and Thomas A. Cordrey became partners in the grocery business under the firm name of Joplin & Cordrey. At the outset they had but a small capital, each putting into the concern but $400 or $500. They soon extended their business, however, by including in it lumber and agricultural implements, and to such an extent that in a short time its transactions embraced annually thousands of dollars.

They failed to keep a regular set of books. The firm kept no account of its cash sales or notes taken, but only of accounts

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owing or what was sold on credit. Each partner was equally culpable, however, in this respect.

Cordrey died intestate on September 26, 1876, leaving the appellant, Joplin, as the surviving partner, and the appellee, Margaret Cordrey, as his widow. He also left several children. The evidence tends to show that immediately after his death the appellant, Joplin, reported to the widow that the firm business was in fine condition; that they were doing a heavy and prosperous business, and that, if then settled up, she, after the payment of all the firm liabilities, would be entitled to as much as $7,000 as her deceased husband's portion. She knew nothing of its condition and appears to have placed implicit confidence in the surviving partner.

Acting, doubtless, upon the idea that it could legally be done, the appellant and the appellee appear to have entered into an arrangement by which the business was to be continued under the old firm name of Joplin & Cordrey, she taking her husband's place, and each partner drawing family supplies from the grocery.

The appellant, Joplin, as the surviving partner, had no invoice taken of the stock on hand at Cordrey's death. No inventory was then made of the firm assets, nor was any settlement had of any character. Sales were made, and the business proceeded in all respects as before, although the appellant was advised very shortly after Cordrey's death, by at least one person, to have an invoice made of all the firm assets. Matters thus continued from September 26, 1876, when Cordrey died, until December 11, 1876, when the appellant proposed to the appellee in writing to buy the stock on hand at cost and carriage, and give her two notes with security for the half thereof, payable in six and twelve months with interest, and offering, in case of her acceptance, to collect the debts due the firm, settle its liabilities and wind up the business entirely. The appellee claims to have accepted the offer, but this the appellant denies, and says that, ascertaining the widow could not legally step into the place of her deceased husband, they agreed that the arrangement previously made to that effect should be considered a nullity, and that the business should be settled up as if it had never been made, and as if it had been continued by the surviving partner. This last version is supported by evidence aside from the testimony of the appellant.

An invoice was, however, made on January 2, 1877, of the stock on hand, amounting to $2,281.27.

The appellant took possession of the goods, charging himself, however, as the surviving partner of Joplin & Cordrey, with the amount of the invoice; and then, on or near January 2, 1877, put them in as that much capital furnished by him to the firm of Joplin & Bro., which was then formed, composed of himself and his brother, O. K. Joplin.

One of these actions was brought by the appellee to recover one-half of this invoice value of the stock. It appears that the appellee obtained a considerable sum as insurance upon the life of her husband. The evidence satisfies us that, after entreaty of her by the appellant, she, on November 29, 1876, let him have $800 of it as a loan, although he claims that she, acting upon the idea that she was then in the place of her husband in the firm of Joplin & Cordrey, furnished it to it as a partner, and that he, about the same time, furnished several hundred dollars toward the firm business, and which latter statement is doubless true. A note was executed to her in the name of Joplin & Cordrey for this money, payable upon ten days' notice, the appellant so signing it,

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and she being assured that it made her entirely safe, and that she could get it whenever she wanted it.

The other of these two consolidated actions was brought by the appellee upon this note, and for a settlement of the firm matters of Joplin & Cordrey.

Upon the first trial in the lower court it rendered a judgment for the appellee for the amount of the note, but otherwise dismissed both actions at Joplin's cost, and failed to adjudicate by way of a settlement of the partnership, although both parties were asking it.

This court, therefore, reversed the judgment, but held that Mrs. Cordrey was not a partner of the appellant, and that she must be allowed the $800 note. Upon the return of the causes they were referred to the master, who, upon the data furnished by the appellant, reported that the firm of Joplin & Cordrey was insolvent at the date of Thomas A. Cordrey's death, and that it was indebted to the appellant, on account of the payment of liabilities in excess of assets, in the sum of something over $1,500. He, however, also reported that in his opinion, for reasons given by him, that the data so furnished were incorrect, or at least that the appellant must either have received more assets than he has charged himself with, or else had command of money in some way not accounted for by him.

It is claimed by the appellant that after the death of her husband Mrs. Cordrey got groceries belonging to the firm; also a diamond ring and a house and lot, built and bought with assets of the firm, and that she must account for their value as well as a reasonable rent for the house. It is reasonably certain, from the evidence, that she did get all of this property. Indeed the master so reports, and places the value of groceries at $401.60, the ring at $100, the house and lot at $1,425, and the rents at $900.

She, however, claims that the appellant received more assets of the firm of Joplin & Cordrey than he has accounted for, and that he furnished her what she received from the firm assets as a part of what was in fact coming to her and her children.

The chancellor, upon the last hearing, and as a final settlement of all the matters in issue, allowed the appellee to keep the house and lot and rendered a judgment in her favor upon the $800 note. Of this the appellant, Joplin, now complains.

It is necessary to state briefly the history of the house and lot.

In October, 1876, two lots of ground were conveyed privately to the appellant and appellee. They were purchased with firm assets. With like means a house was erected upon each, the buildings being alike in cost. In January, 1877, the appellant conveyed to the appellee his joint interest in one of them and she, in consideration thereof, and in like manner divested herself in favor of appellant of all right in the other. The appellant atteded to all this matter.

He now presents two questions to this court:

1st. That the lower court erred in not continuing the cases for him.

2d. That the judgment is wrong upon the merits.

The ground upon which the continuance was sought was that the master had reported that, according to the appellant's statement, he, up to January 30, 1877, had paid out for the firm over $4,000 more than he had collected of its assets, and that it did not appear from what source he had derived the money, and the affidavit of the appellant for a continuance merely says that if time be given he will make this appear, but the affidavit does not disclose how he could have done so, or that he had any additional testimony.

This was a matter peculiarly within the appellant's own knowl-

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edge, and his deposition shows that he was fully examined as to the extent of his means and from whence he had derived the same. Evidently, therefore, the lower court did not abuse its discretion in refusing him a continuance.

In considering the merits of the case it must be remembered that no creditor of the firm of Joplin & Cordrey is complaining. It is a contract between the surviving partner and the widow of the deceased one. The latter relied implicitly upon the former as to the business and had a right, under the circumstances, to do so. He now says that at the death of her husband the firm was insolvent, and that the appellant must now repay what she has received, although he paid and furnished it to her out of the assets because, as he then said, there was that much, and indeed much more, coming to her.

This claim by him rests altogether upon his own figures and statements, because he failed, at the death of Cordrey to take any invoice of the stock then on hand, and continued the business from then until January 2, 1877, without keeping any books, save one showing the purchases upon credit and open account. No account of cash sales or even any note book was kept. What amount of merchandise was sold during that period is mere conjecture.

This most assuredly arises from the neglect and fault of the appellant, and by reason of it when we enter upon any calculation of the matters of the firm, as we have endeavored to do after a careful examination of the entire record, we are at sea, and it is impossible thus to arrive at any satisfactory conclusion, unless we accept, without question, the ipse dixit of the appellant, and this, too, without consideration of many facts shown in the record which tend to discredit the figures and calculations furnished by him.

Among them are these:

Immediately after the death of her husband he represented to Mrs. Cordrey and to others that there would be as much as $7,000 coming to her from the firm. This was either true or else the appellant was sailing under false colors for some deceptive object, or was ignorant when he ought to have known the condition of the business.

In December, 1876, he offered to buy the stock on hand, execute notes to her for one-half their value, and collect what was owing to the firm, and discharge its liabilities.

Surely time sufficient had then elapsed for him to know the condition of the firm unless by his own acts he had rendered this impossible.

In October, 1876, he purchased the two lots, and during that fall the two houses were built with firm assets paid out by him, and not until January 9, 1877, did he make the deed to Mrs. Cordrey for his undivided interest in her house and lot. This action upon his part seems incapable of explanation, provided the firm was insolvent, because he in substance testifies that he was then as familiar with its condition as was possible, considering how the accounts had been kept and the business done.

The firm of Joplin & Bro. was formed January 2, 1877. The appellant says that he furnished to it, as his part of the capital, only the old stock of goods of Joplin & Cordrey, which had been invoiced at $2,281.27.

The means furnished by the brother never exceeded $2,500, and by reason of his drafts upon the firm he, at times, had but a few hundred dollars invested in the business, and yet in April, 1878, or only about sixteen months after beginning business, and upon

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such a small capital, the firm, upon their own showing, was worth, after the payment of all their liabilities, $14,000.

After the formation of the firm of Joplin & Bro. the appellant mixed the money collected upon the debts owing to Joplin & Cordrey with that of the new firm.

It, however, appears that the brother, O. K. Joplin, put no money into the firm of Joplin & Bro. prior to January 30, 1877. The appellant had no means outside of what he had invested in the firm of Joplin & Cordrey, and yet, upon his own showing, he had paid out upon the debts of the latter firm prior to January 30, 1877, over $4,000 more than he collected of its assets. It must not be forgotten, too, that during this time the two lots were bought and houses built by him with firm assets, costing $2,850. It is true he borrowed some money during the time, but not near enough, according to his own statement, to equal the excess paid for the firm over and above what he collected of its assets, and unless he sold more goods from the death of Cordrey up to January 2, 1877, and collected more assets of the firm up to January 30, 1877, than reported by him, we are at a loss to know from whence he derived the money.

The facts are utterly at war with his present claim that the firm was insolvent. When he should have known its condition, indeed when he must have known it, unless he had so conducted the business as to render this impossible, he was paying and furnishing means and property to Mrs. Cordrey as that much of what she was entitled to from the firm. She was ignorant of its business, and had a right to rely upon him, and if it is now impossible to know that equal and exact justice is arrived at between the parties it is appellant's own fault.

Under such circumstances he has no right to call into activity the aid of a court of equity and ask it to grope in the dark, by reason of his neglect, and furnish him some relief against an innocent party.

The trouble, if there be any, arises from his own laches, and the doctrine of equitable estoppel applies.

Judgment affirmed.

SMITH v. THEOBALD.

(Filed October 11, 1887.)

1. Statute of frauds—A verbal contract for a year's service to be performed at some future time is within the statute of frauds because it can not be wholly performed within a year from the time of making it.

2. Same—Where a petition upon a contract, which the statute of frauds requires to be in writing, fails to show that the contract was in writing it is defective, and the defect may be reached by demurrer, or, if judgment is rendered on the petition by default, it will be reversed.

3. Same—But such a defect in the petition is cured by an answer denying the making of the contract, as such a denial puts in issue not only the existence of the contract, but the fact that it was in writing signed by the defendant.

4. Same—If one is hired to do service in any business that requires constant labor the presumption is, in the absence of an agreement to the contrary, or circumstances showing a contrary intention, that the service was to continue for a year, and while an agreement upon weekly or monthly payment of wages may be sufficient of itself to create a presumption of a hiring for the corresponding periods, still other circumstances may show that the service was to continue for a year, although the payment of wages was to occur weekly or monthly.

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A letter from appellant addressed to appellee as "Manager of the Standiford Hotel, Louisville, Ky.," accepting a proposition of appellee to assume control of a hotel at Hot Springs, Ark., at a salary of $125 per month and board for self and family, is sufficient to show, all the circumstances considered, a contract for a year's service, and sufficiently evidences the terms of the contract to satisfy the requirements of the statute of frauds. Besides, a letter from appellee in reply, referring to the contract as a contract "for one year," to which appellant assented by his silence, may be considered for the purpose of interpreting appellant's letter.

5. Same—Where a contract is one that can not be wholly performed by either party within a year, and each must sign a writing evidencing the contract in order that he may be bound, each party having written a letter, the one in reply to the other, relating to the terms of the contract, both letters should be considered together as forming but one contract.

A. P. Humphrey for appellant.

John Mason Brown and Geo. M. Davie for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellee sued the appellant in the Jefferson Court of Common Pleas to recover damages for a breach of contract of hiring the appellee by the appellant to act as manager of the Avenue Hotel at "Hot Springs, Ark.," for the term of one year.

The appellee's petition alleges in substance that the appellant employed him to take the management and charge of the Avenue Hotel at "Hot Springs, Ark.," for the term of one year, at a salary of $1,500, payable in monthly installments of $125; that in addition to this sum board and lodging was to be furnished himself and family; that his term of service was to commence within thirty days after the 4th of October, 1882.

The case was tried before a jury. The trial resulted in a verdict and judgment thereon for the appellee.

The appellant's motion for a new trial having been overruled he has appealed to this court.

The petition discloses that by the contract the year's service was to commence in the future.

By the 7th subsection of section 1 of chapter 22 of the General Statutes it is provided that no action shall be brought "upon any agreement which is not to be performed within one year from the making thereof, unless the agreement or some memorandum or note thereof be in writing, and signed by the party to be charged therewith," etc.

By this statute no action can be maintained upon any verbal contract that can not be wholly performed within a year from the making of it. And it is well settled by this court that a verbal contract for a year's service, to be commenced at some future time, is within the statute, because the contract can not be wholly performed within a year from the time of making it.

It is also well settled by this court that where the petition discloses that the contract could not be wholly performed within a year from the time of making it, and fails to disclose that the contract was in writing and signed by the defendant, the presumption is that the contract was verbal.

It is also well settled by this court that where the plaintiff's petition expressly discloses a verbal contract, which the statute

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of frauds requires to be in writing and signed by the defendant, in order to charge him, or the petition is silent as to whether or not the contract was in writing and signed by the defendant, such a petition is defective, and the defect may be reached by demurrer, or if judgment is rendered on the petition by default this court will reverse it.

In this case the petition, in not stating that the contract was in writing and signed by the defendant, was defective, and the defect might have been taken advantage of by demurrer.

The appellant, however, did not demur, but he answered, which answer consists: First, of a denial that he made or entered into the contract set forth in the petition; and, second, that the appellee, while in the management of said hotel, managed it so unskillfully and negligently as to give the appellant the right to discharge him, and that he rightfully discharged him on that account.

So the question is, did the denial of the making of the contract cure the defective petition?

It is to be observed that the petition sets forth all the requisites of a common law contract. The only defect in the petition consists in the failure to allege that the contract was in writing and signed by the appellant, and the appellant denies that he made the contract. This denial not only puts in issue the existence of any contract at all, but puts in issue the fact that the contract was in writing and signed by himself, or by any one authorized to sign it for him. In other words, the denial of making the contract was not only a denial of the existence of the contract, but was a denial that the contract was in writing. In the latter respect it was equivalent to an affirmative plea of the statute of frauds, and in this respect the answer assumed that it was essential to the appellee's right to recover that the contract should be in writing and signed by the appellant, and it then proceeded to deny the existence of that fact. Thus an issue was formed as to whether or not the contract was in writing and the defect in the petition was cured.

The issue being thus formed the questions arose on the trial: First, whether the contract alleged in the petition was actually made; second, whether it was evidenced by a sufficient writing, memorandum or note, signed by the appellant, to comply with the requirements of the statute of frauds.

The appellee introduced on the trial a letter signed by the appellant, which reads as follows:

"Louisville, Ky., October 4, 1882.

"T. A. Theobald, Manager Standiford Hotel, Louisville, Ky.:

"Dear Sir—At our interview last night I understand you to propose to assume the management of the Avenue hotel for the Avenue Hotel Co., at Hot Springs, on or soon after the 1st of November next, in consideration of the salary of $125 per month, and rooms and board for yourself and family. I beg leave to advise you that your proposition is accepted, and that I trust you will be able to assume charge early in November. Will also desire you to accept the position of secretary and treasurer of the company.

Very truly,

"M. H. SMITH."

This writing sets out substantially the terms of the contract as alleged in the appellee's petition, except that it does not express in words that the employment was to be for a year, and by reason of this latter fact the appellant contends that the writing evidences an employment only by the month or at will.

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Where a person is hired to serve another without any agreement as to the duration of the service there is no inflexible rule of law as to the length of time the hiring is to continue. The question as to the length of time the hiring is to continue will be governed by the circumstances of each particular case. If one is hired to work in a crop being raised the presumption is, in the absence of circumstances showing a contrary intention, that his term of service is to continue during the crop season. If one is hired to do general service on a farm the presumption is, in the absence of an agreement to the contrary, or circumstances showing a contrary intention, that the term of service is to continue for a year. The same rule applies to the hiring of persons to do service in any business that requires constant labor. As this rule is not inflexible and may be controlled by circumstances, the circumstance of agreeing on weekly, monthly, quarterly or half-yearly payment of wages may be sufficient of itself to create the presumption of a hiring for the corresponding periods. But the circumstances of the hiring, though no time is expressly agreed upon, may show that it was to continue for a year, although the payment of the wages was to occur monthly, and we think that facts set forth in the writing just quoted manifest a hiring by the year and that the appellant intended to hire the appellee by the year, for it is shown by the letter that the appellee was in business in the city of Louisville as the manager of the Standiford Hotel; that he was required to give up that business and move himself and family to Hot Springs, Ark., and there assume the managment of the Avenue Hotel, and to act as secretary and treasurer of the hotel company. Was the appellee to give up his position in the Standiford Hotel in Louisville and move himself and family to Hot Springs, Ark., a distance of several hundred miles, at a large expense to himself, for the sake of a month's employment, at the price of $125 in the Avenue Hotel? We think that neither the appellant nor the appellee contemplated a contract of this kind. We think the writing shows that they did not, but it shows that they contracted for a year's service at the rate of $125 per month, or $1,500 for the year.

Besides, the appellee replied by letter, dated 6th of October, 1882, as follows:

"M. H. Smith, Esq., Vice-President of the L. & N. R. R.:

"Dear Sir—I am in receipt of yours of the 4th inst., in which you accept my proposition to take the management of the Avenue Hotel, at Hot Springs, Ark., for one year at $1,500 per annum, and rooms and board for self and family. I will make arrangements to leave for Hot Springs in the next thirty days. I assure you that whatever of judgment, energy and ability I possess shall be exercised to the fullest in advancing the interests of the business committed to my care. Hoping I may succeed in carrying out all your wishes I am,

"Respectfully,

"THOMAS A. THEOBALD."

This letter was duly received by the appellant, to which he made no reply, and the appellee took charge of the hotel pursuant to the terms indicated in the letters.

But it is contended by the appellant that as the statute of frauds requires that he should sign a written agreement, memorandum or note evidencing the terms of the contract in order to be bound by it, this letter did not bind him to the terms therein indicated. There are two answers to this position: First, the letter does not add to or change the terms of the contract, as in-

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dicated in the appellant's letter. As we have shown, the appellant's letter, as to the duration of the time of service, should be construed according to the understanding of the parties, and the appellee's letter merely definitely interpreted that understanding, to which the appellant assented by his silence and acquiescence; second, the contract was one that could not be wholly performed within a year from the making of it, and in order to bind both parties to its performance each one should have signed a writing, memorandum or note evidencing the terms of the contract. It is true that a writing, memorandum or note evidencing the contract, signed by the party sought to be charged, satisfies the statute, but to bind the other party to the performance of his part of the contract where his performance comes within the statute it is necessary that he should sign some writing, memorandum or note evidencing the terms of the contract. Therefore, as neither the appellant nor the appellee could have wholly performed his part of the contract within a year from the time of making it it was necessary that the appellee, in order to be bound to perform his part of the contract, should have signed a writing evidencing the terms of the contract. Therefore, as the two letters relate and set out the terms of a contract which the statute requires to be in writing and signed by each party, in order to bind each to its performance, both letters should be considered together as forming but one contract.

As the foregoing views settle the material questions in the case, it is unnecessary to notice the other points raised in argument.

The judgment of the lower court is affirmed.

SUTTON, &c. v. HEAD.

(Filed October 13, 1887.)

1. While contracts in general restraint of trade are void, contracts which impose but a special restraint, as not to carry on trade at a particular place or with certain persons, or for a limited time, will be upheld if the limitation be a reasonable one.

The provision in a deed to land that "no intoxicating liquors are to be sold on the premises in less quantities than five gallons," which was inserted because the vendor's store and dwelling house were near by, is reasonable, and will be enforced.

2. Injunction—Where the vendee violates such a covenant, injunction is the proper remedy because it avoids multiplicity of action.

3. Such a restriction in a deed is a covenant running with the land, and, therefore, effective against a tenant or assignee of the vendee.

4. Deeds—Consideration—As it is shown that the restriction entered into the consideration for the contract, it could have been shown by parol even if the deed had been silent as to it.

J. C. Wickliffe for appellants.

C. T. Atkinson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Holt.

In 1875 the appellee, F. M. Head, for the recited consideration of $50, conveyed to the appellant, Henry Sutton, a small lot in the town of New Hope.

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The deed contained this clause: "No intoxicating liquors are to be sold on said premises in less quantities than five gallons."

It was inserted because the vendor's store and dwelling house were near by, and the lot had been conveyed to him with a like restriction as to its use.

The appellant, Sutton, built a house on it, which was used for various purposes for several years, and until a short time before this suit was brought, when he rented it to the appellant, Zack Blair, for saloon purposes. The latter began selling liquor in it by the small, and shortly after doing so this action was brought by the appellee against the appellants enjoining such use.

If the restriction is valid then the remedy by injunction is proper because it avoids multiplicity of action and affords adequate relief. Not only is it set forth in the deed but it is shown that it entered into the consideration for the contract. This could have been shown by parol even if the deed were silent as to it. (Pierce v. Woodward, 6 Pick., 206.)

It was one of the most ancient rules of the common law that all contracts in restraint of trade were void.

We learn from the year books that this was considered as settled law in England as early as the year 1415, and its courts would not then tolerate the least infraction of this rule. It was enforced with much judicial severity, and doubtless grew out of the law of apprenticeship, under which no one, in that country, could earn a livelihood at any trade until after long service, and then he must continue in the one adopted by him or have none.

For two hundred years the rule existed, without exception, that all contracts in restraint of trade were void. It was qualified, however, as the law of apprenticeship broadened, and a distinction was then drawn by the cases of Broad v. Jolly, Cro. Jac., 593, and Mitchell v. Reynolds, 1 P. Wms., 181, between a general and a limited restraint of trade.

Other decisions followed until it became the settled English rule that while a contract not to do business anywhere is void, yet one stipulating not to do so in a particular place or within certain limits is valid. This has always been the rule in this country. The wisdom of the rule as qualified can not be doubted. It is eminently suited to the genius of our institutions. It prevents the building up of monopolies and the creation of exclusive privileges.

Contracts in general restraint of trade produce them. They tend to destroy industry and competition in a country, thus enhancing prices and diminishing the products of skill and energy; they impair the means of livelihood and injure the public by depriving it of the services of men in useful employments.

The law, therefore, guards against these evils by declaring such contracts void. (Pike v. Thomas, 4 Bibb, 486.)

This reasoning, however, does not apply to such as impose but a special restraint, as not to carry on trade at a particular place or with certain persons, or for a limited reasonable time. The party contracting is then left free to exercise his trade or transact business at other places, other times and with other persons. Indeed a particular trade may be promoted by being limited for a short period to a few persons, and the public benefited by preventing too many from engaging in the same calling at the same place.

If, therefore, the limitation be a reasonable one, it will be upheld. (Grundy v. Edwards, 7 J. J. M., 368; Turner v. Johnson, 7 Dana, 435.)

The one now under consideration is so. It relates to the use

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and occupation of the property. It was a covenant running with the land, and, therefore, effective against a tenant or assignee of the vendee, and the appellants were, when enjoined, engaged in the willful violation of it. (Stephens' Nisi Prius, 1113.)

Judgment affirmed.

ADAIR v. COOK.

(Filed October 13, 1887—Not to be reported.)

In an action to set aside a deed fourteen years after its execution, upon the ground of the grantor's want of mental capacity to execute it, the chancellor's judgment upholding the deed will not be disturbed, the testimony as to the grantor's mental capacity being conflicting; and while the statute of limitation, although a complete bar, has not been relied upon, the long delay goes far to sustain the chancellor's conclusion.

A. Duvall, Jas. E. Cantrill, Geo. E. Prewitt and L. H. Paxton for appellant.

Owens & Finnell for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, one of the children of Robert Cook, instituted this action in the court below attacking the validity of a conveyance made by her father to his son, Robert Cook, Jr., in the year 1871, by which he conveyed to his son a tract of one hundred acres of land lying in the county of Scott. The deed is assailed on the ground of a want of mental capacity in the grantor to execute such an instrument. The consideration is love and affection, and the further consideration, as is shown by parol, that the son would take care of and provide for the widow of the grantor during her life, and an adult son of the grantor, who had been afflicted from infancy and unable in any manner to provide for himself. The deed was executed during the last illness of the grantor, when he was ninety-one years of age, and, as much of the proof conduces to show, was feeble in both mind and body. The grantee, his son, was about fifty years of age, unmarried, and had, during his life lived with his father and contributed to the support and maintenance of the family for many years. He had several sons who had arrived at age, all of whom had left him some twenty years prior to the execution of the conveyance, except his afflicted son, Edward, and the grantee, Robert. The deed was executed in the year 1871, and the action was brought by his daughter, who was a feme covert when the conveyance was made and at the time the action was instituted. The other children did not unite with her in the action, but some of them, who were defendants, asked the same relief, and others united with the appellee in sustaining the validity of the transaction. The witnsses for the appellant, the most of them being those directly interested in the result, made out a strong case for the plaintiff, while, on the other hand, the witnesses for the defense show the utmost good faith in the execution of the instrument and the capacity of the grantor to execute it. Robert Cook, the grantee, is dead, and also George Cook, his brother, who was

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instrumental in having the deed executed, by which he was deprived of all interest in the land. These parties are not here to throw any light on the subject, and only one of the children, and that, too, after the lapse of fourteen years from the execution of the conveyance, instituted this action. While the statute of limitation has not been relied on, although a complete bar to the recovery, yet the lapse of time and the failure to bring the action for fourteen years, and after the death of both Robert and George Cook, are circumstances going far to sustain the position assumed by counsel that the execution of the deed was in accordance with a fixed purpose of the grantor, entertained long before his illness. The widow, when signing the deed, said it was in accordance with the wishes of her husband, and the long acquiescence of all the parties in interest in this act of the grantor lead to such a conclusion.

Besides, it is shown that this son had lived with the father and mother during his whole life, and devoted much of his time and attention to their wants, and was no doubt their reliance for support and maintenance in the cultivation of their little farm. The invalid and imbecile son continued to live on the place and was under the care and protection of Robert after the death of their father, and in fact the proof conduces to show that the promise by Robert to care for and provide for his mother and invalid brother was the leading consideration influencing the old man to make the conveyance.

There is much conflicting testimony in the case as to the competency of the grantor to execute such a writing, but the circumstances surrounding the parties at the time tend strongly to show that its execution was the offspring of the grantor's mind and in accordance with a desire long before expressed. One of the sons, George, had the paper written and brought the clerk to the house of his father to have it executed and acknowledged. His motives were unselfish, and the making of the deed excluded him from any interest in the land. George, and in fact the children, around the old man's death bed must have known what was transpiring, and the entire proof impresses the mind with the belief that all of them knew of the grantor's purpose, and hence their long acquiescence in the act by which their brother, Robert, was invested with title.

The chancellor below has also passed on the issue made as to the condition of the grantor's mind, and there being no other question involved we are not disposed to disturb his judgment, and it is, therefore, affirmed.

TURNER'S ADM'R v. TURNER.

(Filed October 13, 1887—Not to be reported.)

1. Partnership—By the terms of a partnership, of which J. and H. were the members, J. was to furnish the capital and H. was to devote his time to the business, and after allowing J. the capital invested and interest on a certain portion of it, and deducting all expenses, the profits were to be equally divided between the partners J. having died H. executed to his administrator a note for the balance of the advances made to the firm by J. under the partnership agreement. In an action by the administrator asking a personal judgment upon this note and for a settlement of the partnership, Held—That the court properly refused the personal judgment asked, this debt, as between the parties, being a debt against the firm, for the payment of which the firm assets are primarily liable, and, according to the partnership agreement, the whole debt and the interest thereon should be paid out of the assets of the firm, and in the event the assets are not sufficient for

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that purpose the defendant should be held personally liable for one-half the balance.

2. Same—By a written agreement between H., the surviving partner, and the administrator of J., the deceased partner, H. was to be charged with all the debts set forth in a certain paper, with interest to a named date, subject to a deduction therefrom of such of the debts as were then uncollected. The debts named were firm assets in the hands of H. as surviving partner. Held—That the agreement does not exempt H. from the payment of interest collected by him on the debts named, the interest being a part of the debts themselves.

3. Pleading—Relief—It was error to allow the defendant credit for a greater amount on account of debts against the firm paid by him than the amount claimed by him in an amended answer, although he had claimed a greater amount by his original answer, and the evidence showed that he was entitled to a greater amount.

Wood & Day for appellant.

John T. Hazelrigg for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

The appellant's intestate, J. S. Turner, and the appellee, H. C. Turner, were partners in the mercantile business for several years next before the death of J. S. Turner. After the death of J. S. Turner the business was continued in the name of the appellee as surviving partner.

It seems that by the terms of the partnership J. S. Turner was to furnish the capital and the appellee was to devote his time to the business, and, after allowing J. S. Turner the capital invested and the interest on a certain portion of it, and deducting all expenses, the profits were to be equally divided between the partners.

About a year after the death of J. S. Turner, to wit, on the 19th day of February, 1876, the appellee executed to the appellant, as the administrator of J. S. Turner, a note for $6,291.76, due one day after date.

The appellant, as the administrator of J. S. Turner, brought suit against the appellee for the purpose of obtaining personal judgment on this note and having the partnership business settled.

The lower court, upon the report of its commissioner and the proof in the cause, rendered judgment practically settling the rights of the parties. The appellant contends here that the lower court, in its judgment, committed four errors to his prejudice. The first error complained of is that the court refused to give personal judgment on the note for $6,291.76. The pleadings and proof establish the fact that the note was given for the balance of the advances made to the firm by J. S. Turner under the parter-ship agreement.

The law is well settled that this debt, as between the partners, is a debt against the firm, and that the firm assets are primarily liable for its payment, and according to the agreement between the partners the whole debt and the interest thereon should be paid out of the assets of the firm to the appellant, and in case the assets are not sufficient to pay the whole debt and its interest then the appellee should be held personally liable for one-half of the balance.

The agreement of September 20, 1883, does not contravene the foregoing views, but is in harmony with them, and the judgment of the lower court being in accord therewith must be sustained.

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The second error complained of is that the lower court refused to allow the appellant the item of $500, which he claims was due his intestate as a part of his advancements to the firm, but was left out of the note for $6,291.76 by mistake. We think that the proof satisfactorily shows that the appellee should not be charged with this item.

The appellant assigns as the third error committed by the court that it refused to charge the appellee with interest from and after the 19th of February, 1876.

On the 20th of September, 1883, the appellant and the appellee agreed in writing on a basis of settlement, the first clause of which is as follows: "The defendant is to be charged with all the debts set forth in exhibit 'E,' with interest thereon to the 19th of February, 1876, subject to a deduction therefrom of such said debts as are now uncollected."

The debts mentioned in exhibit "E" were firm assets, which were in the hands of the appellee as surviving partner.

The above agreement, when properly understood, means that the appellee, after the 19th of February, 1876, should not be charged interest on any of the debts mentioned in exhibit "E" that he had collected, but the agreement does not mean that he should not account for any interest that he might collect on these debts, for the interest thereon is a part of the debts themselves, and when collected the appellee should be charged with it.

The judgment of the lower court in this respect is erroneous.

The fourth error complained of is that the court allowed the appellee a verdict of $4,479.49 when he should have been allowed only $4,134.28. The appellee, by an amended answer, alleged that he had paid to Cincinnati merchants debts which they held against the firm, amounting to $6,998.61.

On the same day he filed another amended answer, in which he alleged that he had only paid these merchants $4,134.28, and that the former answer, in which he fixed the amount paid as $6,998.61, was a mistake. He was bound by the statements in the last answer, and the court should have allowed him no more than the $4,134.28, although the evidence might show that he was entitled to a greater sum.

For the errors above indicated the judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judge Holt not sitting.

BURCH v. JONES, &c.

(Filed October 13, 1887—Not to be reported.)

1. The sale of land by a married woman by title bond is absolutely void, and confers upon the purchaser no title, either legal or equitable, nor even the right to rely upon the purchase as an equitable estoppel as against the vendor's assertion of title to the land.

2. Rents and improvements—In an action to set aside a sale of land by a married woman, which was referred to the master to take proof as to waste, rents and improvements, the master charged the vendor with the prime cost of the improvements and allowed her for rents estimated upon the land as it was before it was improved, and then increased in proportion to the prime cost of the improvements. Held—Upon appeal by the vendee, that it is unnecessary to decide whether this basis of adjustment was correct, as it is more favorable to the appellant than the other rule which binds a married

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woman for improvements only to the extent they enhance the value of the land, and allows her rents for the land in its condition before it was improved.

3. Same—The vendee should not be allowed for improvements made by tenants under their terms of lease, and at no cost to himself, either in labor or money.

4. Waste—The vendee is bound to return the land in the condition it was when he received it, and he is, therefore, chargeable with stave and saw-log timber cut by him off the land.

J. P. Hobson and Jas. Montgomery for appellant.

Bush & Robertson for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bennett.

The appellees are the heirs of Harris Irwine, deceased.

All of the appellees except Elizabeth Jones, Albert Jones and John F. Wright brought suit in the Hardin Circuit Court against the said Elizabeth and Albert Jones and John F. Wright, and the appellant, Thomas Burch, in which suit they in substance alleged that Harris Irwine, at the time of his death, was the owner of a tract of land lying in Hardin county, Ky., containing four hundred acres, which belonged to them and Elizabeth Jones and Mrs. Wright as the heirs of Harris Irwine; that the land was sold, after the death of Harris Irwine, under a decree of the Hardin Circuit Court, to satisfy some debts against his estate; that Charles Jones, at the decretal sale, became the purchaser of the land in trust for all of said heirs; that Charles Jones, in 1857, about a year after the purchase, conveyed, by deed absolute on its face, said land to Elizabeth Jones and Mrs. Wright; that the conveyance was intended to be a conveyance in trust for the benefit of all of the heirs of Harris Irwine, including Elizabeth Jones and Mrs. Wright, but by mistake an absolute conveyance was made to the two last named. It was sought to have the mistake corrected and the deed reformed so that the trust would appear, and that the land be sold and the proceeds divided among the heirs, etc. It was also alleged that Mrs. Jones and John F. Wright, the husband of Mrs. Wright, she having died, and the appellant and his tenants wrongfully set up claim to the land.

Mrs. Jones and John F. Wright answered, admitting the truth of the plaintiff's allegations, and consenting to the reformation of the deed and the sale of the land for a division of the proceeds of sale.

After this answer was filed the plaintiffs, upon the motion of the appellant, elected to prosecute the suit against the appellant, and dismissed the action as to Mrs. Jones and John F. Wright.

Thereupon Mrs. Jones and John F. Wright, over the objection of the appellant, were allowed, upon their petition, to be made coplaintiffs with the original plaintiffs to the action. Mrs. Jones and John F. Wright by their petition joined in the relief sought by the original plaintiffs against the appellant.

After this proceeding was had the appellant filed an answer, in which he disclosed that he, in 1871, purchased the land by title bond from Mrs. Jones (she being at the time a married woman, and was a married woman at the time she filed her petition to be made a party to the action); that she agreed, on behalf of herself and as agent of Mrs. Wright, who was also a married woman, to convey said land to appellant as soon as the purchase money was all paid; that, although he had taken posses-

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sion of the land by virtue of his purchase, no deed had been made him to the land.

If the appellant's purchase from Mrs. Jones had vested in him a legal or equitable title to the land, without notice of the latent trust, for it was a latent trust, he might have been in a position to object to the filing of the petition of Mrs. Jones and Wright to be made coplaintiffs with the original plaintiffs, but as his purchase from Mrs. Jones by title bond—she being a married woman—was void, and, therefore, gave him no legal or equitable title to the land—not even the right to rely upon the purchase as an equitable estoppel of her right or that of Mrs. Wright, she being also a married woman, to assert their title to the land, and as Mrs. Jones and John F. Wright agreed that the original plaintiffs held, by reason of the latent trust, an equitable interest in the land, it follows that the appellant could not object to their asserting that interest in conjunction with Mrs. Jones and Wright.

The appellant also in his answer alleged that at the time of the purchase he paid to Mrs. Jones $110 on account of the purchase, and agreed to pay her $1,390 more for the land when he received a deed from Mrs. Jones and Mrs. Wright, which deed was to be made in a short time. He also alleged that he purchased the land in good faith and took possession of it, and believing that it was his he put lasting and valuable improvements upon it, amounting to $10,000. He asked that the rents and improvements be adjusted.

The case was referred to the master to take proof as to waste, rents and improvements, and report.

The master in his report fixed the prime cost of the improvements at $2,657, and the rents and waste at $2,495. The rent was fixed upon the land as it was before it was improved, and the rent was then increased in proportion to the prime cost of the improvements. Whether or not the master was correct in this basis of adjustment, Mrs. Jones being a married woman, it is unnecessary to decide, as this rule of adjustment is more favorable to the appellant than the other rule, which binds a married woman for improvements only to the extent that they enhance the value of the land and allows her rents for the land in its condition before it was improved.

The master's report shows that the clearing of land and the putting up of rails were done by tenants of the appellant in consideration of their leases. In other words, by the terms of the leases the tenants were to do these things. The lower court rejected these claims, and by their rejection nothing was due to the appellant. He complains of this.

Whatever improvements were made on the place by the labor of the appellant, or at a cost to him, and which enhanced the value of the land, he should be allowed to the extent of the enhanced value. On the other hand, if the improvements were made by tenants under their terms of lease and not at the cost of the appellant, either in labor or money, he should not be allowed for such improvements.

The master allowed the appellees the price of stone and saw-log timber cut off of the land by the appellant. He objects to this because, as he contends, the land, including the timber, was charged to him at the price of $1,500, and that for that reason he should not be charged with this timber. As a matter of fact the land was not charged to the appellant at the price of $1,500. He never paid for it. He was bound to return the land

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in the condition it was when he received it. This he did not do to the extent that he cut and removed this timber.

Deducting the improvements allowed for fencing and clearing by the tenants, and allowing the appellant the $110 and interest thereon, which he paid on the land purchased, and allowing him the other items as fixed by the master for improvements, these allowances are not equal to the sums that the appellees were entitled to for rents and waste.

The judgment of the lower court is affirmed.

McKEE, &c. v. MARSHALL.

(Filed October 15, 1887—Not to be reported.)

Construction of deed—The parties to a conveyance are "J—— F—— of the first part and his wife, E—— F——, survivor to himself of the second part." The grantor then proceeds, in consideration of love and affection, to convey the land, describing it, ' to have and to hold the same with the appurtenances thereto to the second party, her heirs and assigns forever, with covenants of general warranty, and survivor to himself." The wife died leaving husband and children surviving. Held—That the husband it invested with the fee, his intention being to give his wife the land in the event she survived him, he to own the fee if he survived her.

G. R. McKee and J. F. & C. H. Fisk for appellants.

Simmons & Schmidt for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

John W. Finnell being at one time the owner in fee of the tract of land purchased by these appellants with a view of securing the property to his wife or vesting her with the absolute estate on a certain contingency, on the 20th of April, 1872, executed a conveyance to his wife of the entire tract of land, and the question presented is as to the extent of the interest acquired by the wife by reason of that conveyance. The wife died leaving her husband and children surviving her, and the land having been sold in this proceeding by the commissioner as the absolute estate of the husband, the purchasers at the decretal sale questioning the validity of the title, excepted to the report of sale on that ground and the chancellor adjudging that John W. Finnell was vested with the title, and overruling their exceptions, they have appealed. The children were not made parties to the action for the sale of the land and are not before the court. If they have an interest they shoul dhave been made defendants, and the sale set aside.

The parties to the conveyance are John W. Finnell, of the first part, and his wife, Elizabeth Finnell, survivor to himself, of the second part. The grantor then proceeds, in consideration of love and affection, to sell, grant and convey the land, describing it by metes and bounds, to have and to hold the same with the appurtenances thereto to the second party, her heirs and assigns forever, with covenant of general warranty and survivor to himself.

After the execution of this conveyance Finnell and wife executed a mortgage on the land to Marshall, and Mrs. Finnell hav-

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ing died, her husband, after her death, executed a mortgage to McKee on the land for purposes therein mentioned. The husband surviving the wife, it is insisted by the purchasers that if he had any interest it was confined to a life estate, and that the wife being vested with the fee the title passed from her to her children. We think not. The manifest object of the conveyance was to create such an estate as vested the absolute estate in the one surviving, and the husband being the survivor was invested with the title. He at the time of the conveyance to the wife owned the fee, and it is apparent that his intention was to give the wife the land in the event she survived him, or that the husband should own the fee if he survived the wife. The words survivor to himself import plainly the intention of the parties. Neither party contemplated, by the use of the word heirs, to vest the children with an immediate or contingent interest, but in creating an estate for the benefit of the wife the husband has provided that the land survives to him in the event he survives her. This is not only evidenced by the subsequent action of the husband in securing his creditors by executing a mortgage after the death of his wife, but is apparent from the face of the deed, and to that alone we must look in determining what estate passed by that instrument. The words survivor to himself, used more than once in the conveyance, are sufficiently expressive to show the intention of the parties, and to pass to the survivor the absolute estate. The purchasers being invested with the title, have no right to complain.

Judgment affirmed.

MILLAY v. WHITE, &c.

(Filed Oct. 15, 1887.)

Construction and repeal of statutes—Exemptions—An act was passed April 4, 1884, so amending section 6 of article 13, chapter 38, General Statutes, as to exempt to debtors so much of any crop on hand as might be necessary to supply the deficiency where there was not a sufficiency of provisions to sustain the family one year, the act to take effect from passage. By an act of April 22, 1884, passed at the same session of the legislature, the same section of the statute was amended by providing "that if there should not be on hand sufficient provisions to sustain the family one year there should be exempt other personal property or growing crops not to exceed $50 in value for each member of the family." This act provided that it was not to apply to any debt contracted prior to June 1, 1884. Held—

1. That as the latter statute fully covers the same subject-matter as the former, it may be presumed that it was intended to repeal the former statute.

2. But even if not, the act of April 4 being silent as to what debts it shall apply to, it must be presumed that it was passed in accordance with the sense of the same legislature as to that matter as expressed in the act of April 22, upon the same subject, and that it was not intended to apply to debts created prior to its enactment, especially as this construction removes any doubt as to its constitutionality.

Wm. B. Noe for appellant.

Jep. C. Johnson for appellees.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Bennett.

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The appellant, in August, 1877, executed his promissory note to the appellee, Robert Williams.

In 1884 the appellee, Williams, recovered judgment against the appellant on this note.

In November, 1885, execution was issued on this judgment and placed in the hands of the appellee, Frank Wright, as the deputy of the appellee, John W. White, sheriff of McLean county.

The appellee, Wright, as such deputy, levied this execution while it was alive and in full force upon the crop of tobacco grown by the appellant in 1885 to satisfy the execution, and the tobacco was sold by the deputy to satisfy the execution.

The appellant, at the time the foregoing proceedings were had, was a bona fide housekeeper with a family in McLean county, Ky.

The appellant executed this action in the McLean Circuit Court against the appellees, in which he claims damages for the sale of said tobacco upon the ground that at the time of the levy and sale he had not a sufficiency of provisions, including breadstuffs and animal food, to sustain himself and family for one year, and that under the statutory exemptions from execution in favor of bona fide housekeepers with a family a sufficiency of the tobacco levied on and sold which would supply the deficiency of provisions, including breadstuffs and animal food, for one year was exempt from execution.

The lower court dismissed the appellant's petition. He has appealed to this court.

Section 6, article 13, chapter 38 of the General Statutes, which was in force at the time the debt sued on was created, provides that there shall be exempt from taxation "a sufficiency of provisions, including breadstuffs and animal food, to sustain the family one year, and if there be not a sufficiency of provisions on hand for that purpose so much of the live stock suitable for the purpose and of the growing crop, if any, as may be necessary to supply the deficiency."

The object of the statute supra was "to supply the deficiency" out of any live stock on hand, if any, suitable for provisions for the family, and to supply the deficiency in breadstuffs for the family out of any growing crop on hand, if any, suitable for breadstuffs, and to supply the deficiency in animal food for such animals or beasts as belonged to the defendant in the execution as were exempt from execution out of the growing crop on hand, if any, suitable for that purpose.

The statute supra has uniformly received the foregoing construction, and it has never been held that the growing crop thereon referred to embraced any crop except that suitable for breadstuffs and animal food. On the contrary this court expressly held in the case of Hayden v. Crutchfield, MS. opinion, June 25, 1881, that the growing crop referred to in the statute meant such crop as was suitable for breadstuffs and animal food, and did not embrace a growing crop of tobacco.

But by an act of the legislature of this State, approved April the 4th, 1884, amendatory of 6th section of the General Statutes above quoted, the words occurring therein "suitable for the purpose" were stricken out and the words inserted therein "or any crop on hand," so as to make the section read as follows: "A sufficiency of provisions, including breadstuffs and animal food, to sustain the family one year, and if there be not a sufficiency of provisions on hand for that purpose so much of the live stock and of the growing crop, if any, or any crop on hand, as may be necessary to supply the deficiency." This act was to take effect from its passage.

The appellant contends that this amendatory act is retroactive,

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and entitled him to an exemption out of the tobacco sold under the execution sufficient to supply the deficiency of one year's provisions for himself and family, including animal food, although the debt upon which the judgment was rendered and the execution was issued was created prior to the passage of the amendatory act.

If this act stood alone and was now in full force the serious question would arise whether the increasd exemption therein provided for could be applied as against debts which were created prior to the passage of the act—whether the antecedent contract or the remedy, which is a part of the contract, was impaired by the additional exemption.

But the legislature of this State at the same session passed another act, approved the 22d of April, 1884, amendatory of section 6, article 13, chapter 38 of the General Statutes, which amendment provides that there shall be exempt from execution in favor of a bona fide housekeeper with a family "sufficient provisions, including breadstuffs and animal food, to sustain the family one year, and if not on hand other personal property or growing crop not to exceed fifty dollars in value for each member of the family."

This act also provides that it should not take effect until the first day of June, 1884, and that its provisions should not apply to any debt contracted before that date.

This act and the act of the 4th of April, 1884, were both passed by the same legislature.

The act of the 22d of April, 1884, by allowing the "nonsufficiency" to be made up out of "other personal property or growing crop" not only covers the live stock and growing crop or, any crop on hand mentioned in the act of the 4th of April, 1884, but it allows the deficiency to be made up out of any other personal property that the defendant in the execution may have. In addition to this the act of April the 22d revised and amended the 6th section in detail.

As the act of the 22d of April amends the 6th section of the General Statutes in detail and fully covers the subject matter of the amendment of the 4th of April, it may be presumed that the act of the 22d of April was intended to repeal the act of the 4th of April.

But be this as it may, the act of the 4th of April was not by express terms given a retroactive effect, and to construe it as acting retroactively would involve the constitutional question of impairing the integrity of antecedent contracts by denying the creditor the rgiht to subject property liable to the payment of such contracts at the time they were made to their satisfaction; on the other hand, to construe the act as acting prospectively would free it of that embarrassing question. So if the act of the 4th of April is to be regarded as in force for any purpose it must be interpreted in the regard in question by the express sense of the legislature which passed it upon that subject. And the legislature, by the act of the 22d of April, expressed the sense that the additional exemptions in favor of execution defendants should not apply to debts theretofore created, and the act of the 4th of April being silent upon that subject, the expressed sense of the legislature must be presumed to have existed when the latter-named act was passed, and that it was in accordance with the expressed sense of the legislature of that session on that subject. Thus interpreting the act of the 4th of April by the act of the 22d of April, which furnishes the sense of the legislature of that session as to what class of debts the additional exemptions provided for at that session should apply, there is no difficulty in determining that the

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act of the 4th of April, if it is still in force, does not apply to debts theretofore created.

The judgment of the lower court is affirmed.

RUDD, &c. v. HAGAN.

(Filed October 15, 1887.)

1. Trusts—Debtor and creditor—Where one is vested by devise with an interest in the profits of an estate, that interest may be subjected to the payment of his debts, although the testator has provided that it shall "in no way be liable for his debts."

2. Same—Under a devise by a testator to his son for the support and maintenance of himself, wife and children, the wife and children take an interest equal to that of the husband in the income of the estate, and in an action by a creditor of the husband to subject his interest, it being charged by the children that their father has wasted the rents and profits of the estate in the payment of his debts and in disregard of their rights, there should be no sale of his interest until there has been a settlement of his accounts as trustee for his wife and children; and if upon a settlement it appears that he is indebted to them, they must first be made whole out of the trust fund.

Geo. W. Williams & Son for appellants.

W. N. Sweeney & Son and Weir, Weir & Walker for appellee.

Appeal form Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

James Rudd, Sr., by his last will devised to his son, James Rudd, Jr., a tract of three hundred acres of land in the county of Daviess for the benefit of James and his children. The language used in the devise is as follows: "Said tract of land is hereby declared and the products thereof to be for my son, James C. Rudd's, use and benefit, for the support and maintenance of himself, wife and children during his life, and in no way or extent to be liable for his debts, and at his death the property to become the property equally of the children," etc. By a codicil to this will he lessens the quantity of land devised to one hundred acres, and gives in lieu of certain property in the city of Owensboro, as follows: "My son James is to have and to hold my city porperty in Owensboro, on Ann street, opposite the courthouse and jail in said city, and the property in Owensboro herein devised to my said son is for the benefit of himself, wife and children, and is to be held subject to the same limitations, restrictions, etc., as are imposed on the three hundred acres named in the eleventh item of this will."

The property on Ann street is valuable and its rents and issues are involved in this litigation. The appllee, a creditor of the son, James Rudd, is attempting to subject the interest of James in these rents to the payment of a debt owing him by James, and is properly in a court of equity for that purpose. The chancellor below subjected the interest of James in the rents, etc., accruing during the pendency of the action and after to the payment of appellee's debt, and gave to James or his creditor the interest in the rents said to have been acquired by him by reason of the death of one of his, James', children, that took place after the probate of the will of James Rudd, Sr.

The children of James are prosecuting this appeal and ask a re-

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versal on several grounds. The appellee maintains that the property known as the Ann street property is not held under the restrictions mentioned in the devise of the three hundred acres of land, and before proceeding to notice the errors complained of by the appellants it is proper to say that it is plain from the provisions of the will and codicil that the property was devised to James for life, with the rents and issues in trust for the support of James and his family. His wife and children were vested with an interest equal to that of James in the income of the estate, and this was, we think, the manifest intention of the devisor. The infants and beneficiaries are prosecuting the appeal, and we perceive no bar to the proceeding by reason of orders purely interlocutory, made during the progress of the action. Counsel for the widow and children of the son, James, insists that the devise to James for the benefit of himself and family places the estate or its income beyond the reach of the son's creditors because the father of James, by his will, has said that it shall not be liable for his son's debts.

It is true the property devised belonged to the father of James, and he had the right to make what disposition he saw proper of his own estate when in accordance with the laws of the land, but here the devise is to James, the son, and vests him with an absolute interest, in conjunction with his children, to the profits of the estate, and it has long since been settled by this court that such an interest may be subjected by a creditor—in fact the statute provides that "estates of every kind, held or possessed in trust, shall be subject to the debts and charges of the persons to whose use or for whose benefit they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof." (Section 21, chapter 63, General Statutes.) This statute is so broad and comprehensive in its language as to obviate the necessity of reviewing the authorities referred to by counsel for appellant. It makes the interest of the son in the rents of the property liable to the extent of that interest, whatever it may be, subject to any exemptions, if any, that by operation of law may apply to it.

It appears from the statements contained in the answer of the appellants, or an amended answer, that an encumbrance existed on the property devised to these appellants and their father and that he had wasted the rents and profits of the estate in the payment of his own debts, and in disregard of the rights of the appellants. A part of their estate had been sold to pay encumbrances when the rents and income were sufficient for that purpose. If these facts are ture, and whether true or not, a settlement should be had of the accounts of James Rudd as trustee for his wife and children for the purpose of ascertaining the exent of his interest. If he has wasted or mismanaged the trust fund or appropriated the proceeds to his own use, to that extent he should be charged. As trustee and beneficiary, when claiming an interest against those who are entitled to share this fund with him, if he has already received more than he is entitled, no recovery can be had either by the trustee or his creditor until the other beneficiaries are made equal with him.

Proceeding on the theory that this trust estate is for the benefit of the entire family, including the husband, wife and children, and that it is to be apportioned between the members of the family as they may increase or diminish, by reason of the birth or death of a child or children, James Rudd has no greater interest than the others, and if he has squandered or wasted the estate by mismanagement or otherwise, so as to consume his in-

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terest, his creditor has no equitable claim upon the fund as against these beneficiaries. Their estate can not be taken to pay their father's debts, from which they derive no benefit, hence the necessity of having a settlement of James Rudd's accounts as trustee in order to ascertain what interest, if any, he has in the rents and profits, and to do this the case should be referred to a commissioner, with directions to ascertain the disposition made by the trustee of the trust fund—his application of it to the support of the family—and if his accounts show an indebtedness to his cestui que trust they must first be made whole out of the trust fund before a creditor of the trustee can subject it. In other words, the claim of the creditor is subordinate to that of the beneficiaries of the trust if the trustee becomes indebted to them on settlement.

The judgment is, therefore, reversed, with directions to refer this case to the commissioner for settlement, and for proceedings consistent with this opinion.

THE OHIO VALLEY RAILWAY AND MINING CO. v. KUHN.

(Filed October 18, 1887.)

Grounds for new trial—The particular ground relied upon for a new trial must be named with such reasonable certainty as to direct the attention of the court to it. "Error of law occurring at the trial and excepted to by the plaintiff" is too general as a ground for a new trial to require the court to review its action in any particular.

Clay & Banks for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

This is a proceeding to condemn a right of way through the land of the appellee. The only grounds upon which a new trial was asked below are: "First; error in the assessment of the amount of defendant's recovery; second, the verdict is not sustained by sufficient evidence, and is contrary to law; third, error of law occurring at the trial and excepted to by plaintiff." Counsel in argument present various reasons for a reversal, but, looking at the grounds upon which a new trial was asked, we can only consider whether the verdict is palpably against the testimony.

The third ground is in verbis substantially as given in the eighth subsection of section 340 of the Civil Code. If it was sufficient, however, for a party to state it thus generally when applying for a new trial it would require the trial judge to review his entire action in the case. It was intended by this Code provision to enable a party to take advantage of all errors to which exception could be taken that were not embraced by the seven subsections preceding this one, provided he specified the particular error or errors relied on, and it has been repeatedly held by this court that the law-making power did not intend that a party could by a general statement, although it might be in the language of this subsection, open for the consideration of the trial judge every step that had been taken in the case and compel him to review each and every one of his rulings.

The ground for the new trial must be specified in order that the attention of the circuit judge may be directed to it. The dispatch

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of business and the public need requires this rule. The particular ground must be named with such reasonable certainty as to direct his attention to it. (McLain v. Dibble & Co., 13 Bush, 297; Meaux v. Meaux, &c., 81 Ky., 475; L. & N. R R. Co. v. McCoy, 81 Ky., 403.)

The verdict in this case allows the appellee $50 for her land taken and $636 in damages, or $686 in all. The jury in the county court had previously given her $600. Two juries have found about the same amount in her favor. Her land is a small tract of about thirteen acres only. The road runs diagonally through one end of it, cutting off two portions in triangle form which are thereby separated from each other and from the main tract. It is unnecessary to review the testimony in detail, but sufficient to say that, in our opinion, the verdict is not palpably against it.

Judgment affirmed.

OWINGS v. HILL, &c.

(Filed October 18, 1887—Not to be reported.)

Construction of deed—A father conveyed land to his children, naming them, reserving a life estate to himself. The conveyance provided as to his daughter H. that she should enjoy the portion given to her during her life and at her death her portion should go to her children. The land was afterward divided and conveyances again made by the grantor to his children for their several interests, the conveyance to his daughter H. conferring upon her the power of alienation, provided she invested the proceeds in other land to be held in the same way. Held—That the first conveyance invested the children of H. with the fee after carving out the two life estates, and the grantor had no power after parting with the title to change the manner of holding without the consent of the grantees.

L. A. Wood & Son for appellant.

W. H. Holt and H. L. Stone for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the year 1853 David L. Jones conveyed to his five children (naming them) a tract of four hundred and seventy-five acres of land lying in Montgomery and Bath counties. By the terms of the conveyance the grantor, who at the time was the owner of the fee, reserved a life estate to himself, remainder to his children, "the land to be equally divided among them and their heirs forever, with this further limitation and restriction, that Mrs. White and Mrs. Hill (two of his children) shall, during their lives, have and enjoy the portion given to each one, and at their death their parts shall go to their respective children, that is to say, the children of Mrs. White at her death to have her part, and the children of Mrs. Hill at her death to have her part," etc.

This conveyance was properly executed and admitted to record. Subsequently, in the year 1859, the grantor or the parties in interest had their land divided, and conveyances were again made by the grantor to his children for their several interests, with the power of alienation conferred on Mrs. Hill of her interest provided she invested the proceeds in other land to be held in the same way.

Mrs. Hill and her husband sold that part of the land allotted to

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her to John M. Jones, one of the children, after the conveyance of 1859, and made him a deed. Jones, the purchaser, failed in business, and made an assignment for the benefit of his creditors. The appellant, Owings, at the decretal sale of this land to pay debts under the assignment, purchased the land for greatly less than its value.

Mrs. Hill died in the year 1878, and these appellees, her children, claiming to own the fee after her death, brought this action to recover the land insisting that their mother had only a life estate. The court below so adjudged, and hence this appeal. It is argued by counsel for the appellant that Mrs. Hill was invested with the fee, and that the attempt to create a fee in the children passed to them no title. Such a view of the case is not sustained by the record.

There was by the express language of the conveyance a life estate retained for the use and enjoyment of the grantor, who was then in possession, and in the remainder, after the termination of his life etate, his daughter. Mr. Hill, took an etate for life, with the fee in the children. In fact the fee passed to the children subject to the life etate of their grandfather and that of their mother. Two life estates, the one to succeed the other, were carved out of the fee with the abolute title in the children by the deed of 1853.

The grantor had no power after parting with the title to change the manner of holding without the consent of the grantees. He had parted with his title and could make no subsequent limitations or restrictions on the rights of those in remainder without their consent. These parties who purchased from Mr. Hill were aware of the defect in the title, or had been told that the title was not good. They purchased with their eyes open, and with both deeds of record in the proper office. The title was understood by nearly every one conversant with the land to be defective, both before the sale and at the time the sale was made, and Owings, the purchaser, was told that Hill's children claimed the land, and if he purchased the result would be a lawsuit. The chancellor below has released the appellant, Owings, from his purchase, and canceled his bonds for the purchase money, requiring the assignee of Jones to refund the purchase money paid. We perceive no objection to that judgment, and the same is now affirmed.

Judge Holt not sitting.

BENT v. MAUPIN, &c.

(Filed October 20, 1887.)

1. Motions—The plaintiff in a proceeding by motion, having filed the notice duly served on the defendant, may, on the day specified therein, either make the motion in open court and cause it be entered of record or cause it to be placed on the motion docket, and whether he takes one course or the other the motion is to be considered as regularly pending in court, and, like an action, may be continued without setting it for hearing on any particular day of the ensuing term. Nor can the failure of the clerk to enter it on the docket of the next term deprive the plaintiff of the right to call it up and have it tried.

2. Execution sales—By statute the purchaser of land under an execution, though he be the plaintiff, may, in a proceeding by motion, have the sale set aside if, upon the trial of such motion, it shall appear that the defendant had no title to the land.

3. Same—Limitation—Such a proceeding is not barred if brought within

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a reasonable time, even if the period of ten years, provided by section 4, article 3, chapter 71, General Statutes, does not apply.

The motion in this case was not barred, although more than two years had elapsed from the date of sale to the commencement of this proceeding.

Cornelison & Mitchell for appellant.

Lewis Apperson for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

Appellees, John Maupin and the firm of Maupin & Orear, caused to be duly executed on the appellant, Bent, a notice in substance that November 28, 1883, they would move the Montgomery Circuit Court to quash the levy and return on an execution issued from the office of the clerk of that court, directed to the sheriff of Carter county in favor of Maupin & Orear, and also the venditioni exponas, issued thereon and return on the same for the reason appellant, the defendant in the execution, had no interest whatever in the land sold under said writs, but it belonged to others.

The motion was not decided at the term it was made, but at the June term, 1884, when judgment was rendered quashing and setting aside the levy and sale mentioned in the notice.

Mitchell & White, assignees of Maupin & Orear, and assignors of John Maupin having, upon their own motion, been made parties plaintiffs in the proceeding there was thereafter no defect of parties plaintiffs, and the special demurrer for that cause was properly overruled.

As appears from the bill of exceptions the defendant objected to the consideration of the motion when called up during the June term, 1884, upon the ground it had not been placed upon any docket, and was, therefore, to be regarded as abandoned.

The Civil Code, section 444, provides that the service of the notice shall be regarded as the commencement of the proceeding by motion. But while sections 348 and 351 require that all ordinary and all equitable actions shall be entered respectively on the common law and on the equity docket the language of section 352 is that "on the motion docket may be entered any motion relating to proceedings in court." And by section 447 it is provided that "unless the motion be made or entered on the motion docket on the day specified in the notice it shall be considered as abandoned."

It seems to us, according to a fair construction of the Code, the plaintiff, having filed the notice duly served on the defendant, may on the day specified therein either make the motion in open court and cause it to be entered of record or place it on the motion docket, and whether he takes one course or the other the motion is to be considered as regularly pending in court, and like any particular day of the ensuing term. Such construction accords with the recognized practice in courts before the adoption of a Civil Code. (Miller v. Boyd, 1 Dana, 272.)

In this case the motion having been made in court and noted on the record the failure of the clerk to enter it on the docket of the next term did not nor could deprive the plaintiff of the right to call it up and have it tried.

The evidence in this case shows that the defendant, Bent, neither had nor claimed to have any interest in or title to the

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particular tract of land levied on and sold to satisfy the judgment of Maupin & Orear against him. But it is identified by the description in the return on the execution as the property of another levied on and sold by mistake of the officer without direction of the plaintiffs, though they are returned as the purchasers.

In such a case the plaintiffs, even if they are the purchasers, are certainly not without remedy. If they are, then the judgment stands satisfied without the debtor having paid anything or the creditor having received anything.

But in order to apply the remedy the proceedings under the execution must be quashed or set aside, for while they remain in force the creditor as well as the debtor is bound by them.

It seems to us, therefore, the only question is as to the form of remedy, for we have not found any case decided by this court where it has been held the purchaser, under circumstances like these before us, is wholly without remedy.

In the case of Edrington v. Harper, 5 J. J. M., 292, referred to by counsel, a fieri facias was levied at the request of the defendant on a tract of land which he claimed, and for which he exhibited a deed as evidence of his title. And upon the appeal from the judgment quashing the sale on account of alleged defect of title it was held that fact alone would not invalidate the sale nor the sale bond so as to justify a quashal of them, or either of them, on moiton for the reason that title to land can not be thus incidentially tried nor the right of the creditor thus irregularly delayed or embarrasse. It was not, however, there decided either that the purchaser was wholly without remedy or the debtor unconditionally discharged from his indebtedness. Moreover the issue in that case was between the purchaser and plaintiff in the execution. Here it is between the plaintiff, who purchased the land, and the defendant, who does not claim to have any title to it.

In Brummel v. Hurt, 3 J. J. M., 709, the contest was between the purchaser and plaintiff in the execution who, by express order, directed poreprty sold to satisfy his execuiton, which was not liable to sale not belonging to the defendant. There it was held the plaintiff was responsible to the bona fide purchaser. But said the court: "When the purchaser shall be relieved the creditor will not be remediless. He may get clear of the effect of the return on the execution by motion to quash or amend the return, or otherwise, by scire facias"

In Sanders v. Hamilton, 3 Dana, 550, it was held that the plaintiff in the execution, who was instrumental in causing the property of a stranger to be sold and consequently liable to the innocent purchaser for the consideration paid, might relieve himself by moving the court to quash the return on the execution. And the same practice was in De Wolf v. Mallett, 3 Dana, 214, held to be proper and allowable.

In the case of Newman v. Hazelrigg, 1 Bush, 412, the following language was used: "The right of the plaintiff in an execution, which has been returned satisfied, to have the return quashed so that another execution may be issued when the return has been made without any satisfaction in fact to the plaintiff, has been repeatedly recognized by this court."

In that case, after the sale of land of the debtor under execution, plaintiff being the purchaser, the same was, in an action by other creditors, adjudged subject to sale under what is known as the act of 1856, 1 R. S., 553, whereby the plaintiff in the execution lost the benefit of his purchase, and thereafter having moved to quash and set aside the sheriff's return of sale it was done. The

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ruling in that case was similar to what had been decided in another case at the same term of court and to the decision in the subsequent case of Tucker v. Fogle, 7 Bush, 290. But it seems to us the proceeding had in this case and the judgment of the lower court are authorized by article 12, chapter 38, General Statutes. By section 9 of that article it is provided that the purchaser of land sold under execution and not redeemed shall have the right, after obtaining a conveyance therefor, to enter a motion on the docket of the circuit court for judgment for the possession of the land, the proceeding on said motion to be the same as under chapter 6, title 10, Civil Code, and section 10, same article, provides that "if upon the trial of such motion it shall appear that the defendant had no title to said land when sold under execution the court shall have the power to set aside and quash the return of the officer, and award execution for the debt as if no sale had been made."

It thus appears that by statute the purchaser, though he be the plaintiff, may in a proceeding by motion have a sale of land under execution set aside if upon the trial of such motion it shall appear the defendant had no title to the land, and, therefore, it may be regarded as settled that by statute the purchaser of land under execution not only has his remedy against the debtor, who may not have title to the land sold, but he may proceed by motion and upon the trial of the motion the question of title may be determined.

Article 15, chapter 38, General Statutes, relates to sales made under execution by fraud, covin and collusion, and article 17 relates to the duties and liabilities of certain officers therein referred to, and consequently neither applies in determining whether the motion in this case was barred by limitation.

It appears that more than two years elapsed from the date of sale in this case to the commencement of the proceeding, but as there is no statute fixing such limitation it is sufficient if, as held by this court in Davis v. Loong, 4 Bush, 574, it is brought within a reasonable time, even if the period of ten years, provided by section 9, article 3, chapter 71, General Statutes, does not apply.

We are, however, satisfied the proceeding was not barrde by time, and perceiving no error the judgment of the lower court is affirmed.

Judge Holt not sitting.

SALE v. THORNBERRY.

(Filed October 20, 1887.)

Construction of devi e — Trusts — A testator devised real estate to his widow in fee simple, adding these words: "I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: That in the event she should marry again she will see that the interests of our children in said property are protected." Held—That the widow takes an absolute estate in the land, and does not hold it in trust for herself and children. If the extent of the interest of the children had been fixed by the provisions of the will a trust might arise for their benefit.

Jas. S. Pirtle for appellant.

G. A. Winston for appellee.

Appeal from Louisville Chancery Court.

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Opinion of the court by Chief Justice Pryor.

John J. Thornberry, of the city of Louisville, departed this life some years since leaving a last will and testament and his widow and two children surviving him. After making certain specific devises to his children he devised all the balance of his estate to his wife in the following manner: "All the rest and residue of my estate, both real, personal and mixed, I give and bequeath unto my beloved wife, Lutie Thornberry, in her own right in fee simple. I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so, without, viz; that in the event she should marry again she will see that the interests of our children in said property are protected."

The devisor at the time of his death was somewhat involved in debt and left nothing but real estate, the income of which was not sufficient to maintain his wife and children.

The appellee, Mrs. Thornberry, still remains his widow, and the two children are now living and parties to this appeal. After the death of her husband the widow, with a view of economizing her means and to provide for her children, sold some of the real estate that she might invest the proceeds in other property more suitable to her condition and pecuniary necessities. The testator owned some land in Jefferson county, the subject of this controversy, that his widow sold by title bond to the appellant, Clarence Sale, who declined to comply with his contract on the ground that by the terms of the will of the testator the testator's two infant children have an interest in the realty sold him by the widow.

The question is raised by counsel for appellant (the purchaser) that by the sixth devise of the will, already set forth, the wife does not take a fee simple estate in the land, but holds it in trust for herself and children. If the request made of the wife in this case is to be regarded as a command there would be but little doubt left as to the intention of the testator, or if the extent of the interest of the children had been fixed by the provisions of the will a trust might arise for their benefit. If the testator had said: In the event of your marriage I request that you convey to our children two-thirds of the estate, the chancellor, looking to the entire contents of the will, would necessarily adjudge that the plain intention of the testator was to vest his children with an interest upon the marriage of his widow. The testator was a lawyer and in such a pecuniary condition at his death as required some disposition to be made of his property or a part of it and a change from the then mode of living by his family to one less expensive. He knew the wants of his family, and in this condition, having the greatest confidence in his wife and knowing her affection for their offspring, vested in her the fee simple title, with the request simply that, as owner of the property, she would, if she ever married, look to the interest of the children.

He knew not only the wants of his family but the meaning to be attached to the words fee simple and in her own right, and used this expressive language so as to leave no doubt as to his intention, and that was to vest in his wife the absolute estate to the property devised by the sixth clause of his will. While vesting in his wife the legal title does not of itself negative the fact that a trust was intended to be created, still the mere request by the testator that his wife should look to the interests of the children in the estate upon a certain contingency will not defeat the plain purpose of the testator to vest in his wife the fee simple title to his lands. Such a title confers upon her the absolute property,

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and the purchaser was properly compelled to accept the conveyance. The confidence of the husband in his wife seems not to have been misplaced. She has not disregarded the request of the husband nor failed to provide for the welfare of the children in discharge of a duty imposed upon her by reason only of the relation of parent and children. The chancellor, if disposed to adjudge that a trust was created, would have much difficulty in determining its character and the extent of the holding by the mother and her children, and in its execution would necessarily speculate as to the intention of the testator in that regard. We have been referred to the case of Bohon v. Barrett's Ex'or, 79 Ky., 387, as bearing upon this question, and as conclusive of the case being considered. There is a manifest distinction between the cases, and while the devise to Thomas L. Barrett was absolute and the request made not as a condition upon which he was to take the estate, still it is plain, from the reading of the entire instrument, that Tillie Barrett was devised ten thousand dollars, to be paid her at the discretion of the trustee. In that case, although it was insisted that a devise was made absolute and unconditional, the testator, in the first clause of the will, directs the executor, who was claimed to be the sole devisee, to consult with A. J. Wood and Wm. I. Wood as to selling his real estate, and require Tillie Barrett to remain with his brother, to be governed by his advice and counsel; not to marry without his consent; to render unto him the most implicit obedience, and when this is done he is requested to give her ten thousand dollars on such terms as he may think her interest requires, but this is left to his discretion, but not to be legally binding on him in a court of equity or elsewhere, but left to his sense of right and discretion, "he being fully advised of my wishes concerning the said Tillie and also concerning the said sum of ten thousand dollars."

In that case the sum devised to Tillie Barrett was fixed and definite, viz., ten thousand dollars, and the testator intending to give to her this sum of money also desired to place such restraints upon the young girl as would cause her to live with and be educated in the family of his brother, and while imposing such conditions as would conduce to show a mere request to a brother to give this sum at his discretion, he says in effect: You know why these restraints on the young girl and the conditions as to the gift are inserted in the will by the use of the following language: "He (my brother), being fully advised of my wishes concerning the said Tillie, and also concerning the said sum of ten thousand dollars, which I request him to use for her benefit on the conditions aforesaid." On the performance of the conditions expressed in Barrett's will Tillie was to have this sum of money, and having complied fully with the wishes of the testator there was no reason for withholding the devise. In the present case no such trust arises, and the children must look alone, as the testator expresses it, "to the kind heart and good judgment" of an affectionate mother in securing to them an interest in the property acquired by her under the will of their father.

Judgment affirmed.

COMMONWEALTH v. WICKER.

(Filed October 20, 1887—Not to be reported.)

In an indictment under the statute for feloniously breaking into an outhouse and feloniously taking therefrom articles of value, it is not necessary, after alleging the name of the owner of the house broken into, to allege the

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name of the owner of the property taken therefrom, or to further negative the fact of ownership in the defendant; nor is it necessary to allege that the property was taken without the owner's consent, and with the intention upon the part of the defendant to convert it to his own use

The indictment in this case charged that the defendants did feloniously break "into an outhouse, viz: A henhouse belonging to and used by R. E. Young in connection with his dwelling house, and that they did feloniously take therefrom articles of value, viz: four chickens of the value of $1." Held—That the indictment was sufficient.

P. W. Hardin and Finley Shuck for appellant.

J. R. Thomas for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Pryor.

The 4th section of article 5 of chapter 29, General, Statutes, provides that if any one shall feloniously take goods or chattels of value from a church, schoolhouse, courthouse, etc., or shall rob any person in his dwelling house or place, or in any booth or tent, in a fair or market, he, his wife, children or servants or other person being within, "or shall feloniously break any dwelling house or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

An indictment was returned by the grand jury of Marion county against several parties under the clause of this statute, charging them with feloniously breaking into an outhouse or a henhouse belonging to and used by R. E. Young in connection with his dwelling house, "and that they did feloniously take therefrom articles of value, viz., four chickens, of the value of one dollar, contrary to the form of the statute."

The court below held that the facts stated in the indictment constituted no offense, and instructed the jury to find the defendants not guilty, and the case has been brought to this court by the attorney for the State that the question as to the validity of the indictment may be determined. The offense charged is purely statutory, and to make it complete there must be a felonious breaking of the outhouse and a felonious taking therefrom of articles of value, the property taken to be described in general terms that the accused may know the nature of the charge against him.

The felonious breaking of the outhouse of Young is sufficiently averred, but it is insisted, or was adjudged by the court below that the facts showing the felonious taking of the property must be specifically set forth, viz.: That Young or some other person was the owner and the property was taken without his consent and with the purpose on the part of the accused to appropriate it to his own use.

Such facts if stated would make the indictment good as an indictment for larceny, and if the statute had provided that if the party should be guilty of larceny when feloniously breaking and entering the dwelling or outhouse, by taking goods therefrom, then as larceny is a common law offense it should be defined or essential facts necessary to constitute larceny should be specifically pleaded, and not left to the mere conclusion of the pleader.

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By the common law rule, says Mr. Wharton, it is sufficient to frame the indictment in the words of the statute in all cases where the statute so far indicates the offense that the offender has proper notice from the mere adoption of the statutory terms what the offense he is to be tried for really is. (Wharton's Criminal Pleading, 8th edition, page 220; Davis v. Commonwealth, 13 Bush, 318.)

In this case the felonious breaking into the outhouse of Young being alleged, the averment that the accused at the time feloniously took therefrom the four chickens, of the value of one dollar, constitutes the statutory offense, and it was unnecessary to aver that Young was the owner or that the accused took the chickens with the purpose of converting them to his own use. An averment of the felonious taking, in connection with the felonious breaking of the dwelling of the party named, is a sufficient notice to the accused of the charge made against him.

The felonious taking necessarily implies the evil intent, and it was not necessary, after alleging that Young was the owner of the house, to give the name of the owner of the property taken at the time of the felonious breaking, for that was immaterial, nor was it necessary, in order to make the indictment good, to negative the fact of ownership in the party charged with the felony. This had already been done by the averment of the felonious breaking into the outhouse of Young and the felonious taking therefrom of the property mentioned in the indictment.

In our opinion the indictment was good. No reversal of the judgment can be had as the accused stands acquitted. The clerk will certify the opinion to the court below.

NEWTON v. CARSON.

(Filed October 20, 1887—Not to be reported.)

Res Judicata—Limitations—Instructions—In an action upon a note one of two sureties pleaded limitation. The plaintiff replied that the surety promised to confess judgment and that relying upon that promise he failed to issue summons upon the petition, which was field in time. Upon a former appeal this court held that if the promise to confess judgment was made, the time between the making of the promise and the refusal of the surety to comply should be deducted from the period of limitation. Upon another trial there was another verdict and judgment for the defendant from which this appeal is prosecuted. Held—

1. The opinion upon the former appeal must be regarded as the law of the case.

2. The fact that the plaintiff might have had a summons issued after the refusal of the surety to confess judgment so as to have prevented the running of the statute does not bar his right of recovery. That question was before the court on the former appeal, and considered.

3. As there was no evidence of any condition annexed to the agreement alleged to have been made by the surety pleading limitation, it was error to instruct the jury to find for him if they believe the alleged agreement was made upon condition that he was not to be bound by it unless the other obligors also confessed judgment.

4. It was error to instruct the jury that if the delay was caused by anything else than the plaintiff's reliance upon the alleged promise to confess they must find for defendant, as there was no evidence sustaining such a view of the issue raised.

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Clark & Grider and E. W. Hines for appellant.

Jas. A. Mitchell for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Pryor.

This case has been heretofore decided by this court and an opinion rendered under which the judgment below was reversed. That opinion must be taken and regarded as the law of the case, and upon a careful consideration of the record we find no material difference in the facts now before us and those in the record of the former appeal—in fact the case is similar in every aspect, and without stopping to discuss the legal questions already determined, and by which the court below is to be guided, it is necessary to notice only the instructions given in the present cas and their application to the facts proven.

The fact that the appellant might have had a summons issued after the refusal of the appellee to confess judgment, so as to have prevented the running of the statute, does not bar his right of recovery. That question was before the court on the former appeal and considered.

This court held that if the agreement to confess judgment was made, as alleged and proven by the appellant, the delay, or the time intervening between the promise and the time of the refusal, should not be computed in determining the question of the statutory bar.

The only question for the jury to determine was: Had such an agreement been made, and if so did the appellee, the surety, refuse to comply with his undertaking? We understand from the pleadings and the proof on the part of the defendant that he denies having made such an agreement, so the issue was directly made on this point, and is the only issue to be tried by the jury. It is insisted by the appellee that if the agreement was made, that it was in effect that all the parties to the obligation should confess judgment, and the others failing to enter their appearance he was not compelled or required to confess judgment. This depends upon the character of the agreement. If the appellant, Newton, withheld proceedings at the instance of obligors and on their promise to confess judgment, then it was their duty to comply, and the failure of one did not absolve the other; but, on the other hand, if it was agreed that if all did not appear, then it released the others from a compliance, the refusal to comply by one constituted a defense by the others. But this view of the case is not sustained by the testimony on either side, and we only allude to it because of the suggestion of counsel and from the fact that the proof may vary on the return of the case.

The distinct issue, however, is made by the affirmative statements of the plaintiff, that the latter agreed with the plaintiff if he would not sue on the note until court began and save him further cost he would enter his appearance and confess judgment. An amendment was offered, and directed to be filed by the former opinion, in which it is alleged that the promise to confess judgment was with the fraudulent purpose of relieving the defendnt from his liability as surety, and to enable him to plead the statute of limitation.

There is no evidence of any condition annexed to the agreement said to have been made by Carson, and, therefore, the instruction that appellee was not bound unless Covington and Robinson both appeared and offered to confess judgment was erroneous. Nor was it material that the attorney of Newton, the appellant, con-

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curred in the contract. The contract was made, if at all, with Newton, and the attorney had no power to give the indulgence or make such a contract without authority from Newton, nor is it pretended that he made the agreement. Instruction No. 1 was, therefore, misleading. It was also error to say to the jury that if the delay was caused by anything else than the alleged promise to confess they must find for defendant, or that such reliance alone on the promise must have prevented the appellant from bringing his action. There was no evidence sustaining such a view of the issue raised. As the record now appears the question for the jury to try from the pleadings and proof was did Newton and Carson make the agreement alleged, and did the appellee refuse to comply with the agreement? If so, the appellee is liable.

The judgment is reversed and cause remanded for a new trial in conformity with this opinion.

SOUTH v. THE COMMISSIONERS OF THE SINKING FUND, &c.

(Filed October 20, 1887.)

1 While proceedings for the removal of an officer for cause belong properly to the judicial power of the State, unless its Constitution or laws provide otherwise, yet when the legislature creates an office it may refer the power of removal to the governor or other tribunal not judicial.

2. The commissioners of the sinking fund have the power to remove the warden of the penitentiary without trial, in their discretion, and their action is not subject to judicial investigation; and while the legislature has reserved to itself revisory power over the action of the commissioners in this matter, their order of removal takes effect at once, and does not operate merely as a suspension of the warden pending the action of the legislature. The removed warden, therefore, has no right to retain possession of the property set apart by the legislature for the use of the warden and his family.

Wm. Lindsay for appellant.

A. Duvall and P. W. Hardin for appellees.

Appeal from Franklin Common Pleas Court.

Opinion of the court by Judge Holt.

The appellant, South, was duly elected warden of the penitentiary for the term ending March 1, 1888. The commissioners of the sinking fund, on September 16, 1884, entered an order for his removal. This action was brought against him on April 10, 1885, for the possession of the dwelling in which the warden is required by the statute to reside, and the validity as well as the effect of the action of the commissioners of the sinking fund is involved. The law provides:

"§ 1. The commissioners of the sinking fund shall hereafter be ex-officio directors of the Kentucky penitentiary, and shall perform the duties hereinafter prescribed for them in this act.

"§ 2. That a warden of the penitentiary shall be elected by joint ballot of the two houses of the general assembly, who shall hold his office for the term of four years, commencing on the first day of March of the year of his election, subject to the provisions of this act, provided that the warden elected by the present general assembly shall qualify immediately after his election and shall hold his office until March 1, 1884; also subject to the pro-

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visions of this act. The general assembly next preceding the expiration of the term of office of any warden so elected shall elect his successor. If a vacancy should occur at any time when the general assembly is not in session it shall be the duty of the said commissioners to fill the same by the appointment of a suitable person to discharge the duties of the office until the next ensuing meeting of the general assembly, and until the general assembly, by a regular election, as above provided, has elected a person to fill the vacancy for the remainder of the term. The said commissioners shall have power in their discretion to remove any warden, and they shall communicate the fact, with the grounds upon which the removal was made, to the next succeeding general assembly within ten days after its organization. If the general assembly fail or refuse to concur in the said removal within twenty days after the fact of removal is communicated to it, then it shall be the duty of said commissioners to re-instate said warden." * * * The statute also provides that it shall be the duty of the commissioners to appoint a deputy warden whenever they may deem it necessary; also that "the warden shall reside in the dwelling near the prison, belonging to the State, and now occupied by the family of the late keeper, and shall have the same with its appurtenances free of rent," and that he shall execute a covenant to the Commonwealth providing, inter alia, that he "shall faithfully account for all the property in his hands or under his control belonging to the State when he ceases to be warden, or is required to do so by said commissioners."

The appellant contends, first, that the order of the commissioners was merely interlocutory; that it operated merely as a suspension of him as warden and not as a removal from the time it was made until the legislature should either fail or refuse, within the time fixed by law, to concur in it; that in the interim he was still warden entitled to the emoluments of the place, but without the power to exercise the functions of the office; and, second if this were not so, that, having been elected warden and having, therefore, a right to the office, the commissioners had no such discretion under the law as authorized them to remove him without notice, the preferment of charges and a trial, and while a court should not interfere with the exercise of a discretion, yet if legally exercised it will not assist in making it effective.

The office in question is not a constitutional one. It is the creature of the legislature, and subject to its will.

Proceedings for the removal of an officer for cause belong properly to the judicial power of the State unless its Constitution or laws provide otherwise.

Where, however, the legislature creates an office it undoubtedly may refer the power of removal to the governor or other tribunal not judicial. (Page v. Hardin, 8 B. Monroe, 648.)

If the office of warden is, under the law, held subject to the judgment of the commissioners of the sinking fund, then he can not complain although his removal may in fact be without proper cause. Whether they have this power he may, as the appellant is now doing, ask a judicial determination.

A right dependent upon the mere judgment of another or a discretionary power can not exist by its consent, and must end at its will.

In this instance the law makes no provision for an investigation. There is no intimation that notice is to be given to the warden, or that charges shall be preferred, and he be heard in defense.

No such inference can be drawn from anything contained in the statute.

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The fact that it requires the commissioners to report their action, with the grounds therefor, to the next general assembly does not so imply. This merely affords the legislature an opportunity to revise the action of its agent if in its opinion the discretion it has given has not been properly exercised. It is a power which it has reseved to itself. A case might arise where the public welfare would require immediate action.

If notice, the preferment of charges and a trial were required the matter might be protracted indefinitely and the public interest jeopardized.

It seems to us, therefore, that a reason was presented to the legislative mind for not requiring it, and that neither the language nor the spirit of the law admits of such an interpretation.

It provides that the warden shall "hold his office * * * subject to the provisions of this act;" that "the said commissioners shall have power, in their discretion, to remove any warden," and "if the general assembly fail or refuse to concur in the said removal within twenty days after the fact of removal is communicated to it then it shall be the duty of said commissioners to re-instate said warden."

The language must be given its ordinary meaning. It is plain. Webster says that the word "remove" means "to move away from the position occupied; to displace, as to remove a building," and that "re-instate" means "to restore to a state from which one has been removed."

The legislature evidently intended to give the commissioners of the sinking fund broad powers. They doubtless believed that the welfare of the State required it. They recognized the fact that cases might arise where summary and immediate action would be highly necessary; they, therefore, gave to the commissioners the power to remove the warden in their discretion, but to avoid a possible injury to the State or to the individual they reserved to themselves a revisory power.

As the commissioners had the power of removal without trial, in their discretion, their action is not subject to judicial investigation, and as it for the time being removed, and not merely suspended, the warden in exercising the functions of the office, he had no right to retain possession of the property.

Judgment affirmed.

NORTH'S ADM'R v. KENTUCKY CENTRAL R. R. CO.

(Filed October 20, 1887—Not to be reported.)

1. The court will not reverse because of erroneous instructions which do not appear to have prejudiced the rights of the appellant.
2. Special verdict in action for willful neglect not against the weight of the evidence.

W. H. Holt and Cardwell & Jackson for appellant.

Breckinridge & Shelby for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Bennett.

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The appellant's intestate while crossing the appellee's road was struck and killed by appellee's locomotive and tender.

In this action the appellant claimed damages against the appellee for said killing upon the ground that the same was done first, by the negligence of the appellee; second, by the willful negligence of the appellee.

The appellee put in issue the allegations of negligence, and also alleged that the killing was the result of the negligence of the appellant's intestate.

In response to the questions submitted to the jury they found, first, that the intestate did not use ordinary caution in placing himself on the appellee's track; second, that he knew that the appellee's train frequently passed over the track at the place of killing at irregular hours; third, that it was negligence in the appellee's intestate to go upon the track at that time—night—and place without exercising care and diligence to ascertain whether or not a train was approaching; fourth, that he could by the exercise of ordinary care and prudence have ascertained whether or not a train was approaching at the time he started across the track; fifth, that his death was not the result of the appellee's willful negligence; sixth, that the noise from the engine could have been heard by appellant's intestate at the shanty from which he started just before he was killed; seventh, that the engine bell was ringing and it could have been heard at the place where the intestate was killed; eighth, that the appellee by the exercise of ordinary care and diligence could not have discovered the intestate in time to have avoided striking him; ninth, that the death of the intestate was not the result of the ordinary negligence of the appellee.

Upon every proposition essential to the appellant's right to recover for the killing of his intestate the jury found the facts against him.

We can not say that their findings, or any of them, were against the weight of the evidence. On the contrary it is probable that their findings accord with the weight of the evidence.

It is needless to enter into an analysis of the instructions. It is sufficient to say that some of those given at the instance of the appellee are erroneous, but they were not calculated to influence the finding of the jury to the prejudice of the rights of the appellant, and doubtless they did not prejudice the finding of the jury against the rights of the appellant.

The judgment of the lower court is affirmed.

Judge Holt not sitting.

PATTERSON v. COMMONWEALTH.

(Filed November 23, 1887.)

1. Reversible errors—A judgment of conviction in a criminal prosecution can not be reversed upon the ground that the evidence is not sufficient to support the verdict.

2. Practice—The right to object to an indictment because it was not properly endorsed and presented was waived by failing to demur or to move to set it aside.

3. Indictment—As the order filing the indictment states that "the foreman of the grand jury reported an indictment, a true bill," it sufficiently appears that sections 119 and 121 of the Code were substantially complied with.

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4. Practice—As the record states that "the defendant having heretofore pleaded not guilty of the offense charged in the indictment, for his trial puts himself upon his country, and the attorney for the Commonwealth likewise," it is a fair inference that the indictment was read, and the defendant's plea stated to the jury.

5. Competency of witnesses—One who has been convicted of a felony is competent to testify in a judicial proceeding, unless expressly excluded by section 8, article 8, chapter 29, General Statutes.

6. Repeal of statutes—A provision of the Revised Statutes omitted from the General Statutes is treated as repealed where the General Statutes treat of the same subject.

7. Extra-judicial confession—Accomplice — Corroborative evidence —The law does not authorize the court to require other and additional evidence than proof of an extra judicial confession of guilt to corroborate the testimony of an accomplice, or other than the testimony of an accomplice, to accompany proof of a confession. It is for the jury in either case to say whether the additional evidence does or does not conduce to prove the guilt or to corroborate.

8. Verdict—A verdict which finds the defendant "guilty as charged in the indictment" is sufficient where the indictment charges but a single offense.

9. Bills of exceptions—Where the judge certifies as to his own rulings and exceptions taken during the progress of the trial, his statement can not be assailed by the affidavits of bystanders.

10. Instructions—There can be no reversal for the refusal to give an instruction where the same idea is embodied in other instructions which were given.

Matt. O'Doherty, T. L. Martin and N. R. Harper for appellant.

P. W. Hardin and Aaron Kohn for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having been indicted jointly with Albert Turner, though tried separately, for the murder of Jennie Bowman, and by the verdict of the jury found guilty and his punishment fixed at death, prosecutes this appeal.

It has been often decided that this court has no power to reverse a judgment of conviction in a criminal prosecution upon the ground the evidence is not sufficient to support the verdict. But as provided in section 344, Criminal Code, "a judgment of conviction shall be reversed for any error of law appearing on the record when upon consideration of the whole case the court is satisfied the substantial rights of the defendant have been prejudiced." We will, therefore, refer to the evidence no more in detail than is necessary to determine whether it tends to establish the guilt of the accused, and whether he was tried and convicted according to law.

The crime with which he is charged was, as appears from the evidence, committed between the hours of nine and ten o'clock of the forenoon in the dwelling house of A. Y. Johnson, situated in a populous part of the city of Louisville. The statements of the deceased made after she was injured, and without objection admitted in evidence as her dying declarations and other circumstances proved on trial, make it clear that the deed was done by two men. But no one but Albert Turner, who had been tried for the offense and pleading guilty convicted, testified directly that Patterson, the accused, was one of them, though there was other evidence, some of which will be hereafter referred to, tending to corroborate his testimony.

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In behalf of the accused several witnesses testified to his presence in another and distant part of the city at or about the time as proved by others the crime was committed. But it was the exclusive province of the jury to decide as to their credibility as of all witnesses in the case, and also whether, giving full credence to their capacity to recollect and disposition to truthfully testify in regard to the precise times and places they saw him, it was still impossible for him to have been at the house of Johnson when the crime was committed.

We will now consider the alleged errors of law:

1st. It is contended the record fails to show the accused was legally indicted, and the two sections, it is argued, were violated or disregarded are as follows:

"§ 119. The concurrence of twelve jurors is required to find an indictment; where so found it must be endorsed 'a true bill,' and the endorsement signed by the foreman.

"§ 121. The indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, and remain in his office as a public record."

The record on the subject is as follows: "This day the foreman of the grand jury reported an indictment, a true bill, against Albert Turner and William Patterson for willful murder, and previous convictions, which said indictment is as follows, etc."

By his failure to either demur to the indictment or move to set it aside for the causes now relied on for reversal, both of which steps are authorized by the Code to be taken in the lower court, the accused has waived his right to make the objections in this court. But we think the two sections were substantially complied with, for it is expressly stated the indictment was endorsed a true bill, and it also sufficiently appears to have been signed by the foreman. The objection that it was "reported" instead of being, in the exact language of the Code, "presented" is a mere play upon words, commonly understood when used in that connection to mean practically the same thing.

2d. Following the provisions for empannelling and swearing the jury to try the issue in a criminal prosecution is section 219, as follows: "The clerk or Commonwealth's attorney shall then read to the jury the indictment, and state the defendant's plea."

The record is as follows: "The defendant, William Patterson, is this day brought into court, * * * and came parties by counsel, and the said defendant having heretofore pleaded not guilty of the offense charged in the indictment, for his trial puts himself upon his country, and the attorney for the Commonwealth likewise."

Though it is not in terms recited in the record that either the indictment was read or the defendant's plea stated to the jury, it does appear that an issue was formed, and for the trial of it the defendant put himself upon the country, the jury in legal parlance being the country, and the attorney for the Commonwealth likewise. And as the proceeding thus recorded by the clerk can be properly done only in presence of the jury, it is at least a fair, if not necessary, inference, and such as the record authorizes, that all that was necessary to be done to inform the jury what the charge was by reading the indictment, and what the plea was by stating it was done. We, therefore, think the record shows the requirement of the section quoted was substantially complied with.

3d. In the case of Commonwealth v. McGuire, 7 Ky. Law Rep., 814, it was decided by this court that all persons are now qualified to give evidence as witnesses in judicial proceedings, except

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those expressly excluded by section 8, article 8, chapter 29, General Statutes.

Article 8 referred to contains eight sections, the last one being as follows: "If any person be convicted of either of the offenses described in the five preceding sections he shall ever afterwards be disqualified from giving evidence in any judicial proceeding or from being a witness in any case whatever."

By section 5, chapter 107, Revised Statutes, it was provided that, "except as otherwise expressly provided, no person who has been or shall be convicted of felony * * * shall be competent as a witness in any case unless he has been pardoned, nor shall a person convicted of perjury, or subornation of perjury, be a competent witness although pardoned."

But in Broadus v. Broadus, 10 Bush, 299, the rule was laid down, and ever since adhered to, that "when a section in the Revised Statutes has been omitted in the General Statutes, or any change made, however slight, in a general law the whole law, as found in the Revised Statutes on that subject must be considered and treated as repugnant to the provisions of the General Statutes."

As, therefore, section 8, article 8, chapter 29, relates to the subject of disqualifying persons as witnesses who have been convicted of crimes, and is the only section in the General Statutes containing any provision in regard thereto, it must be treated as controlling the question of Albert Turner's qualification as a witness in this case. And as he does not appear to belong to the class excluded thereby, he was, we think, properly permitted to testify.

It is true, as section 8 reads, persons convicted of perjury and false swearing, denounced in sections 1 and 2 of article 8, are not excluded and may testify, while those convicted of subornation of perjury, and the various statutory offenses of the same class described in the five succeeding sections, are disqualified. Obviously that omission was not intended, and resulted from oversight. But it does not affect the question of Turner's competency one way or the other, for, as said in Broadus v. Broadus, "this court can not * * * look to the Revised Statutes to supply any defect that may appear in any general law introduced in the General Statutes, except such laws as are expressly left unrepealed." If there was any doubt on the subject it would be removed by section 241, Criminal Code, hereafter quoted, where the qualification of an accomplice to testify as a witness in behalf of the Commonwealth is recognized.

4th. It is contended the court erred "in failing to instruct the jury that evidence of extra-judicial confession of guilt was not such evidence as the law makes necessary to corroborate the evidence of Turner, an avowed accomplice, and also erred in failing to instruct the jury that Turner's evidence could not furnish the corroboration necessary to the support of evidence of an extra-judicial confession."

The two sections of the Code relating to proof of confession and to the testimony of an accomplice are as follows:

"§ 240. A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with proof that such an offense was committed.

"§ 241. A conviction can not be had upon the testimony of an accomplice unless corrobrated by other evidence tending to connect the defendant with the commisson of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."

In Greenleaf on Evidence it is said that all confessions of this kind, extra-judicial, are receivable in evidence, being proved like

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other facts to be weighed by the jury. But in the United States the prisoner's confession, where the corpus delicti is not otherwise proven, has been held insufficient for his conviction. (Sections 216-17, and cases cited.)

The same author further says that there is no rule of law requiring the testimony of an accomplice to be corroborated by other evidence. But that it is now so generally the practice of judges to advise juries not to convict of felony upon the testimony of an accomplice alone, and without corroboration, that its omission would be regarded as an omission of duty on the part of the judges. (Section 380.)

Section 240 of the Code is consistent with, and was intended to give legislative sanction to, the rule applicable to the confession of a defendant, just as it had previously been. And section 241 is in accord with the uniform practice of the courts at the time the Code was adopted.

But there is a material difference between the two sections. For while one relates to the legal effect to be given to a confession when proved as a fact, the other not only prescribes the legal effect which may be given to the testimony of an accomplice when credited, but also determines the condition upon which the jury may give any credence to it.

The converse of the proposition stated in section 240 is that if the confession is accompanied with proof such offense was committed, that is, with proof of the corpus delicti, it will warrant a conviction. But such proof is not, according to the plain language of section 241, sufficient corroboration of the testimony of an accomplice to authorize a conviction, other and additional evidence tending to connect the defendant with the commission of the offense being required.

In Craft v. Commonwealth, 80 Ky., 349, it was held to be the duty of the court when an accomplice testifies for the Commonwealth to instruct the jury as to the law contained in section 241, and the court has, in this case, properly given such an instruction.

In the case of Cunningham v. Commonwealth, 9 Bush, 149, it was said: "The manifest meaning of this provision (the same as section 240) is that, besides the proof of confession a defendant may have made of his guilt, unless made in open court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged to have been committed by him." And the court did, in this case, following the rule there laid down, give the following instruction: "Any confession of the accused, or statement amounting to such, if there be such in the case, will not warrant his conviction unless same is accompanied with other proof that the offense charged was committed, and tending to connect the accused with the commission thereof."

Although the conclusion announced in the Cunningham case is somewhat different from the views just expressed, we would not have hesitated to reverse the judgment if the court had failed to instruct the jury substantially in accordance with the ruling in that case, because it was the law as expounded by this court when the accused was tried.

But the instruction which it is contended by counsel should have been given, but refused, is entirely different from, and beyond the range of, the ruling in that case, and consequently is not sustained by it. The fundamental error in that instruction is that without warrant of the Code, express or implied, it gives to the court what belongs exclusively to the jury, the power to judge of the weight and sufficiency of the evidence in establishing a fact, for while it is made the duty of the court, by section 240, as construed in the Cunningham case, to instruct the jury not

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to convict upon proof of a confession by the defendant without other evidence conducing to prove his guilt, and by section 241 that a conviction can not be had upon the testimony of an accomplice unless corroborated, it is a question of fact and not of law, and, therefore, for the jury and not the court to determine whether other evidence introduced does or does not conduce to prove the guilt or to corroborate.

It seems to us it would be a palpable usurpation of the power given to the jury for the court to assume authority to direct them what weight is to be given to any particular evidence in determining a question of fact submitted to them, unless in such case as the law in express and unambiguous terms authorizes and requires, and as the law does not authorize the court to require other and additional evidence than the proof of confession to corroborate the testimony of an accomplice, or other than the testimony of an accomplice to accompany proof of a confession, we think the court properly refused to give the instruction referred to. It is not the policy of the law nor consistent with our form of government to enlarge the power of courts, and correspondingly contract that of juries in determining issues of fact involving life and liberty, and certainly can not be done where it is not expressly provided by statute.

5th. One of the witnesses was permitted to state on the trial that he had, on a certain occasion, said to another person he could discover with his naked eye a spot of blood on the hatband of the accused, but inasmuch as he testified before the jury to the same fact we do not see how the accused was prejudiced.

6th. The verdict of the jury is in these words: "We, of the jury, find the accused, William Patterson, guilty as charged in the indictment, and fix the punishment at death."

Counsel contend that verdict does not conform to the Code; does not fix the degree of the offense, and ought, therefore, to have been set aside.

Section 262 of the Code provides that upon an indictment for an offense, consisting of different degrees, the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of an offense included in that charged in the indictment.

And by section 257 it is required that in a general verdict of guilty the offense and the degree of the offense and the punishment be fixed.

As the accused is charged in the indictment with murder and nothing else, we think the verdict describes that offense with sufficient certainty to meet the requirements of the Code, and although murder and manslaughter are degrees of homicide, and under an indictment for the former a person may be convicted of the latter, yet as murder itself is not divided by our statute into degrees, as is the case in some other States, that part of section 257 requring the degree of the offense to be fixed in the verdict has no application to this case.

The language of the verdict seems to us to be too plain for doubt as to either the offense the jury intended to find the accused guilty of or the punishment fixed.

7th. The bill of exceptions shows that whenever an objection was made to the conduct of the attorney for the Commonwealth in his closing argument to the jury the court ruled in favor of the detendant.

But it appears that what is called a bystander's bill of exceptions was prepared, and is now before us, which purports to show that during the argument of the attorney for the Commonwealth

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certain statements were improperly made to the prejudice of the rights of the accused, which, though objected to by his counsel, the court failed to exclude from the consideration of the jury to pass on.

Section 337 of the Civil Code, by which proceedings in criminal as well as civil cases are regulated, provides that "a party objecting to the judge's of an exception which purports to state the evidence, may, within five days after the bill is signed, file the exceptions as written by him, if its truth be attested by the affidavits of two bystanders," but no authority is given to this court to consider questions of law made during the progress of the trial of either a civil or criminal case unless they appear, by the bill of exceptions, regularly approved and signed by the judge to have been passed on by the court, nor are we authorized to assume, upon the evidence of a bystander's statement, that the court failed or refused to pass upon such questions when made.

In Garrott v. Ratliff, 7 Ky. Law Rep., 463, this court said: "The truth of what the judge states or certifies as the bill of evidence may be controverted by the affidavits of bystanders in the form of a bill of evidence, but when he certifies as to his own rulings and exceptions taken during the progress of the trial, we know of no practice that authorizes his statement or the verity of the record as made up to be assailed either by bystanders or the affidavits of parties interested in the litigation.

It is proper to say, in justice to the judge before whom this case was tried, that he states every objection made to the argument of the Commonwealth's attorney which was heard by him he passed on, and for obvious reasons of public policy his statement should be taken in preference to that of bystanders.

8th. For the accused the following instruction was asked and refused by the court: "The jury can not convict the accused on a mere preponderance of the testimony, but the law presumes his innocence until he is proved guilty to the exclusion of a reasonable doubt."

That instruction contains the law, and the refusal of the court to give it as asked would be sufficient cause for reversal if the same idea was not fully expressed in some other instruction, but if it was substantially, and in such manner as to be clearly understood, embodied in another instruction, the refusal of it in the form presented did not nor could prejudice the defendant.

Instruction No. 5 given by the court is as follows: "The law presumes the innocence of the accused, and it is the duty of the jury, if they can reasonably do so, to reconcile all the facts and circumstances of the case with that presumption, and if, upon the whole case, the jury entertain a reasonable doubt of the guilt of the accused, or of any material fact necessary to his guilt having been proven, then they should find him not guilty."

And in instruction No. 1 the jury were told in substance that in order to convict the accused they must believe, from all the evidence to the exclusion of a reasonable doubt, he was guilty of the offense charged.

It seems to us these two instructions so fully convey the idea contained in the instruction refused that any jury of ordinary intelligence would readily understand that they have no right to convict a defendant of a criminal offense upon a mere preponderance of the testimony, for a belief so decided and clear as to be beyond reasonable doubt can not possibly be produced in the mind of a man who reasons at all by mere preponderance of evidence.

We have carefully examined the record in this case, and per-

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ceiving no error of law occurring at the trial to the prejudice of the substantial rights of the accused, the judgment must be affirmed.

KENTUCKY SUPERIOR COURT.

HARDIN, &c. v. PAUL, &c.

(Filed January 8, 1886.)

1. Under the mechanics' lien law for the city of Louisville, where a subcontractor gives the required notice to the owner or employer, the extent of his lien is for the amount due from the employer to the contractor at the date of his notice, subordinate to all liens obtained by other subcontractors by previous notice. He does not acquire a lien that relates back and overreaches payments theretofore made, or other liens valid against the contractor theretofore acquired.

2. Where notice is given to the owner or employer before the contractor has completed his contract, the utmost that can be claimed under the notice is a lien on so much as remains due the contractor at completion, it being proper to assume that the employer paid, after notice, only as much as represented work done thereafter.

Ward & McAfee for appellants.

E. W. C. Humphrey and F. Hagan for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bowden.

The principal question presented by this record requires a construction of the act of March 2, 1869, to provide a mechanics' lien law for the city of Louisville and county of Jefferson.

That act provides for the security of two different classes: First, those who are employed by the person interested in the land to be improved; and, second, those who are in the employment of the first class.

Section 1 relates exclusively to the first class. Their lien begins with the thing done; overreaches all other liens thereafter created, and continues, by force of section 2, so that it may be enforced by a proper action begun within one year from the completion of the work or furnishing the materials.

Section 3 relates exclusively to the second class.

Their lien is not created by the fact that they labor or supply material, but "by giving notice in writing to the owner or employer before payment is made to the contractor or building mechanic that he looks to the property for the payment of what may be due to him for such labor done or materials furnished." It is then and by such means only that he "acquires" the lien. As a person of this class can not complain of any payment made to the contractor by the owner or employer before he has given notice, and as several of this class may give notice at different times and after the owner or employer had made different payments, it was provided that "if payments are made by the employer after notice by one or more subcontractors, and prior to notice by another or others, such notice or notices so given prior

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to such payments shall have reference to the extent of such payments, and in such cases the subcontractors shall be classified, and under these regulations the court shall distribute the fund amongst the parties according to their respective rights and equities." As a precautionary measure it was declared that these liens of subcontractors shall not increase the indebtedness of the owner or employer beyond what he would be bound for on his contract or on a quantum meruit. This provision is implied in that which directs the distribution of the "fund," and doubtless would have been judicially supplied if it had been omitted.

The effect of these provisions is illustrated in this way: If a subcontractor, A, whose claim is $300, gives notice to the employer then owing the contractor $500, he secures a lien on the $500 for the payment of his claim, and it will not be affected by any payment thereafter made by the employer to the contractor; but if the employer thereafter pays the contractor $200, and after that payment is made another subcontractor, B, whose claim is $200, gives notice, he acquires a lien on the remaining $300 subordinate to A's lien. If the fund comes into court for distribution all of the $300 will be paid to A, and B will get nothing. B can not complain that the employer paid the contractor the $200 after A gave notice, for when the payment was made he had no lien, and had no right to object to the employer paying a debt he owed. A can not complain because he is not injured. There is money enough left to pay him. If, on the contrary, A were permitted to assert his lien to cover the payment of $200, and $100 of the $300 retained, there would still remain $200 of the retained fund on which B's lien for $200 would attach. The result would be that the employer who retained enough to cover all existing liens would have to pay $700, when he owed only $500, and B would be in as good condition as if he had given notice when A did. The time of giving notice would become immaterial, and instead of a distribution of the funds remaining in the hands of the employer at the dates of the respective notices the only inquiry would be as to what was in hand when the first notice was given, as, according to the version considered, the employer would in effect be called on to refund every payment for the benefit of the subcontractor who gave notice before it was made, thus finally leaving the fund in hand for the benefit of the last one who gave notice. To prevent a result so unjust the legislature deemed it prudent to provide "that the demands of subcontractors shall be severally paid out of what may be due to the contractor or building mechanic under whom they claim, if so much be due him after giving credit to the employer as to each demand of subcontractors for payments made to the contractor or building mechanic prior to notice as above provided." The extent of each subcontractor's lien is for the amount due from the employer to the contractor at the date of that subcontractor's notice, subordinate to all liens obtained by other subcontractors by previous notice. It contravenes the careful details of the statute as well as its general spirit to hold that the subcontractor, by giving notice, acquires a lien that relates back and overreaches payments theretofore made or other liens valid against the contractor theretofore acquired, and by which the employer is himself bound as fully as if he had discharged it by paying the money.

For example (and it is a question presented by this record), if the contractor has been sued, and the employer is brought into court as a garnishee, he must disclose what he owes. The fact that the contractor has a lien to secure the debt is surely no reason why his creditor may not subject it. If no subcontractor

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had asserted a lien before the employer was served with process of garnishment what answer could be made? The only possible excuse would be the conjecture that such lien might be thereafter asserted. That could not be certainly foreseen, but even if it could be the ready answer is that it could not relate back, and that the attachment lien being first would prevail, so that the payment under it would stand as if paid the day the attachment was served.

The appellant, Hardin, was the employer. Paul was the contractor and his coappellees, Gage and Blatz & Krebs, with others, were subcontractors. The evidence is so conflicting that we do not feel authorized to disturb the adjustment made by the lower court of the account between Hardin and Paul with regard to damages claimed by them against each other. In the modified judgment Hardin was properly credited by $58 paid as garnishee at the suit of Sims, which fixed the amount due from him to Paul at $693.44, of which he had paid into court $341.28, leaving $352.19 to be paid.

But the modified judgment not only held Hardin for this sum of $693.44, but in addition thereto it subjected his property to the repayment of $318, which it recites he paid to Paul after Gage and Blatz & Krebs gave notice. In this it seems to us there were two errors. The sum of $58 paid as garnishee is part of the $318, and as Hardin was served as garnishee before service of notice from the subcontractors, he was, in any aspect of the case, entitled to be credited by it as a payment made before notice; but if Hardin, after notice, paid Paul the balance, being $260, it was found that he still had in hand $693.44 out of which the notifying subcontretors could be paid as far as it would go. Their debts, however, aggregated $703, being $956 more than Hardin had retained, but the uncontradicted evidence was that there remained, at the time the proof was taken, work to be done to complete the contract, which would cost more than $9.60, for which no deduction was made. It is also apparent that the money paid after the subcontractors gave notice was for work done after that time. When such notices are given before the contractor has completed his contract, it seems to us that the utmost that can be claimed under them would be a lien on so much as remained at completion, assuming that the employer paid, after notice, only so much as represented work done thereafter. The view most favorable to the subcontractors that can be taken, so as not to rob the employer or to deprive him of his right to have his work completed, would be to regard the remaining surplus as the exact fund in his hands when he received notice.

Our conclusion is that $693.44 was the amount due from Hardin to Paul, and that this sum was in lien under the notices given by Gate and Blatz & Krebs, and that the judgment in their favor for the additional sum of $318 was erroneous.

We do not think the alleged personal assumption by Hardin of Paul's debt to these parties was proved.

There is no cross appeal except against Hardin. So far as the judgment orders distribution of the sum of $693.4 it must stand, as parties interested in it are not before this court.

On Hardin's appeal the judgment is reversed so far as it subjects his property to the payment of any sum beyond $693.44 and costs, and upon the cross appeals of Paul, Gate and Blatz & Krebs it is affirmed.

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TABOR v. HARDIN, &c.

(Filed October 26, 1887.)

1. Limitation—A due bill is a "written contract" within the fifteen years' statute of limitation.

2. Same—Date of payment—When the fact of payment is denied by the payor or his representative the endorsement of a partial payment on a note is not sufficient to suspend the operation of the statute of limitation.

The burden of proving that the payment was actually made and at the time it purports in the endorsement, when denied, is upon the holder of the note, where he claims that the running of the statute of limitation was suspended by the alleged payment.

3. Same—The fact that the endorsement was placed upon the note when it purports to have been made is not sufficient evidence that the payment was actually then made by the obligor.

4. Evidence—Res gestæ—Payment can not be proved in such a case by proof of statements made by the plaintiff himself about the time of the alleged payment, as such evidence is mere hearsay, and is not competent as a part of the res gestæ unless the statements were made at the time the endorsement was made on the note.

5. Declarations, to become part of the res gestæ, must have been made at the time of the act done, which they are supposed to characterize.

6. Evidence—A party cross examining a witness whose testimony in chief is incompetent can except to the evidence given upon cross-examination as well as to that on direct examination. But if the cross-examiner interrogates as to new matter, he can not then object to the answers unless they really go to contradict the illegal testimony.

7. Limitation—This action against the heir upon a due bill executed by the ancestor, upon an allegation of property descended, is barred by limitation, the action not having been brought within fifteen years after the date of the writing sued on, and the fact that the defendants are nonresidents is immaterial, the statute having begun to run in the lifetime of the ancestor, who lived and died in this State. Moreover the action being in rem, there was no time after the accrual of the cause of action when the action could not have been brought.

J. P. Hobson for appellant.

D. W. Farleigh and Montgomery & Poston for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Barbour.

This action was brought against the heir upon a due bill executed by the ancestor upon an allegation of property descended. The date of the due bill was March 8, 1870. There is upon it this endorsement: "August 9, 1875, received $5." The action was commenced October 9, 1885. The answer controverted the payment endorsed on the note, and relied upon the statute of limitation of fifteen and of five years.

In Prewitt v. Wortham, 79 Ky., 288, the court said: "The test whether this is a written contract within the fifteen year's statute of limitation depends upon whether it could be declared on as a covenant to pay." Frequently an action will be upon an instrument in writing, which is a mere acknowledgment of the debt, and in which there is no express promise to pay. (Metcalf v. Poindexter, 4 Met., 52.)

It was held in Kalfas v. Walls, Litt. Sel. Cases, 198, that a due bill must be understood to contain a promise to pay the

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amount named upon which a petition and summons would lie, and in Harrow v. Dugan, 6 Dana, 341, it was held that the words "I have borrowed from Aaron Meyers $136," in a writing signed by the parties sought to be charged, imported a promise to repay it, and was a note for the direct payment of the money upon which a petition would lie. We, therefore, think it is well settled that a due bill is "a written contract" within the meaning of the statute. The action not having been brought within fifteen years from the date of the writing the appellant relies upon the alleged payment endorsed as a credit as sufficient to take the case out of the operation of the statute. An endorsement of a partial payment on a note, where the fact of payment is denied by the payor or his representative, is not sufficient to suspend the operation of the statute. The burden of proving that the payment was actually made, and at the time it purports to have been made, in the endorsement, when denied, is upon the holder of the note where he claims that the running of the statute of limitation was suspended by the alleged payment. (Frazier v. Frazier, 13 Bush, 399.)

This counsel for appellant concedes, but complains that the court ruled as incompetent the evidence offered to prove the payment. The evidence rejected is embraced in the depositions of the appellant and his witness, Morris.

Morris says that in 1874 or 1875, in a conversation with him, Tabor told him that Moreman (the obligor in the note sued on) had just paid him $5 on a note. Witness remarked that he was lucky; that it was so much money picked up, for he owed witness, and he had almost given up getting anything. Witness told Tabor he had better take it out in groceries or anything else if he could get it. This evidence we think was properly excluded. It was but hearsay, and can have no bearing upon the alleged payment as endorsed on the note—it can not be part of the res gestæ as is argued, for it is not pretended that the conversation was had at the time the endorsement was made on the note. Declarations to become part of the res gestæ must have been made at the time of the act done which they are supposed to characterize; nor can we see how it can be material upon the issue of payment made by the answer. Tabor in his deposition, after saying that the note sued on had been in his possession since its execution, in answer to question 3 says that the endorsement "August 9, 1875, received $5," has been on the note since August 9, 1875. This answer was excluded, and it is of this ruling that appellant complains most. The fact that the edorsement was made upon the note at the time it purports to have been made, though it was made ten years before the note became due, and when ordinarily it would not have been for the interest of the obligee to make it, is not of itself sufficient evidence of the fact under the issue raised that the payment was then actually made by the obligor. (13 Bush, 399.)

The real issue is, was the payment made? This, the evidence of Tabor, as to when the endorsement was made, no more tends to establish than the endorsement itself.

Conceding, as agreed by counsel, that the testimony of Tabor, that the endorsement was placed upon the note when it purports to have been made, does not concern any personal transaction between the plaintiff and the deceased, still, as held in 13 Bush, 399, this was not sufficient evidence of the payment, and as there was no other evidence tending to show that the deceased made the payment, the exclusion of this evidence could not have prejudiced the appellant, for even with it the court would not

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have been authorized to render a judgment for him. The answer to question 4 in Tabor's deposition was testimony as to the admission of the deceased, implied from his presence, and as to the payment made by him, and was clearly incompetent.

It is insisted that so much of Tabor's deposition as is embraced in the cross-examination having been elicited by the defendants, they can not except to it. The cross-examination is based upon the evidence in chief, and if the witness was incompetent to give that evidence the cross-examination upon it is also incompetent, and the party cross-examining can except to it as well as to the direct evidence.

It would be a severe rule which would hold that because a party cross-examines a witness upon evidence he has objected to, he thereby renders the evidence competent if the witness repeats it on the cross-examinaton, but this rule must be restricted to the cross-examination on the matter illegally drawn from the witness on the direct examination. If the party cross-examining interrogates as to new matter he can not then object to the answers unless they really go to contradict the illegal testimony. Some of the questions, upon cross-examination of Tabor, were not made necessary by the direct examination, yet as they do not bear on the question of limitation, and should not have affected the judgment of the lower court, we can not reverse on that account.

The appellant attempts to avoid the statute upon the ground of the nonresidency of the heir he sues. The statute begun to run in the lifetime of the ancestor, who lived and died in this State. It is not claimed that the heir was a resident of this State at any time while the cause of action existed, or in any way obstructed the prosecution of the action. Moreover, this is an action in rem against the defendants by reason of their ownership of land in this State, descended to them from their ancestor, and there was no time, after the accrual of the cause of action, in which the action could not have been brought.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

CATLETT v. YOUNG.

Filed November 9, 1887. Appeal from Anderson Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

If a surety pays a judgment and declines to take an assignment he fully satisfies the judgment for all purposes, and the cosurety who contributes to the payment discharges a debt to him, and not to the plaintiff. He can not, therefore, get an assignment from the plaintiff to be used against the principal.

L. C. Willis for appellant; Ira Julian for appellee.

COMMONWEALTH v. CAMPBELL, &c.

Filed November 9, 1887. Appeal from Clinton Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

A bail bond in the usual form, except that it did not specify the amount to be paid the Commonwealth in case the defendant defaulted, a blank being left unfilled where the amount should have been inserted, is void, and an order of court, reciting the sum in which the defendant might be admitted to bail, can not be read to supply the omission.

P. W. Hardin for appellant; J. A. Brents for appellees.

SMITHSON'S ADM'R v. BAKER.

Filed November 9, 1887. Appeal from Fayette Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, reversing.

Proof of claim against decedent—An affidavit purporting to prove an account against a decedent's estate was this: "R. S. Taylor states on oath that he has examined the annexed account for $212.08, and the same is just and correct."

Held—Insufficient. (The test is laid down in Leach v. Kendall's Adm'r, 13 Bush, 424.)

George B. Kinkead for appellant; J. D. Hunt, S. G. Sharp and G. W. Darnell for appellee.

COMMONWEALTH v. DAVIS.

Filed November 9, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Judge Ward, reversing.

Indictment—Bawdy house—An averment in an indictment that a person "keeps and maintains a certain common house of ill-fame, otherwise called a bawdy house, resorted to for the purposes of prostitution and lewdness, and in said house for lucre and gain certain persons whose names to the grand jury are unknown, as well men as women of evil fame and repute and name, and of dishonest conversation, to frequent and come together did cause," sufficiently charges that the defendant knew the character of those he thus caused to assemble.

P. W. Hardin for appellant; Major & Johnson for appellee.

F. & L. T. P. CO. v. COLLANT.

Filed November 9, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, reversing.

Garnishment—Practice—C. and F. sued appellant on account, summoning appellee to answer as garnishee. Appellant answered, admitting plaintiff's claim, alleging appellee's indebtedness to it, and praying judgment against appellee, asking that after payment of plaintiff's demand out of the amount

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recovered, the balance be paid over to it. Appellee answered, by one pleading, to both the petition and cross petition. Issue was joined between plaintiffs and appellants, and between appellants and appellee. After a mistrial another garnishee satisfied plaintiff's claim by paying into court a sum sufficient to cover it, and on appellee's motion the cross petition was dismissed. Held—The answer not objecting, any right on the part of the appellee to object to the issue being tried in this action as to whether he was indebted to the appellant was waived, and, therefore, it was error to dismiss the cross petition.

Collins & Fenley for appellant; O'Hara & Bryan for appellee.

OSBORN, &c. v. TAYLOR.

Filed November 9, 1887. Appeal from Grant Circuit Court. Opinion of the court by Judge Ward, affirming as to Chisholm, reversing as to Osborn.

1. Mortgage—Estoppel—When there was no formal release by a mortgagee, nor any written authority given by him for the execution of a release of his mortgage on a horse which the mortgagor had exchanged to another, Held—This third party can not defeat the mortgage claim, except upon the ground that the mortgagee by word or act misled him to his prejudice, and is, therefore, estopped in equity from making claim under his mortgage.

2. The issue of mortgaged female animals passes by the mortgage and is subject to the mortgage debt.

3. Fraudulent transfer—Where O. bought land of S., May 12, and at the same time rented the land to S. for one-half of the tobacco to be grown on it, Held—O.'s ownership of one-half of the tobacco can be assailed only on the ground that the deed to him was fraudulent, and passed no title as against S.'s creditors. That S. fraudulently mortgaged the tobacco July 1, and that he contemplated the fraud when he sold the land does not affect O. unless he knew of it and participated in it.

E. E. Settle, J. J. Landram and O. D. McManama for appellants; W. W. Dickerson and Montgomery, Lindsay & Botts for appellee.

RANSOM v. McCALLISTER.

Filed November 9, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Obstruction of light and air—The owner of a house in which is a window overlooking the adjacent premises of another does not thereby acquire a right to the light and air coming laterally over such adjacent premises. No action will lie for the obstruction or darkening of such window by a wall built by the defendant on his own land, though his only motive in building it was to obstruct. Whether a right to prevent the obstruction could be acquire by lapse of time is a question not presented.

W. S. Hogue for appellant; Dodd & Grubbs for appellee.

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KENTUCKY COURT OF APPEALS.

SEILER, &c. v. NORTHERN BANK OF KENTUCKY, &c.

(Filed October 4, 1887.)

1. A conveyance absolute in form may be shown by parol evidence to be but an equitable mortgage, and the courts, in fact, lean to this conclusion in doubtful cases. The question in this case is, however, res judicata.

2. Res judicata—Where two or more actions are consolidated, a party to one of them is required to notice, and is bound by all that is done in each and all of them.

3. Same—A party to an action will not be permitted to lie by while another party makes an issue in which he is interested, and then say that he is not concluded by the judgment of the court upon that issue because he did not make the issue and was not a party to it.

In a contest between attaching creditors and a creditor asserting a vendor's lien, as to whether the transaction between the latter and the debtor was a sale or a mortgage only, sureties of the debtor in the notes to secure which a vendor's lien was asserted were interested in having the transaction declared to be a mortgage, and being parties to that action they are concluded by the judgment of the court upon that issue, although they did not join in the issue.

4. A clerical misprision can not be corrected after the expiration of the term at which the judgment was rendered, except upon notice to the adverse party or his attorney, and where the court attempts to do so without such notice the corrected judgment is void and no appeal lies from it without a motion being first made in the lower court to set it aside.

5. A mere mistake in computation is a clerical misprision and may, upon notice to the adverse party, be corrected at any time. As to it there is no limitation.

6. Reversible error—An error of $34 is too small to justify a reversal in a case involving many thousands of dollars.

Robert Richardson, Hallam & Myers, James P. Tarvin and B. F. Graziani for appellants.

Geo. R. McKee and W. H. Mackoy for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Holt.

Charles Geisbauer died heavily indebted and the owner of a

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large brewery. In order to prevent its sale at the suit of creditors, his executor and devisees applied to the appellee, the Northern Bank of Kentuck, for a loan to be secured by a mortgage on the property. It was refused. Subsequently it was conveyed to the bank by the widow, heirs and executor for the consideration of $60,000, by a deed absolute in form. Simultaneous with this conveyance the appellee sold and agreed to reconvey it to Louis Geisbauer, a son of the decedent, for $77,740, upon long credit and in payments, with the stipulation that if any of the notes were not paid at maturity, the entire purchase money should, at the election of the bank, become due. The debts of the father were paid with money thus obtained, including a large one to the bank. For the greater portion of the purchase money Louis Geisbauer gave his individual notes to the bank, but for the balance of it he executed notes with the appellants as his sureties.

By reason of default of payment of one of them this action, seeking a personal judgment and the enforcement of a vendor's lien, was brought upon all of the unpaid ones, all of the appellants being made parties to the action.

Other creditors of Louis Geisbauer brought suit and attached certain property upon the brewery premises, claiming that it was not covered by the lien of the bank and that it had been obtained by Louis Geisbauer subsequent to his purchase of the bank. These creditors, or some of them, also made themselves parties to this suit, and insisted that the agreement, first between the widow, devisees and executor of Charles Geisbauer and the bank, and then between the latter and Louis Geisbauer, was, in fact, but a mortgage and should be regarded as one transaction. All the suits were consolidated and a considerable litigation followed between the bank and the attaching creditors, but to which the present appellants were parties. By consent all of the property was sold, the proceeds to be the subject of the litigation. The lower court held that the transactions between the Geisbauers and the bank constituted only a mortgage, and allowed the attaching creditors, $6,292 out of the fund in court, upon the ground that this much of it had been realized by the sale of property upon which the bank had no lien.

From this judgment the bank appealed to this court. Its opinion in the case may be found in 83 Ky., page 154. (Northern Bank of Ky. v. Deckebach, &c., 7 Ky. Law Rep., 66.) It held that the purchase by the bank and then the sale to Louis Geisbauer were absolute sales, and that they did not constitute a mortgage, but affirmed the judgment of the lower court inasmuch as it afforded no relief save it gave a portion of the fund in court to the attaching creditors, which, in the opinion of this court, was right. The present appellants were parties to that appeal.

Upon the return of the cause the lower court rendered a judgment against the appellants for the amount of the notes sued upon, less the fund left from the sale of the property after the payment of the $6,292 to the attaching creditors, and of this they now complain, the principal ground of complaint being that the transfer to the bank and then by it to Louis Geisbauer was but a mortgage and not an absolute sale.

The doctrine is well settled that a conveyance absolute in form may be shown by parol evidence to be but an equitable mortgage. In fact courts lean to this conclusion in doubtful cases. The question in this case is, however, res judicata. This court, upon the former appeal, passed upon it.

It is urged that the appellants were merely nominal parties to it; that no error was assigned as to them; that the then contro-

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versy was between the attaching creditors and the bank, and that the appellants were not interested in it. The latter part of this statement is certainly incorrect. The bank was asserting a vendor's lien. The attaching creditors denied this, and claimed that it had but a mortgage lien. The appellants were certainly interested in this issue. If the attaching creditors succeeded as to it, then the liability of the appellants would be lessened. It was exactly the issue, which they now present, and when presented before, although by other litigants, yet they were then parties to the action and interested in the determination of this issue. The character of the lien of the bank and what it embraced was in question. The appellants were not only interested in having it declared to be a mortgage lien only, because this would decrease the debt, but also in defeating the claim of the attaching creditors as the entire fund would then be applied in payment of their liability.

The actions were consolidated, and a party to one of them was required to notice, and was bound by all that was done in each and all of them. The law looks approvingly toward the end of a litigation. It will not, therefore, permit a party to a suit to lie by while another makes a question in which he is interested, and then say that he is not concluded by it. In this instance, upon the former appeal, one of the errors assigned by the bank was that the lower court had held the transaction to be a mortgage instead of an absolute sale.

One other question remains to be considered.

After the determination of the former appeal the lower court, at its October term, 1885, rendered a judgment against the appellants for $15,368 with interest from April 17, 1880, which was the date of the sale of the property. This amount appears to have been arrived at by first deducting from the proceeds of the sale the $6,292 allowed the general creditors and $750 for the master commissioner. The remainder was then applied first to extinguish the individual notes of Louis Giesbauer, and then as a credit on the unpaid notes of the appellants.

At the same term of court that this judgment was rendered the appellants, save Louis Geisbauer, moved to correct it The motion gave no reason or grounds for doing so. The entry of record is simply that they moved to correct it. The bank in no way entered its appearance to it, nor did the court act upon it at that term. There was no order continuing the motion or reserving it for further consideration, or suspending the judgment. At the next term of the court it rendered what was termed "a corrected judgment" against the appellants for the sum of $11,726.50, with interest from that time until paid. We do not see how this result was reached, but as this record stands it is immaterial. The appellants have appealed from both judgments, while the appellee, by a cross-appeal from the last one, insists that the first judgment must be upheld. This involves the right of the court to render the last one.

It is said, arguendo, that the power of the court over the first judgment expired when the term ended at which it was rendered and that the motion to correct it then died. Upon the other hand it may be said that from the mere entry of it we are to infer a suspension of the judgment and that the court took time to consider it.

Undoubtedly the first judgment was a final one. It fixed the rights of the parties and admitted of enforcement without further order of the court. The cause was then at an end between the parties to this appeal, and in the absecne of notice as provided by statute they were not required to pay any further attention to it. The bank was then out of court. The judgment not

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having been suspended by an order of the court or by implication by any act of the court, the appellee had a right to enforce it. The power of the court over it was at an end, unless exercised in conformity to the statute.

By section 518, et sequentes, of the Civil Code, a court may, in certain ways and for certain reasons, vacate or modify a judgment after the expiration of the term at which it was rendered. This case does not come within any of those provisions, however, unless the rendition of the first judgment involved a clerical misprision. It is unnecessary to decide whether it did or not, because the lower court, per section 519 of the Civil Code, can not correct a judgment upon this ground after the expiration of the term at which it was rendered, unless notice be given to the adverse party or his attorney. In this instance the motion did not state any ground for correction, but waiving this objection, inasmuch as the court in fact acted upon it, yet there was no notice of it given to the adverse party. The bank was then not in court. It, in the absence of notice, was no longer required to be observant of any further action in the case. It results that the court had no jurisdiction to render the last judgment, and it being void, no appeal lies from it without a motion being first made in the lower court to set aside, which was not done. (Civil Code, section 763.)

Both the appeal and the cross-appeal from it must, therefore, be dismissed. This leaves the appeal from the first judgment yet to be considered.

According to our calculation, based upon the items and figures shown by the record, it is for about $34.00 too much. Whether this resulted from a mere mistake in calculation in the lower court, or from the exercise of its judgment in allowing some item of cost or expense, we are unable to say. If the former, it may yet be corrected in the court below upon proper notice, because it should be regarded as in fact the act of the clerk and as a clerical misprision as to which there is no limitation, and can be no appeal prior to a refusal by the lower court to correct it. Indeed, if there be any mistake in the mere computation, whether it be much or little, it may yet be corrected in the manner indicated.

If, however, the small error indicated was, in fact, the result of an exercise of judgment upon the part of the court in the allowance of expense or cost, and not a mere clerical misprision, yet in a case like this, involving thousands of dollars, justice would be nearest attained by applying the maxim, de minimis non curat lex.

The appeal from the judgment of October 27, 1885, is affirmed, and the appeal and cross-appeal from that of June 18, 1886, are dismissed.

WESTERN BANK v. MARION COUNTY DISTILLING CO.

(Filed October 22, 1887—Not to be reported.)

To entitle a warehouseman to assert a lien for purchase money as against a bona fide holder of a warehouse receipt it is not necessary that the amount of purchase money unpaid should be set forth in the receipt. It is sufficient if it appears from the receipt that the purchase money is unpaid, without stating the amount.

Brown, Humphrey & Davie for appellant.

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Barnett, Noble & Barnett for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

This action is between the Western Bank and the Marion Distilling Company, and involves the title to a number of barrels of whisky. Henry Wolf, who seems to have been an extensive dealer in whisky, purchased of the distilling company some twenty-five hundred barrels at a fixed price, some of which was delivered by the execution of certain warehouse receipts to Wolf, who transferred them to the bank, in pledge or as a security for the loan of money.

The receipts read as follows:

"Marion Fire Copper Whisky,
"Louisville, Ky., November 7, 1881.

"Received in the Marion County Distilling Company's Bonded Warehouse. No. 372, fifth district of Kentucky, for account, and subject to the order of Henry Wolf, Louisville, Ky., deliverable to the holder upon surrender to me of the same and payment of the purchase price of said whisky, and all charges thereon and storage on the same from the 7th day of November. 1882, at the rate of 5 cents per barrel, per month, ten barrles Marion County Distilling Company's Fire Copper Whisky, entered into bond as follows," etc. The serial numbers are then given and the number of gallons in each barrel, and the receipt signed by the president, C. H. Mattingly. The other receipts were similar in their character and evidenced the ownership in Wolfe, at the time of the transfer, of 189 barrels that were pledged to the bank by Wolf as collateral security for the loans made.

By the provisions of the act of March 6th, 1869, all such receipts are made "negotiable and transferable by endorsement in blank, or by special endorsement and with like liability as bills of exchange now are and with like remedy thereon." (3d section of the act; Acts 1869. volume 1, page 57.)

The 5th section of the same act provides that no warehouseman or other person shall issue any receipt for any goods, etc., for any money loaned or other indebtedness unless such goods, etc., shall, at the time of issuing the receipt, be the property, without encumbrance, of said warehouseman, "and if encumbered by prior lien, then the character and extent of that lien shall be fully set forth and explained in the receipt, and shall be actually and in fact giving in store and under the control of said warehouseman at the time of such receipt or voucher."

Wolf became insolvent with the whisky purchased in the possession of the distilling company in their bonded warehouse, and the receipts given for its delivery in the possession of the bank as security for the money loaned. The distilling company set up its equitable lien for the purchase money, as it had not been paid, and the bank claimed a prior equity by reason of the transfer to it of that negotiable paper for value.

The claim of priority by the bank over the distilling company is asserted for the reason that it had no notice, at the time it acquired the paper, of the extent of the company's lien, and this is the only question necessary to be determined in the case.

It is insisted by counsel for the bank that as the mode of retaining the lien by the warehouseman is purely statutory, the statute must be strictly followed and the amount due upon or for

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the whisky or the goods for which the receipt is given expressly and certainly stated.

The case of Greenbaum Bros. & Co. v. Megibben, 10 Bush, 419, is relied on to sustain this view of the statute. In that case Megibben, the warehouseman, executed to Wolf & Co. a receipt for fifty barrels of whisky, describing it, deliverable on return of the receipt and payment of storage and charges. There was no attempt even in that case to retain a lien for the purchase money or to notify others that there was such an encumbrance on the property. Wolf transferred the receipt to Greenbaum Bros. & Co., and when they demanded the whisky Megibben asserted his claim for the purchase money. This court held that the legislature, in making such paper negotiable, in order to protect the rights of the innocent holder taking it in the usual course of trade, required that the warehouseman, in executing such a receipt, should place upon its face all the evidences of any lien that might exist upon the property the receipt was intended to represent, and further said "that the warehouseman could easily have protected his rights and at the same time prevented loss to innocent parties by complying with the plain letter of the statute in endorsing the nature and extent of his lien on the reciept. Megibben, by executing his receipt, said in effect to all who might come into the possession of it as purchasers for value that the whisky was the property of Wolf & Co., free from any encumbrance." Is such the character of the receipt in this case?

We think not.

The paper on its face acquainted the purchaser not only with such facts as should put him on inquiry, but gave the nature, character and extent of an encumbrance upon the whisky that would or ought to have prevented any one, exercising ordinary prudence and judgment in a business transaction, from accepting the paper as a collateral, or becoming, by purchase, the absolute owner.

The appellant, as against the company, was not a bona fide holder. He had notice of the inferiority of the paper, and that Wolf held the whisky subject to the lien of the distilling company. When applied to any other character of negotiable paper, there can be no doubt as to the priority in equity of the distilling company over the bank. The bank would have taken it, subject to all the equities of the original drawer. It could not in fact be said to be negotiable paper. It is insisted, however, that this is a statutory lien and the statute must be strictly pursued, therefore, the nature of the lien and the amount due on the whisky should be stated. The statute provides that if encumbered, the character and extent of the lien shall be fully set forth. Here it is evident from the face of the receipt that the lien is for purchase money; that the extent of the lien is the entire purchase money, and that it remains unpaid. The kind of whisky sold is mentioned in the receipt, and a statement that when the purchase money is paid, the holder of the receipt becomes entitled to the possession of the whisky.

This, it seems to us, was not only sufficient to put the bank on inquiry, but was such an evidence of the drawer's right to a set-off against the paper as would have precluded one who was disposed to exercise the slightest care and caution in a business transaction from purchasing it. The paper was in fact worthless, upon its face, to the purchaser. The purchase money, he was told, was unpaid, and while the whisky might have sold for a greater sum than the purchase price, as negotiable paper it was worthless, and if the bank or its officers had read the receipts, or declined to rely on Wolf's representation, the paper would not have been so accepted. The statute in regard to liens for the

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purchase money of land provides that no lien exists as against a purchaser, unless it is stated in the deed what part of the consideration remains unpaid. In such a case the statement that a lien is retained for the purchase money without anything more would not create a lien.

The amount due on the land and for which the lien exists must appear on the face of the deed by describing the purchase money notes or stating in express terms the amount unpaid. Is such a construction of the language used, if alike in each case, to be applied to commercial paper where the purchaser has notice before he obtains the receipt or by reason of its stipulations that the purchase money is unpaid? Should this court, in construing such a statute, disregard the well established rights of parties with reference to negotiable paper and hold that, because of the satute, the purchaser, even with notice before he becomes the owner, is holding bona fide because the statute requires the nature and extent of the lien to be set forth in the receipt. If Mattingly had said to the bank before its purchase of the paper that the distilling company held a lien, by agreement, for the entire purchase money and then had the actual possession of the whisky, would not the bank, in becoming a purchaser after notice, hold the receipt mala fide? Such paper is made negotiable by the statute and with like liability as bills of exchange now are and with like remedy thereon.

The appellant was informed when it read the receipt that all the purchase money was due. This was the extent of the lien, and although the amount is not inserted, it informed the purchaser that the paper was worthless, or that if he took it he held the whisky subject to the vendor's lien. The purchaser might have been required to ascertain the amount of the purchase money, but it knew when it made the purchase that the purchase money, whatever it was, had to be paid to the vendor. The receipts in this case were not read by the chief officer of the corporation, but relying, as he states, on the representation of Wolf, accepted the receipts as security for the money, and while his negligence can not enlarge or diminish the rights of the lien holder under the statute, it is evident that if the chief officer had examined the contents of the receipts that the money would not have been loaned, and when the nature and extent of the lien is so apparent as that any one of ordinary business capacity, in reading the receipts, must have been informed of the appellee's equitable right to the purchase money, it is such a compliance with the statute as gives to the warehouseman a superior equity to that of the purchaser.

The judgment below is, therefore, affirmed.

FITZPATRICK & McCORMICK v. RINGO.

(Filed October 22, 1887—Not to be reported.)

A vendee is not entitled to have his deed reformed so as to include an additional tract of land upon the ground that the vendor represented that it was in the boundary sold to him, it appearing from the vendee's knowledge of the land that he could not have been misled by such a representation. Moreover, it appears that he could, before accepting the deed, have discovered, by a slight examination of it, that the boundary, as therein described, did not include the lot in controversy, and for that reason he is not entitled to have the deed reformed.

A. T. Wood for appellants.

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W. H. Holt and B. F. Day for appellee.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Lewis.

This action was instituted by S. A. Peters and husband to recover of appellee, Ringo, a tract of about thirty-five acres, allotted to her in a division under judgment of court of the lands of her father, Thos. Calk, deceased. And he seeks, in a cross-petition against appellants, Fitzpatrick & McCormick, his vendors, not a rescission of the contract between them, but judgment for $125, the estimated value of the lot in case of recovery by the plaintiffs.

But to entitle him to any judgment at all in his cross-action against appellants, it becomes necessary to reform the deed from them to him, for the lot sued for by the plaintiffs is not thereby conveyed.

He alleges the existence of two reasons for reforming the deed, whereby to make them liable on their covenant of warranty.

The first is that they, at the time of the contract, represented to him that the boundary of land sold by them to him included the lot of thirty-five acres, and he was thereby induced to make the purchase.

The second is that by mistake the deed was so written as to only include a tract of about fifty-three acres, allotted in the same division to Mrs. Nesbitt, another heir of Thos. Calk, and purchased of her by appellants.

The contract was made and agreed on between Ringo and McCormick, Fitzpatrick not being present. And the evidence shows that McCormick did not reside in the same county where the land is situated; did not know, and informed Ringo he was ignorant of the location of the northern line of the tract he was selling, which was really the dividing line between it and the Peters lot. And the nearest approach to a representation, was the expression of a vague opinion, based, as he informed Ringo, upon information of an indefinite character, given by a person, a neighbor of Ringo, residing near the land. On the other hand, Ringo then, and had for several years, resided within 150 yards of the land, and had every facility, as well as inducement, to ascertain, if he did not already know, where the northern boundary line was.

It seems to us it would be trifling with the facts of this case to assume that he was in the least degree misled by any representation of McCormick in regard to the boundary of the land he purchased. And if he was not, then, according to a well settled rule of equity, the first of his alleged reasons for reforming the deed fails.

The quantity of land appellants represented they owned and undertook to sell, and that appellee admits he purchased, was about fifty-three acres, and that he gets by the deed as it stands.

McCormick testifies he informed Ringo, at the time of the negotiation, that the land he and Fitzpatrick owned and proposed to sell was the tract allotted to Mrs. Nesbitt in the division mentioned, and the only other witness present states he then knew and Ringo knew he was buying the Nesbitt lot and no more.

If the deed be reformed so as to cover the land appellee alleges he purchased, then the eastern line extending from a well known corner, instead of being forty-four poles in length, would be ninety-five poles, and the western line would be correspondingly increased, while the quantity of land, instead of being fifty-three acres, would be eighty-eight acres.

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In our opinion the alleged mistake is not clearly made out by satisfactory proof, as it must be to justify the interposition of a court of equity. On the contrary, it seems to us the preponderance of the proof is decidedly the other way.

But even if it was so, it is manifest that, by the exercise of ordinary diligence, he could, before accepting the deed, have ascertained where the line dividing the Peters from the Nesbitt lot was. The deed, as written, containing the same description of lands as that allotted to Mrs. Nesbitt, was delivered to him for examination, before being acknowledged or lodged for record, and a slight examination would have satisfied him, having the knowledge he did of the situation of the land and of the division among the Calk heirs, that the boundary, as therein described, did not include the Peters lot, and it was not owned by appellants. We think the court erred in rendering judgment in favor of appellee, and it is, therefore, reversed, and the cross-petition directed to be dismissed.

Judge Holt not sitting.

WHITE'S ADM'R v. CURD.

(Filed October 22, 1887.)

1. Interest—A note executed under the conventional 10 per cent. interest law, bearing interest at 10 per cent., bore interest at that rate only until maturity, and after that at the rate of 6 per cent., unless due one day after date or "instanter;" and in that event it bore 10 per cent. from date until paid.

2. Same—Mistake—In a suit upon a note due twelve months after date, bearing interest at 10 per cent., it being alleged that by the terms of the contract the note was to bear 10 per cent. from its date until paid, and that by mistake the note was not so drawn, the fact that the payor for several years paid the interest annually at the rate of 10 per cent. is held to be sufficient evidence, under the circumstances, in the absence of opposing evidence, to establish the alleged agreement and mistake.

3. Limitation—A writing which acknowledges an indebtedness and promises to pay it, is "a written obligation for the payment of money" within the meaning of the statute of limitation, and an action thereon is barred only after the lapse of fifteen years.

4. Homestead—Lien—The mere fact that borrowed money was used by the borrower in discharging a lien upon his homestead does not entitle the lender to the benefit of the lien thus discharged, there being no agreement to that effect.

C. W. Lester for appellant.

R. D. Hill for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

The appellee instituted suit in the Whitley Circuit Court against the appellant, Dempsey White, as the administrator of M. E. White, deceased, and the widow and heirs of said decedent, on three notes, one for $500, dated May 20, 1872, and due twelve months after date, together with interest from date "at the rate of ten per cent. per annum," and one for $675.91, dated the 8th of October, 1873, and due instanter, together with "ten per cent. interest thereon from date," and one for $64.30, dated

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the 11th of September, 1877, and due instanter, together with interest thereon "at eight per cent. from date."

The legal construction of the first named note, according to the repeated decisions of this court, is that it bears interest at the rate of ten per cent. per annum until its maturity, and after its maturity it only bears six per cent. interest. But it is alleged that, by the terms of the contract, the note was to bear ten per cent. interest per annum from its date until paid, and that the note was to be so drawn, but by mistake it was not so drawn. The intestate paid the interest annually on the note at the rate of ten per cent. per annum until 1879. We think that this fact, under the circumstances of this case, furnishes sufficient evidence, in the absence of opposing evidence, to establish the alleged agreement and mistake. And, therefore, the lower court did right in not applying four-tenths of the sum so paid, as partial payments of the principal of said note.

It is also well settled by this court that under the conventional ten per cent. interest law, if a note was made payable one day after its date, and bore ten per cent. interest from its date, that such note continued to bear ten per cent. interest until it was paid, for the reason that to limit the interest at ten per cent. to only one day, would be an absurdity, which it was not supposed the payor and payee intended to indulge in. It is contended, however, that the second and third named notes are only due bills, simply acknowledgments of indebtedness, and not promises to pay. We can not so construe these two pieces of paper. Each one of them acknowleges an indebtedness and promise to pay it, not only the principal, but also the interest, at the rate of ten per cent.

It is also contended that said due bills are not promises to pay, but merely acknowledgments of indebtedness, and, therefore, the five years statute of limitation bars the right of action.

To this proposition we can not agree. As before said, such paper is not only an acknowledgment of indebtedness, but it contains a promise to pay it. Such is its meaning. And the right of action on it is not barred, except by the statute of fifteen years limitation. Besides, the language of chapter 71, article 3, section 1, is, that the action on a written "obligation for the payment of money" shall be commenced within fifteen years after the right of action first accrued.

As these two pieces of paper are obligations for the payment of money, the right of action thereon is not barred until the lapse of fifteen years from the time the right of action first accrued.

The appellee took a mortgage on the tract of land in controversy to secure the payment of the $500 note. This note was given for borrowed money. At the time the money was borrowed and the mortgage was taken, M. E. White occupied the land as a homestead, and continued to so occupy it until his death. His widow, who now claims a homestead in the land, never joined in the mortgage. The appellee alleges that prior to the execution of the mortgage, M. E. White was the surety of the sheriff of Whitley county, on his revenue bond, and that the Commonwealth obtained a judgment on this bond against the sheriff and M. E. White, upon which execution was issued, which execution was levied on the land in controversy, and that the land was sold to satisfy the execution, and that the Commonwealth bought it in at the sale, whereby the lien of the Commonwealth on the land was continued; that the appellee applied $306 of the $500 borrowed by M. E. White of him, to the discharge of said

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lien; that by reason of the foregoing facts, he is entitled to be substitute to the lien of the Commonwealth. The record shows that, prior to the execution of the mortgage, the land in controversy had been sold and purchased by the Commonwealth to satisfy an execution against M. E. White and others, and M. E. White applied $306 of the $500 borrowed of the appellee to the discharge of his indebtedness to the Commonwealth, whereby the Commonwealth's lien on the land was discharged. But the record does not show that the appellee, in any way, or in any event, looked to the lien in favor of the Commonwealth as an indemnity for his loan, or any part of it. Nor does the record show that there was any understanding or agreement between the appellee and M. E. White that the appellee was to have a lien on the land equivalent in scope and effect to that of the Commonwealth. On the contrary, it appears that M. E. White was to give the appellee the mortgage sued on as security for the $500, and that he did give it for that purpose, and that the appellee looked to the mortgage as given as security for the money loaned, and that he looked to no other security whatever. Under the foregoing circumstances we think that the appellee is not entitled to be subrogated to the lien of the Commonwealth. And as Mrs. White did not join in the mortgage, she is entitled to a homestead in the land in controversy.

Therefore the judgment of the lower court is reversed, to the extent that it disallowed the appellant, Mrs. White, a homestead in the land, and the case is remanded for further proceedings consistent with this opinion.

MURRAY, &c. v. DAVIS, &c.

(Filed October 22, 1887—Not to be reported.)

A homestead is not exempt from sale for the purchase money, and where one has taken up the purchase-money notes and had other notes executed to him in lieu thereof, expressing that they are for the land, the homestead is not exempt as against the notes thus substituted for the original purchase-money notes.

W. P. D. Bush and Boles & Muncie for appellants.

J. M. Basham and Porter & McQuown for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Pryor.

In this case the claim to the homestead must be denied. The statute expressly provides that it shall not be exempt from sale for the purchase money. The party, Witty, who originally owned the land in conjunction with Gill, and who sold it to Davis, states that Davis was indebted to him, as purchase money for the land, the sum of $1,577.40. This fact is not controverted. Witty then states that he sold the purchase money note to one Nunn, who assigned it to Murray.

Nunn makes a similar statement and says that after his purchase of the note, the appellee then executed the present note to him (Nunn), in lieu of the purchase money note obtained by Nunn from Witty. Not one of these facts is controverted, and the note given by Davis to Nunn specifies that it was for land,

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and that it was substituted in lieu of the note Davis owed Witty, is evident. So it is plain that this note was for the purchase money, and there is no reason assigned for giving the vendee a homestead as against his vendor or assignee of the purchase money notes, or against one who has taken up the purchase money note and had other notes executed to him expressing that they are for the land. In such case it is taking from the owner and his assignees purchase money to which they are entitled and giving to the vendee a homestead without any consideration whatever. (Broomfield v. Broomfield, 7 Ky. Law Rep., 221; Miller v. Jones, 6 Ky. Law Rep., 364.)

The judgment in this case is reversed and cause remanded with directions to dismiss the petition.

OHIO VALLEY RAILWAY & MINING CO. v. THOMAS, &c.

(Filed October 22, 1887—Not to be reported.)

1. Grounds for new trial—The assignment of "error of law" as ground for a new trial is insufficient to raise any question whatever.
2. The damages awarded in this proceeding for the condemnation of land are not excessive.
3. As the verdict is not palpably against the evidence it will not be disturbed.

Clay & Banks for appellant.

Brown & Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

Several questions are presented, arguendo, by the counsel for the appellant. None of them can be considered, however, save one. This is because the grounds upon which a new trial was asked are insufficient to raise any other. They are:

"First, error in the assessment of the amount of recovery; second, that said verdict is not sustained by sufficient evidence; third, error of law occurring at the trial and excepted to by plaintiff."

It has been so often held by this court that merely assigning "error of law" as a ground for a new trial is insufficient to raise any question whatever, and the reasons therefor have been so often given that citation of authorities and a repetition of the reasons upon which they are founded is unnecessary.

The single question, therefore, upon this appeal is whether there is sufficient evidence to support the verdict.

The condemned way runs through the farm of the appellees, containing about 160 acres, taking a little over four acres of it, and leaving 100 acres of it upon one side and 56 acres upon the other. It necessitates the removal or destruction of several outbuildings, and to enclose the road over 500 panels of fencing will be required. Indeed, the evidence shows overwhelmingly that the damages which were awarded, aside from the value of the land taken, were fairly estimated. The witnesses vary in their estimate as to the value of the land taken for the right of way.

It is unnecessary to review in detail the testimony upon this question. Sufficient to say that the verdict is not palpably against it, and unless it be so the finding of the jury should not be disturbed.

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The commissioners selected by the county court for the purpose fixed the damages at $800. The road appealed. The jury in that court allowed $960. The road again appealed, and upon the trial in the circuit court the jury allowed the appellants only $740. One would presume from this history of the case that the last finding was not excessive. A review of the testimony sustains this presumption.

Judgment affirmed.

ALLSMILLER, &c. v. FREUTCHENICHT, &c.

(Filed October 27, 1887.)

Void judgment—Guardian ad litem—Dower—Rents and improvements—A testator devised all his property to his widow, which she was to manage and use for the raising of his and her children so long as she should remain a widow, but upon her marriage the property to vest absolutely in the testator's then living children, subject to the widow's right of dower. The widow having married again, the executor brought suit against her and against her husband, A., and against the surviving children of the testator, who were infants, to settle his accounts as executor, and alleging an indebtedness by A. and wife to the estate, for which he asked personal judgment. A guardian ad litem was appointed for the infants, but no summons was issued against them. A. and wife filed an answer, alleging that the executor had caused to be built a house upon the testator's land, for which, by the executor's direction, they had paid. An amended answer was then filed, which was made a cross petition against the executor, by which A. and wife sought to hold him personally liable for the sum paid by them for building this house. A second amended answer was then filed, asking that dower be allotted to the wife of A. in the land of her former husband, and alleging also that she was entitled to the interest in said land of her children who had died. Upon this pleading a summons was issued against the infants, and a guardian ad litem appointed for them. Under these pleadings fifty acres of land was allotted to the wife of A. as dower and thirty acres was set apart to her absolutely as compensation for the enhanced value of the whole tract of land by reason of the improvements. The boundary of the whole eighty acres was given, but not the boundary of the fifty acres or the thirty acres. The children of the testator, disregarding these proceedings, brought suit to have dower allotted to their mother, and for a division of the land between themselves. A. and wife relied upon the former proceedings as a bar to the plaintiff's right of recovery. The court disregarded the former proceedings and made a new allotment of dower and refused to charge the land with the improvements. Held—

1. The appointment of a guardian ad litem for the infants before they were summoned was void, and did not bring them before the court.

2. They were not brought before the court except upon the second amended answer and cross petition, and are not, therefore, bound by the judgment except as to the matters as to which that pleading related.

3. Neither that pleading nor any other sought to hold the lands bound for improvements, and the prayer for general relief was not sufficient for that purpose. Therefore, the judgment charging the land with the improvement is void and affords the defendants no protection.

4. As the fifty acres of land attempted to be allotted as dower was not identified by metes and bounds, the attempted allotment was invalid.

5. The mother was not entitled to the interest of her deceased children in the land, for the reason that they died before she married again, the will providing that the land should go to the children living at the time of the widow's marriage. This matter was not determined by the former judgment.

6. The judgment in this case directing the allotment of dower out of the

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whole tract without reference to the enhanced value of the land by the improvements is correct, as is also the judgment disallowing the improvement as a charge upon the land.

7. The defendants should be charged with rent only for the thirty acres and not for the fifty acres.

Helm & Bruce for appellants.

O'Neal, Jackson & Phelps for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

Fred Klages, a resident of Jefferson county, Ky., died in 1866. At the time of his death he was the owner of a tract of land near the city of Louisville, containing one hundred and fifty-two acres. After his death his will was duly probated in the Jefferson County Court. By this will he devised to his widow (now Mrs. Allsmiller), all his property, which she was to manage and use as she deemed best, except that she should not sell the land, for the raising of his and her children, so long as she should remain his widow, but upon her marriage the property was to vest absolutely in his then living children, subject to his widow's right of dower, etc.

By this will Henry Wehmhoff was nominated as executor. He was duly qualified as such executor by the Jefferson County Court.

At the time of Fred. Klages' death he had a number of children, some by a former wife and some by his widow. All of these children, except the two appellees, died during infancy, before the marriage of Mrs. Klages to the appellant, Wm. Allsmiller. The two appellees are children by Fred. Klages' first marriage, and were also infants at the time of his death.

Mrs. Klages married the appellant, Wm. Allsmiller, within two years after the death of Fred. Klages.

In 1868 Henry Wehmhoff, as executor of Fred. Klages, brought suit in the Louisville Chancery Court against Wm. Allsmiller and his wife, formerly Klages, and the two infant children of Fred. Klages, who were infants under fourteen years of age, in which suit he sought to have his accounts, as executor, settled. He also alleged that Wm. Allsmiller and wife were largely indebted to the estate.

The two infants were never served with process to answer this action, but a guardian ad litem was appointed to defend for them. Wm. Allsmiller was their statutory guardian.

Wm. Allsmiller and wife, for themselves alone, answered, in which they alleged, among other things, that Henry Wehmhoff, as executor, contracted with one Wedekemper to erect a house on the one hundred and fifty-two acre tract of land, at the price of $2,295.82; that they, by the direction of Wehmhoff, as executor, paid said sum, a part to Wehmhoff himself, which went to Wedekemper, and the other part to Wedekemper.

On May 27, 1870, they filed an amended answer, which they made a cross-petition against Wehmhoff. In this cross-petition they sought to hold Wehmhoff personally responsible for the sum that they paid for building this house.

On July 1, 1870, they filed another ameded annswer, which they made a cross-petition against the two infants. In this cross-petition they alleged, first, that Mrs. Allsmiller was entitled to dower in the one hundred and fifty-two acre tract of land, which they asked to be allotted; second, that she was entitled to the interest in said tract of land that her children would have been

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entitled to, if they had lived. The two infants were summoned to answer this cross-petition, and a guardian ad litem was appointed to defend for them.

Upon the issue made by the amended answer, filed May 27, 1870, seeking to recover from the executor the sum of $2,295.28, the price of the improvements, the court's commissioner reported that the claim was not a proper charge against the estate, as neither Mrs. Miller nor the executor had the right to erect the improvements on the land, and charge the same against the infants.

The court sustained the Allsmillers' exceptions to this report, upon the ground that while the real estate could not be charged with the claim for improvements, the will prohibiting such a charge, the widow under the will "had the power to use the personalty at discretion for the benefit of the children."

On April 4, 1872, the court adjudged that the executor did not contract for the improvements, and he should not, therefore, be charged with them in his settlement with the widow.

In the same judgment the court said: "It seems" that the defendants should be entitled, as against the children of the testator, to pay for the improvements which they made with their own money, to the extent that they enhanced the value of the land, but upon this subject and all others not herein disposed of this cause is retained for further orders. The case was again referred to the court's commissioners to report upon the enhancement of the value of the land by reason of the improvements. The report fixed the enhanced value of the land by reason of the improvements at $2,900.

This report was confirmed, and in the same order commissioners were appointd to allot dower to Mrs. Allsmiller. The commissioners were directed to allot to Mrs. Allsmiller one-third of the land involved, including the improvements, and in addition thereto to set apart to her in her absolute right $2,900 worth of land, as compensation for the enhanced value of the whole tract of land by reason of the improvements.

The commissioners reported that they allowed Mrs. Allsmiller fifty acres of land, including the improvements, as dower, and thirty acres in addition thereto in her own absolute right, by reason of the improvements, making in all eighty acres. They gave the boundary of the whole eighty acres, but did not give the boundary of the fifty acres or the thirty acres.

Thereupon Allsmiller and wife went into the possession of the whole eighty acres, and have held the possession of the same ever since.

Said children having subsequenlty married, they and their husbands, disregarding the above mentioned proceding, brought suit in the Louisville Law and Equity Court for the purpose of having dower allotted to Mrs. Allsmiller and a division of said land between themselves.

Allsmiller and wife relied, first, upon the above named proceedings as a bar to the plaintiff's right of recovery; second, that if not a bar they established an enforcible judgment as against the land which bound the said children for the sum of $2,900, etc.

The lower court disregarded the defense and rendered judgment allotting to Mrs. Allsmiller dower in said land, without reference to its enhanced value by reason of the improvements, and ordered a division, and reserved the question of rents and costs. From that judgment Allsmiller and wife have appealed to this court.

First. The infants were not served with summons to answer the petition filed by Wehmhoff. His petition was simply to settle his accounts as executor, and to obtain personal judgment

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against the appellants. By the appellants' answer they relied on the fact that they had paid for the improvements by his direction, and by their amended answer they sought to have judgment for this sum against the executor. The infants were not served with process to answer any of these pleadings. Nothing was sought personally against them. The contest thus far was between the executor and the appellants. No judgment could have been rendered against them because they were not served with summons to answer. Although a guardian ad litem was appointed for them, yet they had not been summoned to answer. The appointment of the guardian ad litem did not bring them before the court. The appointment itself was void.

Sceond. The second amended answer of the appellants, filed in the old suit, related only to Mrs. Allsmiller's claim of dower and her supposed right to the interest that her children would have had in the land had they lived. She was not entitled to any interest in the land on account of her dead children, because they having died before she married Wm. Allsmiller, they had no inheritable interest in the land, for the reason that the will provides that the land should go to the children living at the time of the widow's marriage. To this amended answer the infants were made defendants and served with summons.

Any judgment rendered settling the dower right of Mrs. Allsmiller or settling her pretensions to an interest in the land as the heir of her dead children, would have bound the infants, because they were properly before the court relative to these two matters and these two matters only.

The appellants not only did not seek to hold the land bound for these improvements in this amended answer, but did not seek to hold the land liable for them in any of their pleadings. Nor did their prayer or general relief in this amended answer, nor any of their other pleadings, authorize the court to place the improvements as a charge upon the land. The judgment, therefore, charging the land with the improvements is void and affords the appellants no protection.

The fifty acres of land attempted to be allotted to Mrs. Allsmiller as dower was not identifid by metes and bounds by either the judgment of the court or the commissioner's report. Therefore, the attempted allotment was invalid.

The judgment of the lower court in this case directing the allotment of dower out of the whole tract of land without reference to the enhanced value of the land by the improvements is correct.

The judgment of the lower court disallowing the improvements as a charge upon the land is also correct. But Mrs. Allsmiller's dower should be so laid off as to include the improvements. In this respect the lower court should amend its judgment.

As the appellants have used only fifty acres of the land as dower, which is about equivalent to one-third of the whole tract, both in acreage and value, without reference to the improvements, they should not be charged with rent for the same.

The lower court should confine its inquiry as to rents to the thirty acres of land.

As the question of rents was left open by the lower court, and as its judgment will be amended as above indicated, and as further proceedings will be had in reference to rents, consistent with this opinion, the judgment is affirmed.

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KENTON INSURANCE COMPANY OF KENTUCKY v. CITY OF COVINGTON, &c.

(Filed October 27, 1887.)

1. Taxation—A taxpayer, in listing his property for taxtion under the equalization law, can not deduct contingent liabilities, and in this regard the same rule applies to insurance companies that applies to other taxpayers. Therefore, an insurance company, in listing its property for taxation, can not deduct from its assets its contingent liability to policy holders for losses, or by reason of their right to reclaim premiums paid in the event of a cancellation of the insurance contract.

In this case an insurance company is held liable to taxation upon its reserved fund, or "unearned premiums," although as much as this fund amounts to may be required to pay losses for the year.

2. Same—The mere fact that a corporation is required to pay into the State treasury, as taxes, a certain sum upon each share of its capital stock by or on a named day, does not manifest an intention upon the part of the legislature to exempt it from municipal taxation.

3. Distraint for taxes—Under the charter of the city of Covington the city loses its right to distrain for taxes unless the tax bills are placed in the hands of the collector once in each year.

J. F. & C. H. Fisk for appellant.

W. K. Benton for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was instituted in the court below to enjoin the collection of what was claimed to be delinquent taxes assessed against the insurance company for the years 1879, 1880, 1881, 1882 and 1883. The injunction was sustained as to the collection for the entire period, except as to the year 1883, the chancellor below holding that the remedy by distress, as to those years, had been lost by the failure of the council to place the delinquent bills or tax bills in the hands of the collector at least once in each year as required by the provisions of the charter of the city. The failure to do this lost to the city the particular remedy, as was held in the case of the Covington Gas Light Co. v. City of Covington, &c., 8 Ky. Law Rep., 442.

The taxes for the year 1883 are alone involved on his appeal.

The insurance company asserts an exemption from taxation on its reserved fund, or what is termed unearned premiums, on two grounds: The first is, that being required to pay into the treasury the sum of fifty cents on each $100 of its capital stock by or on a named day, it was the legislative intent to exempt it from any other burden in the way of taxation, State or municipal, and the cases of Johnson v. Commonwealth, 7 Dana, 338, and the Farmers' Bank v. Commonwealth, 6 Bush, 127, are relied on as settling this question. An examination of those cases will show that in considering the charter of the two banks it was held that the legislature had manifested an intention to exempt the banks from any additional taxation, in providing that the tax imposed "shall be in lieu or in full of all other taxes." There is nothing in the charter of the appellant expressly exempting its property from municipal taxation, nor can a reasonable implication arise from any provisions of its charter that such was the legislative will. On the contrary, the company has been listing its property for taxation from year to year with the assessor of the city, and

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paying taxes thereon for municipal purposes, placing upon the language of its charter the only reasonable construction that can well be applied to it.

It is insisted, however, by the city that the re-insurance reserve, or what has been termed unearned premiums, is liable to taxation, and as the company has failed to list this money under the equalization law, or has deducted the amount from its assets, it is not bearing its share of the municipal burden.

The General Statutes, regulating the assessment of property, provides that after the assessment of the specific property described, each person shall fix the amount he is worth from all other sources after deducting his indebtedness. Section 6 provides: "The indebtedness, which may be deducted as aforesaid, must be just and honest debts owing as principal and not as surety and created for a valuable consideration which the person intends to pay," etc.

The 15th section of an act, approved March 12, 1870, entitled an act for the incorporation of and regulation of fire, marine, health, accident, etc., insurance companies, except life insurance companies, provides as follows:

"It shall not be lawful for the directors, trustees or managers of any insurance company to make any dividend except from the surplus profits arising from their business, and in estimating such profits there shall be reserved therefrom a sum equal to the amount received for premiums on unexpired risks and policies, which are hereby declared to be unearned premiums; and also there shall be reserved all sums due the corporation on bonds and mortgages, bonds and book accounts, or other securities, of which no part of the principal or interest thereon has been paid during the last year, and for which foreclosure or suit has not been commenced for collection, or which, after judgment obtained thereon, shall have remained more than two years unsatisfied, and on which interest shall not have been paid, and also there shall be reserved all interest due or accrued and remaining unpaid. Any dividend made contrary to these provisions shall subject the company making the same to a forfeiture of its charter," etc.

We find no provision of the genearl law, with reference to taxation, that exempts this or like corporations from the payment of municipal taxes, and no provision of appellant's charter from which it may be inferred that such an exemption exists, and if no such burden can be imposed, it must arise from the obligation of the company to pay losses sustained out of this reserved fund, denominated unearned premiums, or its contingent liability to policy holders to refund to them a portion of the premiums paid when presenting their policies for cancellation.

If the right on the part of policy holders to demand pay for losses, or to reclaim premiums paid upon a cancelment of the insurance contract, can be regarded as an indebtedness on the part of the company, then such indebtedness may be deducted from the assets of the corporation when listing its property for taxation. These outstanding risks pertain to all insurance companies, and if deducted from the value of assets would result in exempting their property from any taxation whatever.

The act of March 12, 1870, with reference to the payment of dividends, requiring that no dividends shall be made of this reserved fund, does not divest this corporation of its right of property in it, or to use and invest it for the benefit of the stockholders. The policy holder is not required to pay taxes on the amount of his policy, because he is entitled to no part of the money until he has sustained a loss. The premiums paid on unexpired poli-

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cies belong exclusively to the corporation, and a reserved fund of near $70,000, that is used, controlled and managed by the corporation for the beneficiaries called stockholders, by loaning it out at interest or investing it in securites, from which profits are constantly derived, is asked to be believed from municipal burdens for no other reason than by the general law enacted for the protection of the company and the policy holders, no dividends are to be paid out of this reserve fund. Mortgages and bonds due the corporation, and upon which no part of the principal or interest has been paid during the last year, constitute a part of this reserved fund, yet they are the property of the corporation, and the principal and interest, as it accrues, held for the benefit of the stockholders, and if an exemption exists in the one case a like reason should exempt the entire reserved fund from taxation.

It is argued for the company that at least fifty per cent. of the premiums paid into any insurance company for any year will be paid out for losses occurring during that year, and that at least as much as that amount is used to pay losses for any year. What, then, is to be realized from the business of the corporation, upon such a theory, is left so uncertain as to afford no guide to the mode or assessment of the property of such corporations for taxation, and if the probable loss of such corporations is to govern, then, if the premiums paid for any one year are insufficient to pay losses, no burden should be imposed, and the amount of taxes to be demanded is to be regulated by the profits resulting from the enterprise. We perceive no difference between the business of insurance and any other business in which capital may be invested with a view to profit. It is reasonably certain, in all business enterprises, that losses will be sustained, and to hold that deductions are to be made from the assets in anticipation of loss would be to relieve all business enterprises from taxation and substitute for the present system a mode of assessment entirely impracticable. The company may be required to cancel some of its policies, but this is a risk it assumes when engaging in its business. The merchant may reasonably expect to lose a certain per cent. of the sales of goods made to his customers, but this affords no reason for anticipating the loss and deducting it from the value of his personalty before loss is sustained.

Their contingent liabilities are not debts, and can not enter into the estimates of value when making an assessment.

In the case of the People v. Ferguson, 38 New York, 91, where such contingencies were held to lessen the value of the assets of an insurance company, the opinion was based on a statute taxing the capital stock and surplus profit of the insurance company, and the distinction was drawn between that statute and the general law assessing individuals on their personalty. The general law permitted (as is the law in this State) the just debts owing by the owner of property to be deducted, and it was held in that case that if the same facts had been presented with reference to the estate of the individual owner, he would not be entitled to the deduction claimed. In this State why should the property of the corporation be taxed otherwise than as required by the general law? We find no statute prescribing a different mode when taxing for even municipal purposes, and, besides, we are at a loss to perceive why the individual owner should pay the tax under such circumstances, and the corporation be exempted from the burden. While the actual marketable value of an estate is lessened if encumbered by contingent liabilities, the statute provides in effect that no deduction for such reasons shall be made.

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If one is worth $50,000, and liable as surety for $25,000, and the principal is insolvent, his estate is lessened in value, but still he is required to pay tax on the $50,000. These unearned premiums are retained under the law by the corporation to provide against contingent losses. It is found set apart for that purpose, and in the usual course of business in like corporations such a reserve fund would usually be retained, even if no statute existed requiring it.

In the case of the State v. Insurance Company, 34 New Jersey Law, 575, it is said that this idea of the difference between earned and unearned premiums, as affecting the question of present property, is too uncertain to form a basis for taxation, and it was further held in that case that such distinctions between earned and unearned premiums might affect the strength of the company when declaring dividends, but it can not be said that unearned premiums are so charged that they can not be said to be the property of the company for the purposes of taxation. The right of property in the company exists, although a part of the premiums may be reclaimed.

In the case of the Insurancce Company v. Cappellar, 38 Ohio St., 560, the insurance company, in listing its property, included as an item of indebtedness what was called re-insurance. The amount was a sum equal to 50 per cent. of all premiums on policies unpaid at the time for listing property for taxation. The sum, in the aggregate, retained was composed, as was alleged, of unearned premiums. The statute of that State provided that "no insurance company, organized under any law of this State, shall make any dividend except from the surplus profits arising from its business, and in estimating its profits there shall be reserved therefrom a sum equal to fifty per cent. of the whole amount of premiums on unexpired risks and policies, which is hereby declared to be unearned premiums."

In discussing the questions raised in that case the court held that bona fide debts, owing, etc., mean nothing more than a fixed liability to pay a sum certain, due or to become due at all events, and not a loss that has not happened or may never happen.

Insurance is obtained to provide against loss, and while the insured may have the right to have the policy canceled, the right to do so has no fixed value, nor can this right be taxed. This company, in the year 1883, listed with the assessor its taxable assets, amounting to $80,293.64, and its liabilities at $83,240.00, and, therefore, for the purpose of taxation the company was insolvent. It held United States bonds and other evidences of debt, exempt from taxation, amounting to over $125,000, and while amply able to meet all its engagements, crediting its taxable property, or the value, by the contingent liabilities resulting, or that might result, from a cancellation of the policies, and we find the company in no condition to stand its part of the local burden. It is plain that the policy holders have parted with these premiums, and that the company is in the possession of the money under their contracts of insurance. The money, or its equivalent, is certainly not taxable as against the policy holder, and if not taxable in the hands of the company, it escapes the burden. The company is the absolute owner, and should be compelled to pay the tax. It may have to pay this entire fund in discharge of its contracts, or the whole of its capital stock, but this affords no reason for the exemption, for if such a rule is adopted as the basis of taxation in the one case because experience has demonstrated that a certain amount of loss will be annually sustained, then the same rule must apply as to all business enterprises, and the assessing officer is left to speculate on the chance of loss, or

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the probability of loss, left solely to the judgment of those conducting the business.

When the policy is canceled or the loss sustained the amount paid or refunded can be deducted, and not before. The peculiar character of an insurance company and its mode of doing business can not make it an exception when looking to the law regulating the mode of assessment that must apply to the present case, if taxable at all. and we find nothing in the statute implying even that this fund called unearned premiums is exempt from taxation.

Judgment affirmed on original and cross-appeal.

STACY v. HOLIDAY, &c.

(Filed November 1, 1887—Not to be reported.)

1. A sheriff's deed to land sold under execution relates back to the levy of the execution and invests the purchaser with the legal title from that date.
2. The equity of redemption in land sold to appellant under execution was purchased by the Commonwealth. After the expiration of a year from the date of the first sale the Commonwealth had the land sold at public outcry, although it had never redeemed, and appellee became the purchaser. Held—That appellee acquired no title. His claim that appellant, being at the last sale, failed to forbid it is not sustained by the testimony.
3. Matter not pleaded as an estoppel can not be relied on as such.

Wm. Lindsay and John L. Scott for appellant.

J. C. Eversole for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Bennett.

The Commonwealth having obtained a judgment against Grigsby, sheriff of Perry county, on his revenue bond, and Nick Williams and Nick Combs as his sureties, execution was issued on said judgment, which execution was levied on the two tracts of land in controversy as the property of Nick Williams and Nick Combs. And on the 10th day of October, 1880, each tract of land was sold under said execution, and the appellant became the purchaser of each tract at less than two-thirds of its appraised value. The Commonwealth thereafter caused the equity of redemption in each tract to be levied on, and on the 20th of June, 1881, the equity of redemption in each tract was sold and the Commonwealth became the purchaser thereof.

On the 17th day of June, 1882, the Commonwealth caused each tract of land to be sold by its agent at public outcry, and the appellee, Holiday, became the purchaser thereof, and received a deed from the Commonwealth.

Neither tract of land was redeemed within a year from the time of the appellant's purchase. In fact neither tract was redeemed at any time. The second sale was made within a year from the appellant's purchase, and the Commonwealth not having redeemed within a year from the appellant's purchase, it lost the right to redeem after the expiration of that time.

After the expiration of a year from the time of the appellant's purchase the sheriff of Perry county made him a deed to each tract of land.

No one having redeemed the tracts of land within a year from the time of the appellant's purchase, he became, at the expira-

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tion of that time, entitled to the legal title to said land, and the sheriff's deed invested him with the legal title thereto, which deed related back to the levy of the execution upon the two tracts of land and invested appellant with the legal title thereto from and after that date.

And the sale of said tracts of land by the Commonwealth on the 17th of June, 1882, did not overreach the appellant's title.

But the appellee, Holiday, contends that at the last named sale he was a purchaser of said tracts of land without notice of the appellants' claim; that the appellant was present at the sale and failed to forbid the sale or make his claim known; that he was a bidder on the land at the sale; that his conduct in these particulars was such as to lead him, the appellee, to believe that he claimed no interest in the land, whereby he, the appellee, was induced to believe that the appellant had no claim to the land. Therefore, he bought it at full value, and that the appellant is estopped from asserting title to it.

Several witnesses state that Mr. Sublett, the auditor's agent, just before asking for bids on the land, read the boundary of each tract. Other witnesses say he described each tract, and he then announced that he would sell these tracts of land; that at this stage of the proceedings the appellant, to use his own language, according to some of the witnesses, "forbid the sale of that land." Other witnesses say that he forbid the sale of the land.

All of the witnesses agree that he did not forbid the sale of the land but once, and from this fact the appellee attempts to make it appear that he objected to the sale of only one of the tracts, but the uncontradicted facts are that he forbid the sale just after Mr. Sublett finished describing both tracts as the property that he would sell. Therefore, he did forbid the sale of both tracts.

A few witnesses swear that they did not hear the appellant forbid the sale of the land. This, doubtless, is a fact, but nevertheless quite a number of other witnesses swear that they did hear the appellant forbid the sale of the land. The fact that a few persons did not hear it is not, under the circumstances of this case, contradictory evidence. Therefore, we regard it as a fact almost conclusively proven that the appellant did forbid the sale of both tracts of land, and that the appellee bought them, so far as the appellant's claim is concerned, at his peril. Also the appellant swears that before the sale he notified the appellee that he had a claim upon the land. Appellee does not deny this fact.

It is attempted by the appellee to prove that the appellant, just before the sale, proposed to him that the appellant should buy one of the tracts and the appellee the other. The evidence as to this matter is contradictory. Besides, it is not pleaded as an estoppel. And if it were pleaded as an estoppel the proof clearly shows that the appellee was subsqeuently put upon his guard by the appellant's forbidding the sale of the land.

There is no proof whatever that the appellant bid in either of these tracts of land for Williams or Combs, the execution defendants.

We are constrained to conclude, from the record before us, that the appellant is entitled to both tracts of land.

The judgment of the lower court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

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McCORMICK, &c. v. McCORMICK, &c.

(Filed November 1, 1887—Not to be reported.)

1. Joinder of plaintiffs and actions—As it is of common interest to all the plaintiffs in this action to set aside the judgment and sale in another action, and when that is done all questions arising will relate to the same parties and the same subject-matter, there was no misjoinder of plaintiffs or causes of action.

2. Use of plaintiff's name without authority—When an action is prosecuted for the joint and mutual benefit of all the plaintiffs, a presumption may arise that it was done by the consent of all; but when the object of an action is opposed to the interest of one of the plaintiffs and the judgment rendered takes from him his property and transfers it to a coplaintiff, if an issue is afterwards made, it is incumbent on the one benefitted to show that the one injured consented to be despoiled.

3. Parties to actions—In an action by a trustee for the benefit of creditors to subject to the payment of a note held by the debtor one half of a lot, the other half of which was owned by the debtor, the entire lot was sold, it being indivisible. In an action to set aside the judgment in that action and the sale under it. Held—That the trustee for the benefit of creditors is a necessary party defendant.

Cornelison & Mitchell for appellants.

B. J. Peters and W. H. Holt for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

In the action of Little, trustee, and others against Orear & Wyatt to subject an undivided half of the lot of land in dispute to pay the last installment of purchase money therefor, due by the defendants, it was alleged in the petition that interest belonged to J. P. McCormick, but E. N. McCormick, one of the plaintiffs, having become the owner of the note, transferred it with his other property to Little, in trust for the benefit of his creditors.

It was also alleged that John McCormick, now dead, owned the other half, but E. N. McCormick had, previous to his deed of assignment, acquired title to it by purchase from his six heirs at law.

In the judgment rendered in that action, it being agreed that the lot was not susceptible of division, it was directed to be sold entire, one-half of the proceeds of the sale, or enough for the purpose, to be applied to pay the note against Orear & Bryant, and the other to be paid to Little for the benefit of E. N. McCormick's creditors. And at the sale Mitchell became the purchaser at $25, a little over one-twentieth the value of the lot. The plaintiffs, in this action, allege that without their knowledge or consent E. N. McCormick fraudulently caused the action of Little, trustee, etc., against Orear & Wyatt to be commenced and prosecuted to judgment in their names as co-plaintiffs.

J. P. McCormick, one of the plaintiffs in this action, says that he had sold to E. N. McCormick the one-half interest in the lot, but had never been paid therefor, and has a superior lien on that half for the payment of the purchase price, which he asks to be enforced, before the payment of the note of Orear & Wyatt to Little, trustee. But as no judgment has been rendered in that branch of the case, except to set aside the judgment and sale mentioned, the only question before us is whether the court

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erred in refusing to compel the plaintiffs to elect which cause of action they would prosecute. As it is of common interest to J. P. McCormick and the other plaintiffs in this action to set aside the judgment and sale in the action of Little, trustee, etc., against Orear & Wyatt, and all the questions arising, when that is done, will relate to the same parties and subject matter, we think there was no misjoinder of parties plaintiffs nor of causes of action.

It seems to us that neither E. N. McCormick nor Mitchell, the purchaser, is now in a position as defendant to this action to deny the allegation that the four plaintiffs each inherited one-sixth of the lot from their father, John McCormick, but are estopped to do so, by the statements made in the other action.

We do not think the allegation that the plaintiffs in this action were, without their knowledge or consent, entered as plaintiffs in the other, is fully met and denied in the answer. But assuming it is sufficiently so to form an issue of fact, the question arises, in the absence of evidence by either party, upon whom rests the burden of proof?

Although it was alleged in the other action E. N. McCormick had acquired by purchase from his heirs the undivided half of the lot that belonged to John McCormick, no evidence whatever of such purchase of any title or claim of E. N. McCormick was produced. It is, therefore, manifest that without joining those heirs as plaintiffs no judgment could or would have been rendered to sell the interest now claimed by them for the benefit of E. N. McCormick and his trustee.

But they had no motive or interest in prosecuting that action for the benefit of E. N. McCormick or his creditors. On the contrary, the effect of being made parties plaintiffs was to deprive them of their property, and consequently the presumption arises they would not have given their consent, but would have resisted the judgment rendered in that action if apprised of the pendency and object of it.

When an action is prosecuted for the joint and mutual benefit of all the plaintiffs, a presumption may arise that it was done by the consent of all. But when the object of an action is opposed to the interest of one of them and the judgment rendered takes from him his property and transfers it to a co-plaintiff, unquestionably if an issue is afterwards made it is encumbent on the one benefitted to show that the one injured consented to be despoiled.

As it is easy for a disagreeing party to use the name of a person as co-plaintiff without his knowledge or consent, it would be hard indeed to compel such person, as a condition of avoiding or setting aside a judgment to his prejudice thus procured to prove that he did not authorize the use of his name as a plaintiff.

The price bid for the land is referred to by counsel, as a circumstance showig collusion between the purchaser, E. N. McCormick, and Orear & Wyatt, all of whom are appellants.

It is, however, not necessary to go into that question in the absence of evidence bearing upon it. For, upon the ground already stated, the judgment rendered would be proper, as the record stands, if Little had been made a party. But as by the deed of assignment he became invested with all the title of E. N. McCormick to one-half the lot as well as to the note on Orear & Wyatt, and consequently to the proceeds of the judicial sale, it seems to us that judgment can not be disturbed unless he is permitted to make defense to this action.

For that reason the judgment is reversed and cause remanded, with directions to permit the plaintiffs to amend their petition,

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making Little, trustee, a party, and for further proceedings consistent with this opinion.

Judge Holt not sitting.

CHANEY, &c. v. AMERICAN GERMAN NATIONAL BANK.

(Filed November 1, 1887—Not to be reported.)

Mistake—Where the clerk, in writing out his certificate to the deed of a married woman, has, by mistake, failed to include the deputy's memorandum of acknowledgment, the chancellor may permit the mistake to be corrected, although the mortgagee, in suing to enforce his lien, does not allege, in terms, that the failure of the clerk to include the indorsement was by mistake, facts showing that this must have been the case being stated, and all proper relief being asked.

D. J. Park for appellants.

W. M. Smith for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Holt.

Section 13, article 13, chapter 38 of the General Statutes, provides that "no mortgage, release or waiver of such exemption (the homestead) shall be valid unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate." And section 38 of chapter 24 says: "If the deputy of any county court clerk shall take the acknowledgment of a deed or other instrument of writing, and endorse a memorandum thereof on such deed or instrument of writing, but shall fail from any cause to write out and sign the certificate thereof, it shall be lawful for the clerk to write out and sign the certificate, setting forth in such certificate the facts, including the endorsement, and thereupon record such deed or instrument and certificate, and the deed or instrument and the certificate shall be as good and effectual as if certified and signed by such deputy." In conformity to this last provision of the statute it was held in Franklin v. Beckner, &c., 11 Bush, 595, and McCormick v. Woods, &c., 14 Bush, 78, that a certificate of the acknowledgment of a deed before a deputy clerk which does not set out the facts, including the endorsement made by the deputy, is not binding on a feme covert; and in Walters v. Davis, 8 Ky. Law Rep., 688, this court decided that although a wife unites with her husband in a mortgage, and properly acknowledges it, yet if the acknowledgment is before a deputy clerk and the clerk, in writing out the certificate, fails to include in it the deputy's memorandum of acknowledgment, the homestead will not pass.

The mortgage sought to be enforced in this action was properly signed and acknowledged by W. B. Chaney and his wife before a deputy clerk, who endorsed it thus:

"Acknowledged in full January 17, 1878.

"C. J. WHITTEMORE, C. G. C. C.,
"By R. M. RUPARD, D. C."

It was also endorsed "Lodged January 17, 1878, for record."

The county court clerk, however, in certifying it omitted to

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copy the deputy's endorsement, and it was, therefore, defective and insufficient to bind Mrs. Chaney or pass the homestead right.

After being so certified and then recorded it was withdrawn from the clerk's office, and on November 10, 1880, this action was brought to enforce it. This was resisted upon various grounds, but none of them can be sustained unless it be the one that the mortgage was not so certified and recorded as to bind the married woman and pass the homestead right, and has not since been corrected or can not be.

It appears that after the defect in the certificate had been set up as a defense to the action, and when more than five years had elapsed from the recording of the deed, it was withdrawn from the papers of the suit and presented to the county court clerk, who was not the same person who held the office at the time it was certified and recorded, and this new officer appended to it a new and sufficient certificate in form setting forth therein, in to tidem verbis, the endorsement of the deputy clerk, and then recorded the deed and the former certificate as well as his own.

Section 24, chapter 24 of the General Statutes provides:

"If the office of any county court clerk has been or may hereafter be vacated, leaving therein any instruments of writing unrecorded, which, from an official endorsement thereon, shall appear to have been acknowledged or proved ready for record, or that have been acknowledged or proved before another officer, and certified according to law and lodged in his office for record, or shall be produced to his successor for record, the successor of such clerk shall record the same, making his certificate conform to the facts."

It is urged, on behalf of the appellants, that under this provision of the statute an incoming clerk may first certify and record any instrument he may find unrecorded in his office which appear, from an official endorsement, to have been acknowledged or proven ready for record; and, second, any which may have been acknowledged or proven before, and properly certified by, an officer out of the county, but lodged in his office or produced to him for record, but that a county court clerk has no right to certify an instrument to his successor for record. In other words, that by this section an incoming clerk is limited to certifying and recording such instruments as he may find in his office unrecorded, but which, by official endorsement, show that they have been proven or acknowledged for record, and those which have been properly proven or acknowledged before and certified by an officer out of the clerk's county, and lodged in his office or presented to him for record, and that where an instrument has been certified by his predecessor in office and then withdrawn, that the incoming clerk has no power, without a new acknowledgment, to re-certify and record it.

In this instance it had not merely been certified by the old clerk, but he had recorded it, and then it was withdrawn, and if it were necessary in this case to pass upon the right of his successor to thereafter re-certify and again record it, the question would not be free from difficulty. Nor is it necessary to consider the effect of the act of the legislature approved May 10, 1884, volume 1. Acts of 1883-4, page 177, and for this reason.

In Ralston v. Moore, 7 Ky. Law Rep., 815, the defendants claimed a hometsead because the certificate to a mortgage was defective in failing to set out the endorsement of the deputy who had taken the acknowledgment. The mortgagee replied that the failure was from mistake, and asked that it be corrected. It was held that the chancellor should do so and enforce the lien, as the mistake appeared upon the instrument itself.

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To the same effect is the case of Walters v. Davis, 8 Ky. Law Rep., 688.

In the case now before us it is admitted by the pleadings that the mortgage was acknowledged before a regular deputy; that he endorsed the acknowledgment properly on the back of the mortgage, but that the clerk in certifying it failed to copy the endorsement, although he stated the facts. The original mortgage was filed with the pleadings, showing these admitted facts to be true. It is true the pleader did not in express words aver that the omission of the clerk to copy the endorsement of the deputy was by mistake, but the pleading states facts which show that this must have been the case, and all proper relief is asked.

The lower court, therefore, properly enforced the lien, and the judgment is affirmed.

BALLARD v. LOUISVILLE & NASHVILLE R. R. CO., &c.

(Filed November 3, 1887—Not to be reported.)

1. In construing a deed, the intention of the parties, as it appears from the whole deed, must control. If the intention appears, technical rules of construction can not be applied, if they lead to a different result

2. The habendum of a deed may be considered in arriving at the intention of the parties, but if the intention of the parties does not appear and resort must be had to technical rule of construction, then if the words of grant and the habendum are irreconcilable the former control.

3. A deed to a railroad company, although styled a "Deed of right of way," is construed as passing the absolute title, the deed as an entirety showing that such was the grantors' intention.

Jas. W. Head for appellant.

Bullock & Beckham for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Holt.

The appellee, the Cumberland & Ohio Railroad Company, had the power, by legislative grant, to acquire the absolute title to the land for purposes other than the mere right of way, and the single question now presented is whether the Randolph deed vested in it a fee simple or a mere easement.

It reads thus:

"DEED OF RIGHT OF WAY.

"Know all men by these presents, that R. P. Randolph, of the town of Shelbyville, and ——— Randolph, his wife, county of Shelby and State of Kentucky, for and in consideration of the sum of $2,150, cash to them in hand paid, the receipt of which is hereby acknowledged, hath given, granted, bargained and sold, and do, by these presents, give, grant, bargain and sell to the Cumberland and Ohio Railroad Company so much of his land in said county as is required for the use of the road of said company as follows, * * * containing two and seven-tenths acres of land. To have and to hold the same to the said grantors and their assigns forever, and said grantor doth hereby covenant to and with said grantees that he will warrant and defend to them

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and their assigns forever the premises hereby granted, and the said ——— Randolph relinquishes her right of dower herein."

In giving the boundary one call of the deed is for the "east edge of right of way," and the description of the land conveyed shows that it is not of uniform width.

It is urged, first, for the appellants that a consideration of the entire deed shows that the grantor intended to convey but an easement and not the fee, and, second, if this be not so and the intention does not appear, that then the premises of the deed convey but a right of way, and that the words of grant and not the habendum must control.

The object of construction and which is ever to be kept in view is the intention of the parties. If this appears then technical rules can not be applied, if they lead to a different result. The premises of a deed and the habendum are to be construed together if possible. The office of the latter, however, is to define the estate. Its words are those of limitation. It is that portion of a deed which follows the granitng part of the preimses and defines the extent of ownership granted. It can, therefore, be considered only when the granting words leave the subject of ownership open to explanation. In fact it is not an essential of a deed. If the granting part of the instrument has proper words of limitation it may be dispensed with altogether. It may be considered, however, in arriving at the intention of the parties. If, however, this does not appear and resort must be had to technical rules of construction, then if the words of grant and the habendum are irreconcilable the former controls. In such a case the habendum has no effect.

Thus if A grants to B for life, but the habendum is "to have and to hold to B his heirs and assigns forever, with covenant of general warranty," only an estate for life, and not a fee would pass, provided the entire deed did not show a contrary intention.

In the language of Mr. Washburn it is "where the grant is in definite form its generality in respect to the estate in the lands conveyed, which it is intended to create in the grantee, the habendum serves to define, qualify or control it." (2 Washburne on Real Property, page 642.)

"But as will be seen, when considering the habendum, if the language of the grant be definite in limiting the estate, and that of the habendum is clearly repugnant to the grant, the habendum yields to the terms of the grant." (Same, page 612.)

The habendum of the deed to the appellee does not appear to us, however, to be in conflict with its premises. If it were true that the words of grant convey but a right of way, then as the language of the habendum is applicable to the conveyance of an absolute estate, it could have no effect, provided the intention of the grantor did not appear upon a consideration of the entire deed.

It is true that the instrument is styled "deed of right of way," and that one call of the description of the premises is for the "east edge of the right of way," but this is not inconsistent with a grant of the fee when the entire deed is considered.

The words of the grant are not of a mere use. They grant and convey so much of the land as is required for the use of the road, describing it, and not the use of so much as is necessary therefor.

Only two and seven-tenths acres is embraced by the deed. The price paid was $2,150. It can hardly be supposed that this large sum was given for the mere right of way. The road needed land for other purposes, such as depots, stone quarries, etc. It had the right to acquire it therefor. The description contained in the

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deed shows that the land conveyed is not of uniform width but of irregular shape, and contradicts the idea that the intention was to grant a mere right of way. The grant is of the fee. The premises of the deed are not repugnant to the habendum, and the instrument, considered in its entirety, shows that the grantor intended to pass the absolute title.

Judgment affirmed.

NATIONAL MUTUAL BENEFIT ASSOCIATION v. HICKMAN, &c.

(Filed November 5, 1887.)

1. Evidence of a verbal agreement pertaining to the subject matter of a written contract, made before or at the time of the execution of the written contract, and not embraced therein, is not admissible for the purpose of restricting, enlarging, or in any way varying the terms of the written contract, and this rule applies as well to an insurance contract as to any other written contract.

In this case it is held that verbal testimony is not admissible to prove an agreement upon the part of an applicant for membership in a mutual benefit society that he would not act as brakeman on a railroad, the agreement not being made part of the written application nor of the certificate of membership.

2. Insurance—The applicant having stated his occupation to be that of "machinist and railroader," and it being so written down in the application, the fact that the applicant agreed to strike out the word "railroader" is not a defense to an action on the policy, as this was not equivalent to an agreement not to act as brakeman on a railroad, and the striking out of the word "railroader" could not have obliterated the knowledge of the company that the applicant was acting as brakeman on a railroad.

Bullitt & Harris, C. H. Shield, Jr., and Helm & Bruce for appellants.

O'Neal, Jackson & Phelps, James Harlan and P. A. Gaertner for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

On the 24th day of October, 1882, in consideration of certain written representations made by George H. Hickman, and the payment of certain fees to the appellant and his promise to pay certain other fees at stated periods, he was enrolled as a member of the appellant, and received its certificate of membership, in which certificate the appellant agreed to pay to his, George H. Hickman's mother, within sixty days after proof of his death, such sum as should be realized from an assessment on all surviving members of the division of the association in which George H. Hickman was admitted as a member.

The certificate provides that in case George H. Hickman failed to pay to the appellant the sum of $2 within thirty days after each anniversary of his membersihp, and the further sum of $1 within thirty days after the death of any member of the association, his membership should be forfeited, together with all benefits accruing therefrom. The certificate fails to declare any other act or omission of the member a ground of forfeiture of his membership.

By the rules of the association no one could become a member of it except upon written application, in which the applicant

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must answer certain questions, satisfactory to the association, which answers form the basis of the agreement with it and become a part of the certificate of membership.

George H. Hickman, on the day that he received the certificate of membership as a member of the appellant, filed his written application to become a member, in which he gave his occupation, which was so written down by the appellant, as that of "machinist and railroader."

Shortly after George H. Hickman was admitted as a member of the appellant he was killed while acting as brakeman of a train of railroad cars by an accident which befell the train.

His mother, the beneficiary named in the certificate, brought suit against the appellant for the purpose of recovering the sum for which he was insured.

The appellant resisted her right to recover upon the following grounds: First, that upon the presentation of his George H. Hickman's, written application to become a member of the appellant, with the words "machinist and railroader" written therein as his occupation, the appellant informed him that before his application would be accepted the word "railroader" must be stricken from the written application, as the appellant would not admit a brakeman on a railroad to membership. Therefore, he agreed with the appellant that the word "railroader" should be stricken from the application, but by mistake and oversight it was not done; second, that it was agreed by George H. Hickman and the appellant that he might act as conductor on a railroad, but if he acted as brakeman on a railroad his policy should be forfeited; that he was killed while acting as brakeman on a railroad whereby his policy was forfeited. The appellant does not allege that George H. Hickman's agreement not to act as brakeman on a railroad was to become a part of the written agreement, and that it was left out of the written ageement by mistake. Nor does the appellant allege that brakemen on railroads were prohibited by its by-laws from becoming members of the association.

The only allegation of mistake is in reference to striking the word "railroader" from the written application. Suppose the word had been stricken out, the appellant, nevertheless, knew that George H. Hickman was a brakeman as well as a mechanic. It was informed of that fact at the time of the application, and the agreement to strike the word "railroader" out did not and could not obliterate the knowledge of the fact that acting as brakeman on a railroad was a part of his occupation. Nor was such agreement equivalent to a promise on his part not to act as brakeman on a railroad. Therefore, the answer in this particular is not sufficient to entitle the appellant to any relief.

The alleged agreement, which is independent of the agreement to strike the word "railroader" out, is that George H. Hickman promised not to act as brakeman on a railroad. This agreement, it is alleged, was made before the certificate was signed and delivered. The agreement was not made a part of the written application. Nor was it made a part of the certificate of membership.

It is a universal rule that a written contract must contain all the essential terms of the contract, and that a verbal agreement, appertaining to the subject matter of the written contract made before or at the time of the written contract and not embraced therein, is not admissible for the purpose of restricting, enlarging, or in any way varying the terms of the written contract.

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The same rule governs contracts of insurance, where the basis of the agreement is a written application.

In May on Insurance, it is said: "If written application be made, it will be presumed to contain the representations which induce the contract, and proof of prior or subsequent verbal statements is inadmissible, and especially if it be an oral representation as to a future fact."

In Insurance Company v. Mawry, 96 U. S., 544, it is said: "All previous verbal arrangements were merged in the written agreement. The undertaking of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated."

As before intimated it is not alleged that the agreement not to engage as brakeman on a railroad was to be engrafted in the written application, but was left out of it by mistake. The agreement, therefore, is inadmissible to vary the terms of the written agreement.

The fifth paragraph of the appellant's answer alleges that George H. Hickman "fraudulently represented himself to be out of employment on a railroad."

The first paragraph of the appellant's answer alleges that George H. Hickman had its permission to engage in the service of a railroad except in the capacity of a brakeman. Also it is not alleged that the appellant relied upon this representation, or that it was induced to issue the policy by reason of this representation.

We think that the answer sets up no sufficient defense.

The judgment of the lower court giving the appellees $3,537.40 is affirmed.

BANK OF LOUISVILLE v. BOARD OF TRUSTEES OF THE MALE HIGH SCHOOL, &c.

(Filed November 5, 1887—Not to be reported.)

Constitutional law—Escheats—Presumption of death and non-existence of heirs—The opinion delivered October 13, 1887, in the case of Louisville School Board v. Bank of Kentucky, 9 Ky. Law Rep., 433, is decisive of this case.

Hamilton Pope for appellant.

R. H. Blain for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

This case is here the second time on the appeal of the defendant in the action. (For former opinions see 7 Ky. Law Rep., 185.) Since the commencement of the action an act, approved April 30, 1884, has been passed amending chapter 36, General Statutes, which was not, however, considered in the former opinion rendered in this case. And it is contended that by the terms of that act which, merely prescribing a rule of evidence, is applicable, the facts proved in the case, though not essentially different from what they were on the former appeal, are sufficient to authorize the recovery which the lower court again adjudged to the plaintiff.

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Without considering what effect that act should have in determining whether the plaintiff, upon the proof, has made out its case, it is clear that the opinion, rendered by this court in the case of Louisville School Board v. Bank of Kentucky, 9 Ky. Law Rep., 433, is decisive of this case. In that opinion, rendered October 13, 1887, after the former one in this case, is the following language: "While we perceive no objection to the validity of the statute (April 30, 1884), authorizing the presumption of death and the nonexistence of heirs or devisees to take the estate, when no claim has been asserted or heirs heard of for the period mentioned in the statute, a presumption may be overcome by testimony showing that persons are living who are entitled to the estate, or who are asserting claim to the property as the rightful heirs of the decedent. Under such a state of case they ought, at least, to be brought before the court, where they may assert their claims before a judgment is rendered giving their property to a stranger. The judge below was of the opinion that the decedents left those entitled, as heirs at law, to the money in controversy, and we would not be disposed to disturb his finding even if the validity of the statute was not involved. When the money is paid into the treasury, and becomes a part of the State's finances, it may be disposed of under legislative authority when not in violation of the organic law. But to authorize a corporation or private citizen to sue for and recover of one in the rightful possession of this character of money property because it has no real owner, or on the presumption, by reason of the lapse of time, that no such owner exists, and to hold it as a gift from the State, leaving the bailee responsible to the real owner, if he should appear, and requiring both to look to the donee of the State for its value, is changing the legal status of the parties without their consent, and a character of legislation is plain violation of the Constitution."

Unlike that case, the judgment in this was for the plaintiff, but the same principles are applicable to both, and the same reason exists in one as the other for denying to the plaintiff a right to recover.

Wherefore, the judgment is reversed and cause remanded, with directions to dismiss appellee's petition.

RIGGAN, &c. v. CRAIN.

(Filed November 5, 1887.)

1. In an action upon an injunction bond whereby the obligors undertook to satisfy an execution which the principal in the bond was seeking to enjoin, to the extent to which the injunction might be dissolved, an allegation that the defendants have failed to satisfy any part of the execution, and that it is "yet due and unpaid," is a sufficient averment of the breach of covenant as to payment.

2. Same—In an action upon such a bond it is immaterial whether the property released from levy was subject to the execution, or whether the plaintiff has lost his debt by reason of the injunction. Where there is no question as to the execution of the bond, the only inquiry is: Did the chancellor dissolve the injunction?

3. Where a surety's name is signed by another to a note or bond, upon his verbal authority, and he afterwards ratifies in writing the act of his agent, or resigns his name to the note or bond, it is as much binding upon him as if he had signed it in the first place.

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J. S. Lay for appellants.

Edwards & Hazelipp for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellants were sued as the sureties on an injunction bond executed by W. H. Riggan to the appellee, D. L. Crain, enjoining the collection of an execution, then in the hands of the sheriff, in favor of the appellee against him. The injunction was dissolved, and these sureties now say that the facts alleged in the petition do not authorize a recovery for the reason, first, that there is no averment that the debt is unpaid; second, that there is a failure to allege that the appellee lost his debt by reason of the injunction; third, a failure to allege that the property levied on was subject to the execution that had been enjoined.

The plaintiff, appellee, having set forth the undertaking in the bond, which was that "we undertake to satisfy the execution which the plaintiff in this action seeks to enjoin to the extent which the injunction may be dissolved, not exceeding the sum of $220," etc., proceeds to allege that the injunction was wholly dissolved, and the defendants had failed to satisfy the execution to the extent of $220, or any part of it, and that it is yet due, owing and unpaid.

There is a sufficient averment as to the breach of the covenant as to payment, and as to the second and third objections made, it is immaterial whether the property was or not subject to the execution, or whether the plaintiff had or not lost his debt by reason of the injunction. The sureties made themselves primarily liable by undertaking to pay the debt, or the execution, to the extent it might be dissolved, regardless of the condition of the execution debtor, and the only inquiry to be made, when the surety had signed the bond, is, did the chancellor dissolve the injunction, as it is not pretended or pleaded that the debt had been paid since the dissolution of the injunction.

The material inquiry in the case is as to the manner of executing the bond.

It is alleged and not denied that the authority to sign this bond was merely verbal, and in fact any authority given to sign the covenant is contradicted. It appears that the clerk signed the names of these sureties upon the verabl authority glven the principal, as represented by the latter, and issued the injunction.

After the injunction had been granted and the writ issued the clerk, as we must assume, discovering that no liability existed on the part of the surety, required other security, and thereupon E. S. Riggan, who was the son of the debtor, executed this writing: "I, E. Riggan, hereby ratify and confirm the signing of my name by my father, W. H. Riggan, to the injunction bond in the case of D. L. Crain, now pending in the Edmonson Circuit Court, and do acknowledge myself as firmly bound to the stipulation of said bond as if I had signed the same in person,," etc., and after this was done the sureties executed to the clerk a power of attorney empowering him "to sign our names to the injunction bond in the case of W. H. Riggan v. D. L. Crain, pending in the Edmonson Circuit Court, and will ratify and confirm the same as much so as if we had signed said bond in our own proper person." Under this power their names were signed to the original bond, and the injunction suit progressed to a termination, resulting as before stated in the dissolution of the injunction.

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It is insisted that after the clerk had accepted the bond and issued the injunction, he had no power to change or alter its terms so as to increse or create the liability then resting upon the sureties. That if not binding on the appellants when the injunction issued it could not be made binding thereafter by a written ratification or by a resigning on the part of the sureties. It was held, in the cases of Ragan v. Chenault, 78 Ky., 545, and Billington v. Commonwealth, 79 Ky., 400 (3 Ky. Law Rep., 19), that by reason of the statute a verabl authority to sign or a verbal ratification of the obligation when signed, created no liability on the surety, and if nothing else appeared in this case than the signing by the clerk under a verbal power, we would have but litlte difficulty in disposing of this question.

If the surety induces one to loan his money to another upon a verbal authority to a third person to sign his name as surety, and the money is thus loaned, and the surety afterwards ratifies the act in writing or signs his name, it seems to us the original consideration becomes a part of the subsequent ratification or act of the surety, and it is as much binding on him as if he had signed the paper in the first place.

In this case the reasons for holding the surety bound are much stronger than if the transaction had been, in fact, with the plaintiff. The clerk was alone authorized to take the bond, although made payable to the plaintiff. The latter looked alone to the bond for indemnity on the dissolution of the injunction. The levy had been discharged, and the action progressed with a bond, upon which the surety in the first instance was not bound, but to enable the principal to do that which he could not do without a bond, he not only ratifies in writing the act of his principal, but authorizes a third party to sign his name to the instrument, and by this means the principal obtains the benefit of an injunction until the final hearing. The bond is regular, and the signing upon its face proper, and the plaintiff, whose execution has been enjoined from an inspection of the record, had the right to assume that the bond was valid. The surety, when the liability attaches, says, I ratified the act of my agent, but not until after the writ issued, and am, therefore, not liable. I signed the bond after the writ issued, and am not liable. He should be, and is estopped, by the facts pleaded, from making such a defense. The signing under the verabl authority, could not be cured by any verbal ratification, or upon the principle of estoppel, because the statute interposes and relieves the surety in such a case of any liability.

It requires the proof of liability of a surety to be of a higher character, and, therefore, more convincing than a mere verbal authority, or a verbal ratification. It must be authorized in writing or signed by the surety. In this case the ratification was in writing, and the signing was under a power of attorney, and as the surety, by his conduct, secured to the debtor the benefit of his injunction until the final hearing, we will not stop to inquire when the ratification was made or the bond r-esigned. We think there is proof conducing strongly to show that the defendant was a nonresident when the attachment was obtained, and concur with the court below as to the judgment rendered.

Judgment affirmed.

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FOREMAN v. REDMAN.

(Filed November 8, 1887—Not to be reported.)

A judgment for the recovery of land in an action of ejectment should, under the modern practice, be more specific than was required under the ancient practice, so as to guide the officer in executing the writ.

The controversy in this case being between the owners of adjoining lands as to the real boundary between them, the judgment, following the verdict, adjudges that the true line between plaintiff and defendant is "the line run by Martin and Decoursey." Held—That the judgment should designate the courses or the marked line as surveyed by the surveyors named in the verdict, if it can be done by the trial court, so that the officer can execute the writ.

Rodney Haggard and L. H. Jones for appellant.

W. M. Beckner for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Pryor.

This controversy is between neighbors, who own adjoining land, as to the real boundary between them. The space of ground involved is so small that the recovery as to value is more ideal than real. The appellant had built a post and rail fence along what he supposed to be the real line, and the issue made, resulting in a verdict against him, necessitates its removal. The surveyors, some four or five in number, are not in accord as to the true line, but the jury, after hearing the testimony, including the paper title exhibited, returned a verdict establishing the line as appears on the plat of Martin and Decoursey, as the true line, and a judgment was rendered for the plaintiff. The only issue was as to this line, and the instruction offered by the defendant and refused did not prejudice his side of the controversy. It attempted to single out the facts in behalf of the defendant's title, making them more prominent than any other branch of the testimony, and was, therefore, calculated to mislead the jury. Besides, the weight of the testimony favored the recovery. The jury must have fully understood the issue, and the court very porperly left it with them to say where the real line was located.

It is objected that the judgment, based on the verdict, is void for uncertainty, and that the sheriff or other officer executing the writ is left to search among the papers of the action to find Martin and Decoursey's survey, or will be required to go upon the land and deliver the possession at his peril.

The ancient practice in actions of ejectment does not prevail with reference to the execution of the writ of possession. There the verdict being general the plaintiff, through the officer, took possession under his writ, and was liable in trespass if he took more land than was embraced within the boundary received. Under the present practice the judgment should be more specific, and while not void, although following the former system, is erroneous, because there is nothing in it to guide the sheriff, but he is left to his own judgment or that of the plaintiff in determining where the line has been located. The judgment in this case following the verdict adjudges that the true line between plaintiff and defendant's land is the line run by Martin and Decoursey, etc.

That line should be readily ascertained by referring to the survey made by those surveyors, and the judgment should designate the courses or the market lines, as surveyed by them, so that the

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officer can execute the writ. If the court below is unable to do this, the sheriff can not be expected to execute the writ in accordance with the verdict, and the same should be set aside. We have had some trouble in fixing the line by this survey, but the trial court, more familiar with the survey and the ground, may be able to designate the principle courses or marked lines from the survey, that the judgment may be executed. The judgment below is, therefore, reversed and remanded, with directions to make the judgment more specific, if it can be done from the survey, and for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH v. HELM.

(Filed November 9, 1887.)

1. One who bets upon the result of a primary election and wins or loses the bet does not violate section 1 of article 2, chapter 47, General Statutes, but does violate section 11 of article 1 of that chapter, which provides a penalty for betting "at any game or wager." One who bets upon an uncertain event and wins or loses the bet is subject to the penalty imposed by the statute.

2. Indictment—It is not necessary that the indictment should allege that the persons in regard to whom the bet was made were candidates or that they were voted for.

P. W. Hardin and F. Shuck for appellant.

S. S. Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barbour.

A primary election for the purpose of selecting a candidate to be voted for at an election fixed by law, is not an election under the Constitution and laws of this Commonwealth or of the United States, within the meaning of section 1, article 2, chapter 47, General Statutes, and it is conceded that one who bets upon the result of such primary election, is not amenable to the penalty imposed by that statute. It is insisted, however, that one so betting violates section 11, article 1, chapter 47 of the General Statutes, which provides, that "if any person, by playing or betting at any game or wager, at any time, shall win or lose $20 or upwards, or the value thereof, he shall be fined a sum equal to half the value of which he shall so win or lose, and if below that amount he shall be fined $10." The indictment charges the appellee with the offense of "betting and losing at a wager," in that he bet with John Reinhart that T. A. Robertson would receive a larger number of votes at the primary election, to be held September 4, 1886, to nominate a candidate for Congress in the Fourth Congressional district of Kentucky than A. B. Montgomery, which amount he lost to said Reinhart by said bet at the election, which was held as above set forth. The difficulty arises in determining what is meant by the word "wager," as

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used in the statute. Shall it be taken in a restricted sense, and held to include only such wagers as have for their subject matter some "game," or shall it be taken in its primary sense as meaning "something hazarded on the event of a contest or some unsettled question." One objection to the restricted construction is, that if the legislature intended it to have such meaning, it was unnecessary to have used the word, as the intention would have been fully and better expressed without it, "by playing or betting at any game," was all that was necessary to have been said. While the words of the statute are not as felicitous as they might have been, under the rule which demands that penal statutes shall be liberally construed with a view to carry out the intention of the legislature, the language should be held to include cases clearly within the mischief the statute was intended to remedy, unless such construction does violence to the language used.

The object the legislature had in view was to deter persons from the pernicious practice of hazarding money or property upon the event of a contingent issue. Nor does it seem to us that it is necessary that the act or event upon which the bet or wager is made should be illegal or immoral. It is obvious that the same vicious principle runs through all bets or wagers, whether they be upon a game of cards or a horse racce or any other undetermined event. It is not the game or the race but the betting or wagering of money or other property that the legislature aims to punish.

Bouvier defines "wager" as a bet; "a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event. A wager is something hazarded on the issue of some uncertin event; a bet is a wager, though a wager is not neccessarily a bet." We are, therefore, of opinion that it is in this primary sense that the legislature uses the word, and as the appellee, if the allegations of the indictment be true, bet upon an uncertain event, and as he lost the bet, he is answerable to the penalty imposed by the statute.

The failure to allege that Robertson and Montgomery were candidates or were voted for does not vitiate the indictment, though such allegations would have been necessary if the indictment had been for betting or wagering upon an election under the statute. Under section 11, the betting at a wager and winning or losing constitutes the offense, and as the indictment charges that the appellee bet and lost, it is sufficient.

The judgment is reversed and the cause remanded, with instructions to overrule the demurrer, and for further proceedings.

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SUPERIOR COURT ABSTRACTS.

READ v. DICKERSON'S EX'OR.

Filed November 17, 1887. Appeal from Barren Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Payment by checks—Pleading—Where the defendant, in an action upon a note, claims a credit by reason of payments made by checks upon a bank, it is incumbent upon him to allege and prove something more than that the checks were given. It must be shown that the checks were paid or that the drawer had funds in the bank to pay them, and that they were not paid because of plaintiff's fault or neglect. Therefore, such facts, being material, are, when alleged, admitted to be true unless denied.

2. Pleading—A denial "that the checks filed by defendant evidence payments made by him on the note sued on" is but a conclusion of law, and not good as a denial that the checks were paid.

3. Payment—Checks given by the payor of a note to the payee after the maturity of the note, which checks are paid to the payee or his assignees, are conclusive evidence of payments on the note, nothing else appearing as to any other transaction or indebtedness between the parties.

4. Eivdence—Checks made payable to D. or bearer, upon which there is no indorsement by D., and nothing to show that they were ever in his hands, are not evidence against him by virtue of the provisions of section 527 of the Code.

Boles & Duff and James A. Rousseau for appellant; J. W. Jones and E. W. Hines for appellee.

MARKWELL v. GRAY, &c.

Filed November 17, 1887. Appeal from Fleming Circuit Court. Opinion of the court by Judge Barbour, affirming.

Trusts—When a trustee has, by a purchase of the trust property from the cestui que trust, made a profit, the chancellor should never hesitate to set aside the sale, when the effect of so doing is to put the parties in statu quo.

An executor at the earnest solicitation of one of the devisees, who lived in a distant State, purchased his interest, paying him therefor $1,000. At that time a suit against the estate was threatened which was afterwards defeated. If the suit had been decided against the estate the interest purchased by the executor would have been worth less than $1,000. As it was, the interest purchased amounted to more than $1,800. The devisee was informed as to the value of the estate, but it does not appear that he had the same knowledge the executor had as to the probable result of the threatened litigation. In this action by the devisee to set aside the sale to the executor, and to recover the excess of his interest over $1,000, Held—That he is entitled to recover.

W. A. Sudduth, W. G. Dearing and E. W. Hines for appellant; W. J. Hendrick for appellees.

MORGAN, &c. v. VERHOFF, &c.

Filed November 17, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Judgment—Fraud—Knowing that the debt attached and specifically described in the notice indorsed on the order of attachment was not due to the defendant, but to another, and knowing the garnishees had a perfect defense, and that their appearance in court would defeat the attachment, plaintiffs procured their absence, and then procured the court to make an order falsely reciting that the garnishees answered, admitting that they owed

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defendant, and ordering them to pay. Held—This was such fraud as made it the duty of the judge to vacate the order thus obtained.

2. Garnishment—New trial—A response to a rule against the garnishees to show cause why they should not pay the money into court, setting up these facts, and made a cross petition against the plaintiff and praying that the order be set aside and a new trial granted, is a compliance with the requirements of section 520 of the Civil Code.

Collins & Fenley for appellants; Simmons & Schmidt for appellees.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO. v. GRAVES.

Filed November 17, 1887. Appeal from Scott Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, reversing.

1. In an action against a railroad company for the killing of stock by a train of cars, if the defendant's witnesses are impeached, it is a question of law for the court whether the facts testified constitute due care; if so held, the only question for the jury is whether they believe the witnesses; if not so held, a peremptory instruction for the plaintiff is proper.

2. The statutory presumption of negligence is rebutted when such witnesses as may be presumed to know the facts give evidence which, if true, shows there was no negligence.

3. Case adjudged—A mare was killed; the engineer saw her four hundred or five hundred yards ahead of the train quietly grazing twenty five or thirty feet from the track; she took no notice of the train, but continued grazing until it was within thirty or forty feet of her, when she suddenly tried to cross the track and was killed; when she attempted to cross it was impossible to stop the train; the whistle was not sounded or any alarm given to frighten the mare to make her cross the track; stock were daily passed under the same conditions without harm. Held—This is sufficient to constitute ordinary care.

C. B. Simrall and Jas. E. Cantrill for appellant.

HEFLIN v. AUXIER.

Filed November 17, 1887. Appeal from Boyd Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming, with damages.

1. A deputy United States marshal has no account with the government; it is his duty to render such service as the marshal directs; to defray expenses he takes the marshal's money, and when he pays the necessary expenses he acts merely as an agent of the marshal. He should report to the marshal what expenses have been incurred, and what distance mileage can be charged for; and then the marshal may make up his account against the government, either for actual expenses or for mileage, as provided in section 829 of the United States Revised Statutes. But whatever he may decide to do, his deputy is entitled to credit by the amount he has actually paid out in the business. He can not, as against the marshal, insist that he should be allowed mileage as a credit on money advanced, if as a matter of fact he had not actually expended that much. But this mode might be adopted by the marshal and deputy, so that the mileage should be taken in every case to be the actual outlay. If, without the previous concurrence of the marshal, the deputy presents his claim for mileage to be credited against the money advanced, and the marshal gives the credit, it is the same as if there had been a formal agreement to adopt that method of keeping the account; in that case, the deputy could not ask the marshal to give him a further credit by the actual outlay, any more than the marshal could ask the government to pay him twice in this way.

2. Instructions—In a civil action it is not the duty of the court to give to the jury the entire law of the case. If the instruction is right as far as it goes, and with reference to the hypothesis to which it relates, it is proper to give it; and if the adverse party desires to supplement this direction with reference to a different hypothesis, or to a modification of that assumed by the given instruction, he should ask an instruction for that purpose.

L. T. Moore for appellant; A. J. Auxier and Wm. Lindsay for appellee.

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KING, GUARDIAN v. STARR.

Filed November 17, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Joinder of actions—When goods are sold to a guardian for his wards, he may be sued for the price of all of them in one action.

2. A motion to strike out for misjoinder of actions is too late if made after answer filed and issue joined.

Turner & Cunningham for appellant; Yeaman & Lockett for appellee.

COLLINS v. POTTS.

Filed November 17, 1887. Appeal from Madison Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Peremptory instruction—Appeal—To enable the plaintiff to complain of an error in giving a peremptory instruction, it is not necessary for him to object or except. Nor is it necessary for him to assign the action of the court in peremptorily instructing the jury as a ground for a new trial.

2. Same—When there is any evidence conducing to show a right to recover, a peremptory instruction is improper.

J. S. Bronston for appellant; C. F. & A. R. Burnam for appellee.

PERRY v. RIDING'S GUARDIAN.

Filed November 17, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. A valid trust of personal property may be created by parol declaration where the language used is clear and explicit, manifesting the owner's purpose to transfer the right, and points out with certainty both the subject of the trust and the person who is to take the beneficial interest.

2. Trusts—That before creating the trust a person had made a will disposing of her property is no objection to the trust.

3. Pleading—Evidence—The traverse of each allegation of the petition authorizes the introduction of no evidence by the defendant, except such as tends directly to disprove some fact alleged in the petition and denied in the answer.

4. Same—Every matter of fact which the plaintiff need not allege and prove to make out his case must be alleged by the defendant in his answer as new matter constituting a defense.

5. In an action for the recovery of specific personal property, where the allegation of title in the plaintiff is denied, the defendant may rely upon limitation by five years adverse possession in himself or another, or upon any fact showing the plaintiff did not have the title at the commencement of the action. But where the defendant relies upon the fact that he holds the property as bailee, or upon any defense that admits the title in plaintiff and the possession in himself, he must plead the facts of his defense in his answer.

6. Peremptory instruction—When the answer is a traverse merely, the burden of proof is on the plaintiff, and it is error to give a peremptory instruction for him, no matter how strong and satisfactory his evidence may be.

James M. Tisdale for appellant; J. F. & C. H. Fisk for appellee.

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KENTUCKY COURT OF APPEALS.

CUNDIFF v. COMMONWEALTH.

(Filed October 25, 1887.)

An indictment under the statute for willful and malicious shooting and wounding with intent to kill need not charge that the act was done feloniously. As every act essential to constitute the crime is set forth in the statute, an indictment which follows the language of the statute is good.

E. Dudley Walker for appellant.

P. W. Hardin for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted in the Ohio Circuit Court for the willful and malicious shooting and wounding of Wallace with the intent to kill him (Wallace).

The lower court having overruled the appellant's motion for a new trial he has appealed to this court.

The language of the statute under which the appellant was indicted, tried and convicted is as follows:

"If any person shall wilfully and maliciously shoot at and wound another, with an intention to kill him, so that he does not die thereby, with a gun or other instrument loaded with leaden bullet, * * * he shall be confined in the penitentiary not less than one nor more than five years."

The indictment follows the language of the statute supra, and charges that the instrument used was a pistol.

The acts mentioned in the statute supra create a crime. The language used describes the crime in all its parts. Every act essential to constitute the crime is set forth, therefore, if the indictment follows the language of the statute, as was done in this case, it sufficiently sets forth the crime.

In cases of crimes at common law, where the acts, in order to constitute the crime, must be done with a felonious intention, it is necessary to set out such intention in the indictment. In such

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cases the felonious intention is an essential ingredient of the crime, and the indictment is insufficient if it fails to set out such ingredient. Such was the ruling of this court in the Kaelin case. The distinction between the two classes of cases is readily perceived.

We have examined the instructions given and refused by the lower court. Those given are substantially correct, and those refused should not have been given.

The evidence shows clearly that the appellant is guilty of the crime charged.

The judgment of the lower court is affirmed.

COMMONWEALTH v. COVINGTON & LEXINGTON T. R. CO.

(Filed October 25, 1887—Not to be reported.)

The legislature may empower a turnpike road company to remove its gates and establish them at places different from their original location; and the company may be authorized to do this, not only once, but from time to time, as it may seem best for the interest of the road.

The charter of appellee provided that "no gate shall be erected within less than two thirds of a mile of any incorporated town, nor in less than five miles of each other." An amendment to the charter provided that the company might remove its gates "and establish them at such points as they may deem right and for the best interest of said road." Held—That this amendment repealed the provision quoted from the original charter, and gives the appellee the power to remove and establish any of its gates as it may deem right and for the best interest of the road; and under the power thus conferred the same gate may be removed more than once.

Simmons & Schmidt for appellant.

W. H. Mackoy for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bennett.

By an act of the General Assembly of Kentucky, approved the 22d day of February, 1834, the appellee was incorporated and empowered to build a turnpike road from the city of Covington to the city of Lexington, to erect toll gates across the road and to collect toll from persons passing through the gates with horses, carriages, etc.

The proviso in the 17th section of the appellee's charter is as follows:

"That no gate shall be erected within less than two-thirds of a mile of any incorporated town, nor in less than five miles of each other."

By an act approved February 6, 1854, the appellee's charter was amended. The 2d and 3d sections are as follows:

"Sec. 2. That said company, by a majority of the directors, may remove gate No. 5 and place the same at any place between the twenty-first and twenty-second mile points on said road.

"Sec. 3. That said company may remove any other gates on said road and establish them at such points as they deem right and for the best interests of said road: Provided, That where the gates of said road are less than five miles apart the rates of toll shall be in proportion to the distance traveled on said road, as compared to the present rates and charges."

The appellants allege in their petition and amended petition

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(which, for the purposes of this investigation, must be regarded as true) that the appellee, after the passage of the amendment of February 6, 1854, moved its toll gate, which was nearest to the city of Covington, from the place at which it was then located to a point on its turnpike where it is intersected by Kyle's road, and after maintaining the gate at that point over thirty years, then removed it to a place on the turnpike not more than two hundred and fifty yards from the corporate limits of the city of Covington.

The appellants contend, first, that the amendment of the 6th of February, 1854, does not repeal the proviso above quoted in the 17th section of the appellee's charter.

The two sections of the amendment above quoted do not, by express terms, amend any particular sections of the appellee's charter, but they do in fact amend the proviso in the 17th section of the charter.

The second section of the amendment provides that gate No. 5 may be removed to any place between the twenty-first and twenty-second mile points. As to this toll gate, while the power of the appellee is limited, yet it amends the latter clause of the proviso. But by section 3 the appellee has the right to remove any other gate on its road and establish them at such points as it may deem right and for the best interest of the road. These gates, by said section, may also be removed and placed within five miles of each other. In making the changes the only interest to be consulted is that of the road.

The charter says that no gate shall be erected within two-thirds of a mile of any incorporated town. The amendment says that (except gate No. 5) the appellee may remove and establish any of its gates as it may deem right and for the best interest of the road. The charter says that the gates shall not be erected within five miles of each other. The amendment says that the gates may be removed and established within five miles of each other if deemed right and for the best interest of the road, so the language, as well as the spirit and intention, of this amendment is in direct conflict with the proviso in section 17 of the charter, providing "that no gate shall be erected within two-thirds of a mile of any incorporated town, nor in less than five miles of each other." The proviso was, therefore, repealed by this amendment.

The appellant's second contention is that the appellee, under the amendment of the 6th of February, 1854, having removed its gate nearest the city of Covington and established it at the intersection of Kyle's road, its power of removal, by virtue of the amendment, was exhausted. In other words, the amendment authorized only one removal, and the appellee having exercised its right of removal by removing the gate and establishing it at Kyle's intersection, it becomes a permanent fixture at that place; and the appellee had no right to again remove it and establish it at another place.

Where a turnpike company locates and establishes its gates in accordance with the express terms of the charter, which charter expressly and by clear implication prohibits any change in the location of its gates, such location and establishment of the gates become a part of the terms of the charter contract, and the company has no right to remove them and establish them at a different place unless the same is authorized by an amendment of its charter. Such is the general rule. But it is not doubted that the legislature may empower the company to remove its gates and establish them at places different from their original location, and that the company may be authorized to do this, not only once but from time to time, as it may deem best for the interest of the road.

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Does, therefore, the 3d section of the amendment, supra, authorize the appellee to remove and establish its gates, from time to time, at such points as it may deem right and for the best interest of the road? We think it does.

It is to be observed that in making the removals the only interest to be consulted is that of the road. It seems to us that the main object the legislature had in view was to allow the appellee to remove and so locate its gates as to get pay, as nearly as practicable, for all the travel done on its road. Where population is constantly increasing, as is ours, the new business enterprises are constantly springing up which increase the population and business enterprise of our cities and towns, and new roads are constantly being opened, which intersect old ones, to accommodate the march of progress, a sufficient reason is furnished for the change of location of toll gates as to enable the company to receive toll from such persons as obtain the use of the road by means of new thoroughfares unless the company is prohibited by the terms of the charter from making such change. It is readily seen that the increase of the population of the city of Covington and its business enterprise constantly increase the travel on that part of the appellee's road intersecting the city whereby its burden is increased from year to year. The same may be said as to other parts of the appellee's road. Such increased burden may entail upon the company greater expense in the way of repairs than many miles of other parts of the road, and to allow the parts of the road subject to these increased burdens to be used by the traveling public free of charge might result in the bankruptcy of the company.

The location of the gates twenty years ago, which then gave the company ample protection against the contingencies then existing, would not afford, for the reasons above indicated, ample protection now. We think, therefore, that the legislature, by the 3d section of the amendment supra, intended to give the appellee the right to remove its gates from time to time as it seemed to it right and for the best interest of the road.

But it is argued that the city's population has greatly increased and extended in the direction of the toll gate where it stood at Kyle's intersection, and that residences have been built along the pike nearly to the old stand; that these things have been done in view of the fact that the gate was understood to be permanently established at that place, and that the residents along the pike had a prescriptive right to use the appellee's property free of charge. This argument simply means that the residents along the pike desire the appellee to keep up its road and to repair the injury done to it by their travel upon it, at its own expense, for their accommodation. So the individual appellants seem to think that they have a right to travel on the appellee's road and wear and tear it free of charge.

It is true that by the removal of the gate to its present place the appellants and perhaps other persons have to pay toll without getting the benefit of the usual travel on the road that other persons get for the same amount of money, but doubtless the same thing occurs at each gate on the road. Such inequalities can not be helped. The legislature has given the appellee the right to place its gate where it is, and to charge all persons who pass through it toll. The appellants must submit to this supposed inequality.

The judgment of the lower court sustaining the demurrer to the appellant's petition and rejecting the amended petition is affirmed.

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McMURTRY v. THE MONTGOMERY MASONIC TEMPLE CO., &c.

(Filed October 27, 1887.)

1. The directors and managers of a corporation may maintain an action against the corporation for the collection of their demands against it, and to subject property of the corporation mortgaged to secure their demands; and neither the judgment nor the purchase of the property under it by the plaintiff will be held to be fraudulent.

2. Action to set aside fraudulent judgment and sale—A creditor of a corporation can not maintain an action to set aside for fraud such a judgment against the corporation, and the sale under it, in the absence of a judgment on his demand and execution returned nulla bona. A mere allegation of the insolvency of the corporation is not sufficient.

3. Same—The sale having been made and confirmed before the death of the purchaser, one of the plaintiffs, the property was then as much beyond the reach of the creditor as if the deed had been made.

4. Parties to actions—A mortgagee is not required to make a creditor who has no lien a party to his action to enforce his mortgage lien.

5. Judgments—Although a decree for the sale of mortgaged property of a corporation provided that the sale should be made subject to certain bonds issued by the corporation, which were a lien on the property, without the amount, number or time for the payment of such bonds being fixed in the judgment, the court will not presume, in an action to set aside the sale, that any one desiring to bid at the sale might not have ascertained, by an inspection of the record, the extent of the encumbrance by reason of the bonds

Turner & Son for appellant.

Wm. Lindsay for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

Appellant McMurtry instituted this action in equity against appellees, "The Montgomery Masonic Temple Company," a corporation, Jas. M. Jones, administrator of D. B. Jones, E. S. Apperson, executrix of R. A. Apperson, Jr., and in her own person, Lewis DeBard and Jas. Turley, praying for a sale of a building and grounds alleged to be the property of said corporation, and held in trust by E. S. Apperson for the benefit of its creditors, for the payment of the proceeds of such sale, when made, to appellant in satisfaction of an alleged balance due to him by it; for a settlement of the affairs of the corporation, its dissolution, and for general and special relief.

The allegations of the petition and amended petition, to both of which a general demurrer was sustained, are in substance as follows:

That in pursuance of a contract between appellant and the corporation he constructed said building, worth, at the contract price, $33,972.35, of which $30,053.96, and no more, has been paid, leaving due and unpaid the sum of $3,918.39 and interest thereon from January 1, 1871.

That subsequent to that date Rankin & Co. instituted an action in the Fayette Circuit Court to recover of him $600, value of labor done on and materials furnished for said building, to which action said corporation was made a defendant, its alleged indebtedness to McMurtry being attached. And in that action it was adjudged that said corporation was indebted to appellant the sum mentioned, $3,918.39. But as it had not been served with

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summons in Fayette county the only judgment rendered against it was in favor of Rankin & Co. for $600.

It is further alleged by the appellant that by authority under its charter the corporation issued bonds, which were a lien upon its property, to pay for the completion of said building, a part of which were issued and made payable in 1880. He says he does not know how many of such bonds were issued and sold, but has been informed, and states, that only two were actually sold and accounted for, netting the sum of $2,000, and only $10,000 thereof were actually executed for sale, the other $8,000 being held by L. DeBard and R. Apperson, Jr., to indemnify them for money advanced to the corporation and securityship for it; that November 10, 1875, after the bonds mentioned were issued, said corporation mortgaged its building and lot on which the same is situated to Jas. Tulrey, L. DeBard and R. Apperson, Jr., to secure them in the debts and liabilities named in the mortgage; that November 12, 1875, the mortgagees instituted an action to subject the property to the payment of alleged indebtedness to them, and under judgment rendered therein the property was sold January 17, 1876, and purchased by R. Apperson, Jr., at the price of $11,000, the sale being made subejct to the bonds owned by DeBard and Jones, without fixing the number of the bonds, the amount or time of the payment thereof.

He further states that said DeBard, Turley and Apperson were, at and prior to the time of said sale, directors and the managing agents of the corporation, and as a building committee attended to its business from its organization until the sale; that the property was worth, at the time it was sold, at least $25,000, and Apperson was one of the attorneys for the plaintiffs in the action for the sale; that in January, 1887, R. Apperson, Jr., died, and subsequently without an order of revivor, the master commissioner of court undertook, in the name of Jas. Turley and Lewis DeBard, to convey to E. S. Apperson, executrix, all the right, title and interest of the corporation in said property, subject to the bonds held by DeBard and D. B. Jones, neither the latter, in his lifetime nor his administrator, Jas. M. Jones, having been made a party to the action.

It is further stated that at the institution of said action for the sale of the property DeBard, Turley and Apperson each knew of the existence of appellant's claim against the corporation, and also knew who held each of said bonds, and how they were held; that said corporation is substantially dissolved, and is no longer acting as an organization under its charter, and is insolvent.

It is further alleged that the sale made to R. Apperson, Jr., was actually or constructively fraudulent, and that his executrix, under the circumstances, holds the legal title, if invested with it at all, in trust for the use and benefit of the corporation, its creditors and stockholders.

This action was commenced November 24, 1884, about nine years after the judgment for the sale of the property, and nearly fifteen years after the demand sued on is alleged to have been due and owing. And although appellant states the contract between him and the corporation was evidenced by writing, he does not file it with his petition as an exhibit. No copy of the record in either the action instituted in the Fayette Circuit Court or the one in the Montgomery Circuit Court for sale of the property, nor the mortgage or deed referred to is filed.

He alleges the corporation is substantially dissolved, yet the

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president thereof appears to have been served with summons, and is a party to this appeal. It seems to us, therefore, that the mere allegation of its insolvency will not avail the appellant in the absence of any judgment on his demand and execution returned nulla bona. But even if he was in the attitude to attack the judgment and sale of the property as fraudulent the allegations of his petition do not constitute such a cause of action.

It is stated that the corporation mortgaged the building and lot to Turley, DeBard and Apperson to secure them in the debts and liabilities named in the deed. In the absence of the mortgage and any allegation in the petition to the contrary those debts and liabilities must be assumed as subsisting and just demands against the corporation, and the amount of $11,000 bid for the property by Apperson at the sale was no more than enough to pay the mortgaged debts and costs of the action. And if they were just demands we do not perceive wherein the action to subject the mortgaged property to their payment was not rightfully brought, or how the purchase of the property by Apperson could, nine years thereafter, inure to the benefit of other creditors not before the court nor having any lien upon it.

It may, as alleged, be true that the mortagees were aware of the existence of appellant's claim at the time they commenced their action, but as he had no lien upon the property they were not required by any provision of the Code or rule of equity to make him a party.

It is alleged that the property was sold by the terms of the judgment subject to the bonds held by DeBard and Jones, without the amount, number or time for the payment of such bonds being fixed in the judgment, and the property was thereby purchased at a less price than it would otherwise have sold for.

As the judgment made the right of the mortgagees subordinate to that of the bondholders it is fair to presume, in the absence of the mortgage, that in it the character and amount of the bonds were set forth and also stated in the petition filed by the mortgagees. At most we are not authorized, from the allegations of the petition in this case, to presume there was any fraudulent concealment in regard to the bonds, or that any one designing to bid at the sale might not have ascertained, by an inspection of the record, the extent of the encumbrance on the property by reason of the bonds. But in any state of the case the allegations of the petition in this case show the property was sold for nearly, if not quite, its full value, as estimated by appellant himself, for the amount bid by Apperson, $11,000, added to the amount of the bonds issued, $10,000, without reckoning the accumulated interest on them, make within about 15 per cent. of what appellant alleges the property was worth.

Whether or not the action had been revived when the commissioner's deed was made to the executrix of Apperson is not material, for the sale was made and confirmed by the court before Apperson died, and the property was just as much beyond the reach of appellant as if the deed had been regularly made. Nor does it make any difference whether D. B. Jones, holder of some of the bonds, was or was not a party to that action, for he was not prejudiced, nor does his administrator, who is a party defendant, and appellee in this action, complain of the judgment or sale under it.

In our opinion the mortgagees had the right, though directors and managers of the affairs of the corporation, to maintain an action against it for the collection of their demands, and to subject the mortgaged property, and as it is not alleged by appellant either

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that their demands were unjust or that the mortgage lien was not fairly and honestly acquired, we do not perceive wherein the judgment or purchase of the property under it was actually or constructively fraudulent, or upon what principle such purchase can be now adjudged to be in trust for the benefit of other creditors, who, like appellant, by their own laches, failed to attack the mortgage or to enforce their own demand. Moreover, even if appellant had been a party to that action he could not have subjected the property to pay his debt until the mortgage debts and bonds had been satisfied.

The lower court, we think, properly sustained the demurrer, and the judgment is affirmed.

Judge Holt not sitting.

LONDON & LANCASHIRE FIRE INSURANCE CO. v. TURNBULL & CO., &c.

(Filed October 29, 1887.)

1. Double insurance—Where a policy of insurance provides that in case of any other insurance upon the property insured, "whether valid or invalid, * * * the insured shall be entitled to recover of this company no greater proportion of loss sustained than the sum hereby insured bears to the whole amount insured," the insured is bound by the terms of the policy whether the additional insurance effected be valid or invalid, provided it is effected by the insured or by his authority and consent. Such a provision, however, does not apply to policies attempted to be thrust upon the assured by officious persons without his knowledge or consent, and which he repudiates.

2. Agents—A policy of insurance issued by an agent without the knowledge or consent of either the insured or the company is not binding upon the insured or the company.

3 Same—To authorize an agent of an insurance company to effect insurance by other companies, in the interest of his principal, upon property which his principal has insured, requires special authority from the principal.

4. Same—Where the same persons were agents of two companies, and attempted to effect insurance in one company upon property already insured in the other, ostensibly for the benefit of the insured, but in fact for the secret indemnity of the other principal, such conduct was incompatible with their trust duties as agents of both companies, and as between the companies their act was not binding.

5. Cancellation of policy—Notice—Where a policy of insurance provides that the insurance may be terminated at any time, at the option of the company, "on giving notice to that effect," a notice by the company to its agent to cancel the policy is not sufficient to effect a cancellation. The notice referred to is notice to the insured.

Hargis & Eastin for appellant.

Brown, Humphrey & Davie and Marshall & Lochre for appellees.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellees, R. B. Turnbull & Co., instituted suit in the Jefferson Court of Common Pleas against the appellant on a policy of insurance issued by the appellant on the 2d day of

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January, 1884, to the appellees, R. B. Turnbull & Co., insuring the appellees' stock of goods against loss by fire in the sum of five thousand dollars.

The appellees, R. B. Turnbull & Co., alleged that the value of the goods lost by fire amounted to $18,493; that the total amount of insurance thereon by the appellant and other companies was $16,500.

The appellant contested the appellees' right to recover upon the grounds, first, that the appellees did not sustain the loss alleged; second, that the policy sued on was canceled before the loss of the goods by fire occurred; third, that the appellees, by false swearing as to the amount of the loss, forfeited their right to recover on the policy; fourth, that the action was not brought within the time agreed on by the terms of the policy; fifth, that the appellees had insurance on the stock of goods in other companies amounting to $16,500, and that by the terms of the policy sued on the appellees could not recover a greater proportion of the loss sustained than the sum insured by the appellant bore to the whole amount insured on the goods.

By an amended answer, which was made a cross petition against the appellees, the Louisville Underwriters and the Germania Insurance Companies and the Manufacturers Insurance Company (the latter was not served with process), the appellant alleged that on the 8th day of January, 1884, which was before the stock of goods was destroyed by fire, it gave its agents, Spaulding, Knott & Co., directions to cancel this policy and another issued by the Royal Insurance Company to the appellees, Turnbull & Co., for $2,500, which company was under the management of the appellants; that said agents did proceed to cancel these policies; that at the same time Spaulding, Knott & Co., they being also the agents of the appellees, the Louisville Underwriters and the Germania Insurance Companies, and the Manufacturers Insurance Company, in order to keep the appellees, Turnbull & Co., insured, caused the Louisville Underwriters to issue a policy on the 11th day of January, 1884, for $4,000; and the Germania, on the 9th day of January, 1884, to issue a policy for $2,500; and the Manufacturers, on the 11th of January, 1884, to issue a policy for $1,000 to the appellees, Turnbull & Co., aggregating $7,500, in substitution and in lieu of the two policies canceled; that these new policies were issued by said companies and placed in the hands of Spaulding, Knott & Co. as their agents, to be delivered to the appellees, Turnbull & Co., before the fire occurred; that after the stock of goods was destroyed these policies were delivered to the appellees, Turnbull & Co. It is also alleged that the premiums on these policies were paid by the appellants, and that Spaulding, Knott & Co., as the agents of these companies, were authorized to effect these insurances.

The appellant contended, upon the foregoing facts, that these policies were substituted policies for the policy of the appellant, and that the appellees, Turnbull & Co., should look to them alone; but if it should be held bound upon its policy it should be only held bound for its pro rata share, and that said companies should be compelled to pay the appellees, Turnbull & Co., their respective pro rata shares. The allegations of this amended answer were denied by the appellees.

By an amended answer and cross petition filed, during the progress of the trial, the appellant alleged that said insurance companies, in consideration of one hundred and fifty dollars caused to be paid them by the appellant, undertook and agreed to issue said policies to the appellees, Turnbull & Co., in substitution for the appellant's policy, whereby they were liable to the appellant in damages to the extent that it was held bound to the appellees, Turnbull & Co., on its policy.

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The action and cross action were tried by a jury, which trial resulted in a verdict for the appellees, Turnbull & Co., for the full amount of the policy and for the appellees, the insurance companies.

The appellant's motion for a new trial having been overruled it has appealed to this court.

The appellant does not deny that it issued the policy to the appellees, Turnbull & Co. The proof is clear that the property destroyed by the fire was worth as much as $18,495; that the appellant was duly notified of the loss; that there was no false swearing concerning the loss. We shall, therefore, regard these questions as out of the way.

The 7th condition of the appellant's policy provides as follows: "The insurance may also be terminated at any time at the option of the company on giving notice to that effect and refunding a ratable proportion of the premium, if the same has actually been paid, for the unexpired term of the policy."

The notice mentioned in this condition has reference to the insured. A notice to the company's agent to cancle the policy is not sufficient to effect a cancellation of the policy; such notice is nothing more than the company's notice to itself that the policy must be canceled.

The appellees, Turnbull & Co., were not notified, before the loss, that the appellant intended to cancel the policy, therefore, so far as the question of cancellation is concerned, the policy was not canceled at the time of the loss.

By the 6th condition of the policy it is provided that "in case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, whether valid or invalid, and whether concurrent with this policy or otherwise, the insured shall be entitled to recover of this company no greater proportion of loss sustained than the sum hereby insured bears to the whole amount insured thereon."

When two or more policies are taken out on the same interest it is called double insurance, and where the policies, in case of double insurance, contain no provision that the several insurers shall be liable, in case of loss, each for such a proportion of the loss as the several amounts insured bear to each other, the insured may resort to any one of the insurers to recover the whole loss, and such insurer, upon the payment of the whole loss, may resort to the other insurers for their respective contributions; such insurers are regarded in the light of co-sureties, and identical in interest.

But where the policies constituting double insurance contain provisions similar to that above quoted in the appellant's policy, the insured can not recover from any one of the insurers a greater proportion of the loss sustained than the sum insured by that insurer bears to the whole amount insured thereon; such is the contract of the insured with the insurer, and by the contract the insured is bound. And where the contract provides, as in this case, that the insurer is to be bound to pro rate, in case of double insurance, according to the whole amount insured, whether the same is valid or invalid the insured is bound by its terms. (Lucas v. The Jefferson Insurance Company, 6 Cowen, 635; May on Insurance, section 13.) Therefore, we think that appellant's first amended answer and cross petition, in so far as it sought to compel the appellees, the insurance companies, to pay to the appellees, Turnbull & Co., a pro rata of the loss sustained, supposing that they had actually insured, set out neither a defense to the appellees' claim nor a cause of action against these companies. If the fact existed, as alleged, the appellant could have shown it

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under its former plea relative to that matter, which would have prevented the appellees from recovering more than their pro rata; and whether they ever recovered the pro rata due by the other companies was a matter about which the appellant had no concern, and it should not have been allowed to meddle with it.

But the appellant contends that the appellees, Turnbull & Co., in view of the fact that the appellant desired a cancellation of its policy, accepted these new policies in substitution for that policy. The facts are that these policies were made out by Spaulding, Knott & Co., who were the agents of the appellant as well as the appellees, the insurance companies, without the solicitation, knowledge or consent of the appellees, Turnbull & Co. Nor did they have any authority from the appellees to solicit or effect these policies for them; nor did the appellees know that these policies were in existence until after the loss of their property by fire, and when the appellees were apprised of their existence, and they were tendered to them, they promptly declined to accept them. These policies having been thus issued were not contracts of insurance. They were wholly worthless as contracts; the essential ingredient of a contract—that of contracting parties—was wanting in fact and in deed. So the appellant's contention in this regard must fail; also the contention that the pro rata must be had in proportion to the amount insured, whether the policies are "valid or invalid" must fail, because this clause of the appellant's policy refers to such policies as are effected by the insured or by his authority and consent, and not to such as have been attempted to be thrust upon the assured by officious persons without his knowledge or consent, and which he repudiates.

The appellant contends that, in consideration of one hundred and fifty dollars paid by it to the appellees, the insurance companies, they agreed to issue, and did issue, these policies to the appellees, Turnbull & Co., in substitution for its policy, and, therefore, they are liable to the appellant to the extent that it is compelled to pay the appellees, Turnbull & Co., on said policy.

The facts are that the appellant notified Spaulding, Knott & Co., who were the appellants' agents, to cancel this policy and another with the appellees, Turnbull & Co., and that Spaulding, Knott & Co., who were also the agents of the appellees, the insurance companies, of their own accord and without the knowledge or consent of the appellant, and without the solicitation, knowledge or consent of the appellees, Turnbull & Co., and without the knowledge of the latter that the appellant desired its policy to be cancelled, and without imparting the foregoing facts to their principals, who were in utter ignorance thereof, caused said policies to be issued. They then cancelled the appellant's policy on its books without he knowledge of the appellees, Turnbull & Co., and held the new policies in their possession until after the loss of the stock of goods. They then, for the first time, presented to the appellees, Turnbull & Co., these policies for their acceptance in lieu of the appellant's policy, which they promptly refused.

To make a binding contract of insurance there must be contracting parties, to wit, an insurer and insured; their minds must meet and agree upon, first, the subject-matter to be insured; second, the risk insured against; third, the amount of the indemnity; fourth, the duration of the risk; fifth, the amount of the premium to be paid and how paid.

Not one of these requisites was agreed on by the appellees, Turnbull & Co., and the appellees, the insurance companies. Nor

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did the companies' agents, Spaulding, Knott & Co., agree with the appellees, Turnbull & Co., on any of these essentials. There was no meeting of minds whatever; not even an attempt at negotiation, so far as the appellees, Turnbull & Co., were concerned. And when it was made known to them that Spaulding, Knott & Co. had constituted themselves officious intermeddlers in their behalf they repudiated the act. The appellees, the insurance companies, were also not bound, because they had been deceived into issuing the policies to parties with whom they had no contract and who repudiated the act, done apparently in their interest. The appellees, the insurance companies, also had no contract with the appellant to insure the stock of goods in its interest because it is not a fact that Spaulding, Knott & Co., as the agents of the appellees, were solicited by the appellant to effect the insurance in substitution for its policy. On the contrary it was done without its knowledge or consent; again here the meeting of minds was wanting. Also if the soliciting agent of an insurance company can be regarded, at any time during the negotiation, in any sense, the special agent of the insured, such special agency can only be created by the consent of the insured, such agency can not be thrust upon the insured without his knowledge or consent. Therefore, Spaulding, Knott & Co. were not and could not be regarded the agents of the appellees, Turnbull & Co., nor could they be regarded, for the same reason, the agents of the appellant. Also if it be said that Spaulding, Knott & Co. attempted to act in effecting said insurances in substitution for the appellant's policy, for the appellant, as its general agents, and at the same time acted for the appellees, the insurance companies, as their general agents, such act on behalf of the appellant was without the scope of their authority as its agents because their authority was to effect insurance by the appellant on the property of others, and not to effect insurance by other companies in the interest of the appellant. It would require special authority to do the latter. And it was bad faith towards the appellees, the insurance companies, for Spaulding, Knott & Co. to attempt, as their agents, to effect insurance in their companies on the property of Turnbull & Co., ostensibly for the latter's benefit, but in fact for the secret indemnity of their other principal, the appellant. Such conduct was incompatible with their trust duties as agents of both parties, and as between these parties their act was not binding.

The judgment is affirmed.

HILL v. BOURNE.

(Filed October 29, 1887—Not to be reported.)

Homestead and dower—The mere fact that the wife has united with the husband in a conveyance of the homestead and received the purchase money therefor does not operate to charge her with its value upon her claim as widow to dower in other land.

O.B. Hallam for appellant.

J. W. Greene for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Holt.

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The husband of the appellee was, during her coverture, seized in fee simple of the land in which she now claims dower. The widow in such a case is entitled to it unless the right has in some way been barred, forfeited or relinquished. (General Statutes, page 527.)

It appears that the land in which the endowment is claimed was formerly a part of a large tract, out of which the husband was allotted preparatory to an execution sale, he having become involved, a homestead of the value of one thousand dollars.

The appellant finally became the owner of a portion of the land sold under execution, and also purchased from the husband the homestead. The appellee united with her husband in conveying it to the appellant, and by her husband's direction received the purchase money for it. It is claimed that the money so arising was thereafter invested in another homestead now held by the widow in Texas. It does not appear, however, what became of the money. Both the husband and wife were present when the latter received it.

It is not claimed that she has ever relinquished her dower right in the land out of which she now asks to be endowed, but that in allowing it she should be charged with the value of the homestead that was allotted to her husband, thus defeating her claim to dower in toto or at least pro tanto.

Here the homestead was allotted to the husband. It was his property. He sold it. The statute providing that the value of the homestead "shall be estimated in allotting dower" does not apply to such a case; but only where the husband dies the owner of the homestead, and it is then exempted to the widow.

It says: "And such exemption in favor of an execution debtor, or one against whom judgment has been rendered, shall continue after his death, for the benefit of his widow and children, but shall be estimated in allotting 'dower.'"

The mere fact that the wife has united with the husband in a conveyance of the homestead should not operate to charge her with its value upon her claim as widow to dower in other land. True the wife may, by her conduct, estop herself from saying that she shall not be charged with it. Such a state of case may be presented, as in the case of Holloway's Ex'ors v. Harris, MS. opinion. March 31, 1885 (6 Ky. Law Rep., 657-8), where equity not only dictated such charge, but forbade the widow from resisting it in the face of prior judicial determination had at her instance. Here, however, the appellant has not been misled by the appellee. She has been guilty of no conduct that bars the operation of her claim. It can not be affected by a sale by her husabnd of whatever belonged to him, even though the purchase price, by his direction, be paid to her. In fact her possession of it is his possession, and it would, in both law and reason, be stretching the rule too far to hold that the mere receipt of the money by her for the homestead of the husband during his life should operate to defeat, in whole or part, her claim to dower in other land. The act is not inconsistent with her subsequent claim; and the statutory provision, as we have seen, does not apply to such a case.

The appellant resisted the claim of the appellee. He was unsuccessful, and should pay the costs.

Judgment affirmed.

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HOPKINS' ADM'R v. FAEBER, TRUSTEE.

(Filed October 29, 1887.)

Evidence as to transaction with decedent—In an action by a trustee against the personal representative of a decedent, a beneficiary of the fund sought to be recovered can not testify for the plaintiff as to a transaction between a former trustee and the defendant's intestate. If the plaintiff claims that the interest of the witness has been removed by the payment to him of his share of the fund before the transactions as to which he offers to testify took place, the burden is upon the plaintiff to show that fact.

J. Q. Ward for appellant.

T. T. Forman for appellee.

Appeal from Harrison Chancery Court.

Opinion of the court by Chief Justice Pryor.

Ferdinand Faeber died in the county of Harrison leaving a last will, and his widow, with several children, surviving him. He devised his estate to his wife for the purpose of educating and maintaining his children, with the provision that when his son arrived at twenty-one years of age there should be a division of his estate between his children, and in the meantime, if his daughters married, his widow was to give them as much of their share of the estate as she could spare.

The widow, after the death of her husband, having an intimate friend in the person of a young man by the name of O'Hearn, living in the same town with her (Cynthiana), entrusted him with all of her money, to use and invest for her at his discretion, and their friendship soon terminating in an agreement to marry, the confidence she had in him was so great that no evidence whatever was taken by her of the moneys or property she had entrusted to his keeping, and the young man having accidentally and suddenly lost his life by falling from a window, the result is the present action to recover the property or its value confided to his care. The widow instituted the action against O'Hearn's administrator, and dying the present appellee, Perrin, was made the trustee under the will, or rather by appointment, and the action was prosecuted in his name against O'Hearn's administrator. The character of the trust and the amount of money and notes held by O'Hearn for the widow and her children is established by the testimony of her daughter.

She states that certain government bonds belonging to her father had been converted into money by O'Hearn, with the consent of her mother, and that this money had been loaned out to persons whose names are given and their notes made payable to O'Hearn; that a few days prior to the death of O'Hearn, at her mother's residence, in her presence, he pulled out of his pocket, or exhibited, a linen sack with a blue ribbon upon it, in which the notes on these parties were being kept by O'Hearn; that they were then in the sack exhibited, and said by O'Hearn to be the proceeds of the bonds sold, or the property of her mother; that the notes amounted to $2,300; that he also exhibited of money in the same sack $2,200, giving the number of bills, etc. He then took a copy of the will of her father to place in this sack and made, or said he would make, a memorandum showing that the contents of the sack belonged to her mother in order to avoid trouble in the event of any accident to him.

In a few days after this O'Hearn died. The sack was found,

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and in it were the notes described by the daughter and twelve hundred dollars in money, together with a copy of Faeber's will. The chancellor, in the hearing, gave judgment for the notes and twenty-two hundred dollars in money, making in all $4,500; of this the administrator of O'Hearn complains, insisting that the judgment should have been for the notes and twelve hundred dollars, the real contents of the sack as it appeared after O'Hearn's death.

If the daughter of the testator, Faeber, is a competent witness this judgment is correct; if not the judgment is erroneous. There is no witness by whom the trust, as to its amount and character, is established except this daughter, who is one of the beneficiaries under the will of her father.

Perrin, the present trustee, has no interest whatever in the fund except to hold it for this daughter and her brothers and sisters.

The mother was a trustee with an interest in the estate, as provided by the terms of the will, and the testimony of the daughter, establishing the claim of the trustee, is based alone on the transactions and conversations had between her mother and O'Hearn in her presence, the effect of which is to give to her an interest in the sum recovered, the whole to be distributed as directed by the will of her father. This witness was, at the time her testimony was given, married and of full age, and it is insisted that this court should assume that she had recovered her distributable share of the estate, and was, therefore, not interested in the controversy. If her interest had been paid to her, or her incompetency to testify removed before these transactions with O'Hearn, the burden was on the appellee to show that fact for the reason that, as the record now stands, she is evidently entitled to share in the recovery. If the devisee or distributee can testify for the trustee or the administrator, then the very object of the statute is defeated in permitting the person directly interested in the controversy to testify as to transactions with the decedent in order to the recovery. One of the exceptions to the provisions of the Code permitting any one to testify is "that no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, one * * * who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living," etc. (Subsection 2 of section 606, Civil Code.)

The fact that the personal representative or trustee may have an interest in the recovery does not affect the question involved or make those interested with him competent witnesses, for if so, then one of the heirs or distributees, by administering on the estate, could make his co-distributees competent witnesses and in this way destroy the efficacy of the statute. In testifying in this case the witness was testifying for herself against the estate of the decedent, and her testimony controlled the extent of the recovery, and the fact that she was not a party to the action does not alter the rule or vary the construction given this provision of the Code. She was competent to testify as to the character of her mother's estate, but her testimony as to what transpired between her mother and the decedent was clearly incompetent.

If the statement of the daughter is excluded as to what passed between her mother and the decedent as to the amount of money and notes in the small sack, and that it was her funds and he was holding them for her, we must then look to other testimony with a view of determining the right as well as the amount of recovery.

It is manifest, we think, from the proof of Sphan that the money and notes in the small sack belonged to the widow of

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Faeber as trustee under the will. The sale of three thousand dollars of government bonds belonging to the widow is traced directly to the decedent, and that he was loaning money for the widow can be inferred from other testimony, that of Rankin and Sullivan. Sphan states that $1,600 was borrowed by O'Hearn of Mrs. Faeber for Sullivan, and the $1,600-note executed by Sullivan, payable to O'Hearn, was found in the sack as well as another note on Sullivan amounting to $500 and one on English for $200. There was also in the sack twelve hundred dollars in money and perhaps more, as Sphan swears that O'Hearn, a few days prior to his death, took this money from the sack and told him it belonged to Mrs. Faeber and counted as much as twelve hundred dollars, and had other bills in his hands, but, being interrupted by the approach of some one, returned the money to the sack. How much money was in the sack does not appear, and we have no means of ascertaining when the testimony of the daughter is out of the case. Ordinarily a trustee would be required to make an exhibit of his accounts with the beneficiaries, but in this case both parties are dead and the administrator of O'Hearn is denying the right of recovery, and even the existence of the trust. The evidence shows such careless and negligent conduct on the part of Mrs. Faeber in failing to take any receipt of O'Hearn as would preclude the chancellor from fixing upon the sum alleged to be due her from the mere statements of the petition as to the amount of recovery. Besides, it appears that O'Hearn was engaged in business; was a man of business habits and reliable in his business transactions. And when, looking to the entire testimony, including that of the daughter, there remained a doubt in the mind of the chancellor as to the amount of money received by him from Mrs. Faeber. There is certainly testimony conducing to show that it was less than $4,500, but with the statement made by the daughter taken as evidence, it may be said that the weight of the testimony sustains the judgment below. The sack was found in O'Hearn's possession the morning after his death; but a few days before that the daughter says it contained $2,200 in money, but when its contents were examined after his death it contained only twelve hundred dollars. There is no evidence showing that O'Hearn had used any of the money after the time spoken of, and nothing in the record conducing to show that those having the sack in possession after his death used any part of it. We must adjudge that the recovery should have been limited to thirty-five hundred dollars, this is one thousand dollars less than the judgment below.

The judgment below is reversed and cause remanded, with directions to enter such a judgment and for further proceedings consistent with this opinion.

HAVLIN v. REED, &c.

(Filed November 5, 1887—Not to be reported.)

Fraud—Appellant, a real estate agent, discovering the fact that the wife of R. was invested with the title to land inherited from her father, a fact of which both she and her husband were ignorant, falsely represented to the husband that the land was encumbered by liens almost equal in amount to its value, and the husband, believing it, induced his wife to part with her title to the land for the sum of $50, the land being worth $1,000 or $1,500,

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Held—That the chancellor properly set aside the deed to appellant, securing to him the amount he paid by a lien on the land.

Hallam & Myers for appellant.

Collins & Fenley for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

While the relation of trustee or any fiduciary obligation on the part of the appellant towards the appellees did not exist at the time of the purchase by appellant of the lots in controversy, yet it is manifest that the appellee, Reed, placed the most implicit confidence in the statements made by the appellant as to the encumbrances on the lots, and for that reason had his wife to convey the absolute title to valuable real estate upon a mere nominal consideration.

The wife of the appellee, Reed, was a Miss Lungrove and inherited from her father the two lots in controversy. They were located on Scott street, in the city of Covington, and the fact that her father once owned them and that she, as his only heir, was invested with the legal title seems to have been unknown to both Reed and his wife, and the appellant, who is a real estate agent, in tracing the title to other property, discovered that the fee to these lots was in Mrs. Reed. They were worth from $1,000 to $1,500, as the proof clearly shows, and the appellant, representing to the husband that the lots were encumbered by liens equal in amount, or nearly so, to their value, and Reed, believing it, induced his wife to part with her little patrimony for the sum of fifty dollars.

Upon this state of fact the chancellor below properly cancelled the deed at the instance of the wife, securing to the appellee the money he had paid by giving him a lien on the lots.

The judgment is, therefore, affirmed.

SMITH, &c. v. GATLIFF, &c.

(Filed November 8, 1887—Not to be reported.)

1. Action to quiet title—In order to maintain an action to quiet the title to land the plaintiff must allege and prove that he is in possession of the land.

An allegation that plaintiffs are "legally" in possession of the land is but a conclusion of law, and is not equivalent to an averment of actual possession.

2. Same—The possession of the plaintiffs being denied and no proof taken, the petition should have been dismissed without prejudice, the burden of proof being on the plaintiffs

W. O. Bradley and Dishman & Boyd for appellants.

C. W. Lester for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, by the first paragraph of their petition in equity, claimed that they were the joint owners of a certain boundary of land; that they were "legally in possession thereof and were

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entitled to the possession of the same;" that the appellant, Smith, was setting up an adverse title to a portion of this land, which title was inferior to theirs. They asked that their title be quieted.

By the second paragraph of their petition they alleged that the appellant had felled and carried away timber from the land. They sought personal judgment against him for the value of the timber.

The appellant, among other defenses, denied that the appellees were the owners of the land, or that they were in the possession of it, or that he had committed the trespasses complained of.

The lower court, upon the pleadings and the exhibition of the appellees' patent from the Commonwealth to the land, entered judgment quieting the appellees' title to the land. From that judgment Smith has appealed to this court.

In cases like this it is necessary that the plaintiff should be in the actual possession of the land in order to maintain an action in equity to quiet the title to it. He must, therefore, allege and prove, if the allegation is denied, such possession.

The appellees' allegations do not comply with this rule. They allege that they are "legally" in the possession of the land, and are entitled to its possession. This allegation is not equivalent to an allegation of actual possession; it is but the conclusion of the pleader. Besides, the appellant denied that the appellees were in the possession of the land. There was no proof taken upon this issue, and the burden of proof was on the appellees.

The lower court should have dismissed the appellee's petition without prejudice.

The judgment is reversed and the cause is remanded, with directions to dismiss the appellees' petition without prejudice.

HOPKINS, &c. v. CROUCH, &c.

(Filed November 8, 1887.)

The county court has jurisdiction to divide land which is held jointly by two or more persons, and upon an application for a division by one of several joint owners, may hear and determine any equitable defense that may be pleaded against a division.

A owned one undivided half of a tract of land in remainder, and B owned the other half in remainder. C owned a life estate in the entire tract. A having leased C's life estate, applied to the county court for a division of the land, which was resisted by B. The court, upon hearing, dismissed A's petition. Held—That the court acted properly in refusing the division, as to divide the land would furnish A both the motive and the power to improve his portion of the land, and throw the burden of cultivation on C's portion.

Russell Mann for appellants.

Chas. T. Hanson for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bennett.

Laban Letton, by his last will, which was probated in the Bourbon county court in 1864, devised one-half of a tract of land, containing one hundred and fifteen acres, to his granddaughters, Mary L. and Nancy E. Hutsell, and the other half to his grand-

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children, Lida Crouch and J. B. Letton. This land was devised subject to the life estate of E. S. Letton, widow of Labon Letton.

The appellant, Mrs. Hopkins, bought the undivided interest of Mary L. and Nancy E. Hutsell in this tract of land. The appellant, R. T. Hopkins, leased from Mrs. E. S. Letton, widow, her dower interest in this land during her life. Afterwards, and while the widow was yet alive, the appellants filed a petition in the Bourbon County Court for the purpose of having the land divided between them and the appellees, Lida Crouch and J. B. Letton. These appellees resisted the right of the appellants to have the land divided.

The county court dismissed the appellants' petition. They have appealed to this court.

By subsection 1 of section 499 of the Civil Code the county court has jurisdiction to divide land which is "held" by a person "jointly with others." The county court judge has the power to hear and determine any equitable defense that may be pleaded against a division. Any equitable defense that a chancellor might hear and determine as a reason why the division should not be made, or should be postponed for the present, the county court judge has the right to hear and determine.

The appellant, Mrs. Hopkins, acquired by purchase an undivided half remainder interest in this land. The appellant, Bobert T. Hopkins, the husband, subsequently leased from the life tenant her entire term. The life tenant is yet alive.

If the land should be divided now and set apart to each by metes and bounds each part would be owned in severalty and not in common. The appellants would not only have the right to enter upon and hold the portion set apart to Mrs. Hopkins, but would have the right to enter upon and hold the portion set apart to the appellees by virtue of the lease from the life tenant, and hold the same during her life; also if the appellant, Robert T. Hopkins, should die before the life tenant the lease would descend to his heirs during the remainder of the life of the life tenant. During all this time the appellees would be denied the right of entering upon, using, controlling or protecting their own. And during all this time the appellants would not only be in possession and enjoyment of the portion set apart to Mrs. Hopkins, but by virtue of the lease would be in the possession and enjoyment of the portion set apart to the appellees. And they could, and doubtless would, so use the portion set apart to them as to improve its condition and throw the burden of cultivation upon the portion set apart to the appellees, thereby causing a constant wear and gradual deterioration in the productiveness of the soil, whereas they would keep their own portion in a high state of cultivation.

We think that in view of the foregoing facts a chancellor would, and should, decide unhesitatingly against granting an order for the division of the land.

But it is said that if the appellants were to attempt to use the appellees' portion as above indicated such use would amount to waste, and they would be liable to an action for waste. We think that they might so discriminate as to throw the burden of cultivation upon the appellees' portion without being liable to an action for waste. But be that as it may, should the chancellor make the division with his eyes open to the fact that he was in all probability subjecting the appellees to the expense and annoyance of resorting to an action yearly, and may be oftener, to protect their interest against the abuse of power placed in the hands of the appellants by him? We think not.

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But it is said that the life tenant might so cultivate and use the land as to deteriorate a portion of it and improve another portion of it, and of this the remaindermen could not complain, and as the appellants stand in her shoes the appellees have no right to complain of a division now.

It is true that the life tenant might so cultivate and use the land as to deteriorate a portion of it more than another portion. But it must be remembered that she would have no interest hostile to the rights of the appellees, prompting her to do so, and it is not, therefore, probable that she would. But the controlling fact is, even should she do so, that in that case the land would not be divided until after the injury was done, and the division would take place with that fact in view.

The judgment of the county court is affirmed.

SHEARER, &c. v. FRANCIS.

(Filed November 8, 1887—Not to be reported.)

One partner can not sue another save for a settlement of the partnership, unless it be for a matter so distinct from its accounts as not to involve their consideration, or unless it be for a balance that has been found due him upon a settlement of the firm matters. And there can be no settlement of the firm matters at law.

Two of three members of a firm sued the third in equity upon an indebtedness growing out of a contract made by the firm with the defendant. The plaintiffs amended their petition, alleging the insolvency of the defendant and of the firm, and praying a dissolution of the firm, and for judgment against the defendant for whatever might be found due them. Held—That the amended petition was not a departure, and should not have been stricken from the files.

T. Z. Morrow, John S. VanWinkle and J. Knox Frazer for appellants.

M. C. Saufley for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Holt.

Prior to December 10, 1881, the appellants, Shearer and Ramsey, and the appellee, Francis, were partners in the logging business under the firm name of Shearer, Francis & Ramsey, and as such firm were, at the date named, the owners of a large number of logs that were scattered along the south fork of the Cumberland river and its tributaries. At the time named the firm entered into a written contract with its member, Francis, by which by the 1st of June, 1884, he was to deliver these logs, and all the firm might purchase prior to December 1, 1882, at a certain point on the river at a certain price per thousand feet; and all that were not so delivered by June 1, 1884, were, ipso facto, to become the property of the appellee at a certain price per thousand feet, and he was to account therefor to the firm. The contract provided for certain qualifications in certain events, and for the delivery of certain logs by a certain time, but these matters do not affect the question in hand, as all were to be delivered by June 1, 1884.

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The appellants, Shearer and Ramsey, brought this action on September 5, 1884, setting forth, in their petition, the contract, that the appellee, Francis, had failed to deliver by June 1, 1884, a certain number of thousand feet of the logs, whereby the same became his own at the contract price, and asking judgment against him for the two-thirds thereof, after crediting him by his pay for those delivered, and charging him with what had been paid to him thereon. They also sued out an attachment against his property for the amount claimed by them, upon the ground that he did not have property enough in this State to satisfy their demand, and that its collection would be endangered by the delay in obtaining judgment and a return of nulla bona.

The petition was subsequently amended by setting forth more in detail the ground of attachment and the stipulations of the contract and its alleged breaches by the appellee.

The court, however, sustains a demurrer to it as amended, and upon leave to amend the appellants filed an amended petition, setting up the insolvency of the appellee, his consequent inability to pay any of the firm's indebtedness; its insolvency; that upon a settlement of its matters the appellee would be indebted to them, outside of the alleged indebtedness arising upon the contract of December 10, 1881, and praying a dissolution of the firm; a settlement of its matters, and a judgment against the appellee for whatever might be found due them.

This amendment was subsequently stricken from the files upon the ground that it was a departure from the cause of action set out in the petition, and the appellants failing to plead further the action was dismissed.

It is claimed for the appellee that although the action was brought in equity, that yet in fact it is really but one at law for a breach of the contract.

It is a general rule of the law of partnership that one partner can not sue another save for a settlement of the partnership unless it be for a matter so distinct from its accounts as not to involve their consideration, or unless it be for a balance that has been found due him upon a settlement of the firm matters. Nor can any account be taken of the latter at law.

The appellants seem, to some extent, to have misconceived their action. They appear to have acted upon the idea that the contract of December 10, 1881, related to a venture distinct from the existing partnership, and so disconnected with it that questions arising under it do not properly involve the consideration of the partnership accounts. In this they were evidently mistaken. The logs were the property of the firm. It was insolvent. Each partner had a lien upon its assets for the payment of its debts. One had as much right to be in charge of them, prior to a settlement, as the other, in the absence of fraud or an attempt upon his part to pervert them. The logs or their value, being part of the assets of the firm, necessarily entered into a consideration of its accounts and a settlement of its matters without a settlement of the partnership. The appellants would only be entitled to recover in the event they would be justified in keeping what they might get without having, in any event, to account to the appellee for any part of it. The law requires the transaction to be thus distinct from the firm business, or else one partner can not sue the other therefor.

The chancellor in this case could not, therefore, upon the statements of the petition even, have rendered a judgment for the appleants for two-thirds of the price of the logs, but as it asked

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a dissolution of the partnership, and contained a prayer for all proper relief, he should have said to them I can not render judgment for the sum claimed without first taking an account of all the partnership matters, and ascertaining upon a settlement of them whether there is that much due you; but being in equity this shall be done, and I will let the disposition of the attachment, which, upon the face of the papers, has been properly issued, await further proceedings in the case, and until I see whether it was properly issued or any indebtedness exists upon a settlement of all the firm matters upon the part of the appellee.

The amended petition, which was stricken from the files, only supported the petition in this view of the case.

Judgment reversed, with directions to set aside the order striking it from the files and to overrule the demurrer to the petition as amended and for further proceedings in conformity to this opinion.

CLARK, &c. v. LEATHERS, &c.

VERNON, &c. v. SAME.

(Filed November 10, 1887—Not to be reported.)

1. It is no objection to the validity of a tax upon the taxpayers of a county to aid in the construction of turnpikes in the county that the inhabitants of a particular town or city within the limits of the county are not required to share the burden, the tax having been voted by the voters of the county outside of the limits of such city or town under an act of the legislature.

2. Taxation—Elections—The fact that the county judge, who was required to fix the time for holding the election, was presiding as judge of the county court at a term for the transaction of the ordinary business when the order for holding the election was entered, does not affect the validity of the proceeding.

3. Same—The fact that the county judge designated the hours between 7 a. m. and 7 p. m., as the time for holding the election, instead of the hours from 6 a. m. to 7 p. m., does not invalidate the vote.

4. Same—When there has been a fair and free expression of the popular will, a mere irregularity in conducting an election will not invalidate it.

5. Same—Although the question submitted to the voters was: "Are you for the tax or against the tax?" without specifying its object, there was a substantial compliance with the law, as the voters understood the proposition submitted.

6. Same—While the power to tax when given by the legislature must be exercised within the scope of the authority given, literal compliance is not required.

7. Same—Although there is no record evidence that the commissioners whose duty it was to make the subscription to the stock of the turnpike companies were satisfied, as the act required they should be, that there were private subscriptions sufficient to complete the roads, their action evidences their satisfaction as to this matter, and the fact exists that the private subscriptions were made.

8. Same—The fact that certain towns in the county had no voice in the selection of those commissioners does not invalidate the tax as to them.

9. Same—It is not too late for the chancellor to interfere and prevent the collection of the tax, although the subscription has been made and bonds issued, if it could be made to appear that the action of the commissioners was unauthorized.

Simmons & Schmidt for appellants.

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Hallam & Myers for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

A number of taxpayers residing in the city of Ludlow and that of West Covington instituted these actions in equity to enjoin the sheriff of Kenton county and others from the collection of a tax of twenty-five cents on the hundred dollars taxable property within those cities, levied for the purpose of paying the principal and interest on certain county bonds issued to aid in the construction of turnpike roads within the county.

The chancellor dissolved the injunction in each case, and as the questions are similar in every respect the cases have been considered together in this court.

By an act of the legislature, approved March 27, 1880, a board of commissioners was created for Kenton county, and by its provisions the board then elected held their office until the succeeding August election, when the voters of the county (excluding the city of Covington and other towns exempt from the payment of county levy) were required to elect their successors. The cities of Ludlow and West Covington, being exempt from county levy, had no voice in the selection of the commissioners except as to the judge and clerk of the county court. These officials were, by virtue of their office, made members of the board. This board was intended as a substitute for the court of claims of the county, with perhaps more extensive powers.

In April, 1882, an act was passed by the legislature creating a system of improvements within the county, for the purpose of constructing turnpike roads, by which this board of commissioners was authorized to subscribe to the capital stock of any turnpike road company, the termini of which is in Kenton county, the sum of seven hundred and fifty dollars for each mile of road, but before the subscription can be made the commissioners must be satisfied that an amount of stock sufficient to complete each mile of road to which the subscription is to be applied has been taken by private subscriptions. The eighth section of the act further provides that before the commissioners shall execute any of the powers contemplated by the act the question shall be submitted to the qualified voters outside of the corporate limits of the city of Covington, whether or not they are in favor of empowering the commissioners to subscribe to the capital stock of turnpike roads constructed in said county, at an election to be held at each of the voting places of said county outside of the city limits of the city of Covington, on a day to be fixed by the county judge of the county, and if the affirmative of the proposition shall receive a majority of the votes cast the commissioners shall be authorized to exercise the powers conferred by the act. This legislative enactment was intended to give, and did give, the voters in Kenton county, outside of the city of Covington, the right to say whether or not they would aid in the construction of turnpike roads by voting the sum of seven hundred and fifty dollars for each mile of road to be constructed when the private subscriptions were sufficient to construct the mile to which the subscription was to be made, and in order to protect the taxpayers these commissioners, or a majority of them, were to be satisfied that the private subscription was sufficient for that purpose. Bonds were to be issued in certain specified sums, with coupons attached, and

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the commissioners were authorized to sell them and raise the means for paying the interest and principal by an ad valorem tax not exceeding twenty-five cents on the hundred dollars.

It was insisted by counsel for the appellees that the appellants were estopped from making any complaints after the subscriptions had been made and the bonds issued. If the action of the commissioners was unauthorized and private subscriptions had not been made for the purpose contemplated by the act in question, we see no reason why the chancellor should not interfere and prevent the collection of the tax.

This question was made and decided in the case of Clay and others v. Nicholas County Court, 4 Bush, 154.

Numerous objections are made by the appellants to the collection of this tax: First, it is contended that the act required the county judge to fix the day for holding the election, when in fact the day was fixed by the county court; second, that the act required the election to be conducted and held in all respects as elections for county offices; but the judge disregarding this provision, directed the election to be held between the hours of seven a. m. and seven p. m., when elections are required to be held between the hours of six a. m. and seven p. m.; third, that the proposition to be voted upon was "whether these commissioners should be empowered to subscribe to the capital stock of turnpike roads constructed in the county," and that really submitted to the voters was, are you "for the tax or against the tax?" without specifying its object; fourth, there is nothing on record showing that the commissioners were satisfied that an amount sufficient, with the aid of the county subscription, had been subscribed to complete each mile of road; fifth, that the act under which this tax was imposed constituted Kenton county a district in which the roads were to be constructed, and this being the district the tax on a part of the district is unwarranted by its provisons; sixth, that to exempt the city of Covington and leave the cities of West Covington and Ludlow to bear a portion of this burden is unequal taxation, and, therefore, unconstitutional.

The several objections made by counsel as to the action of the commissioners and that of the county judge seem to us to be purely technical, and instead of departing in any material way from the powers conferred by the legislative enactment there has been a substantial compliance with all of its provisions. The fact that the county judge was, at the time the order for holding the election was entered, presiding as judge of the county court at a term for the transaction of the ordinary county business does not affect the validity of the proceeding.

He was the county judge and as county judge fixed the time for holding the election, as required by the act, and while he seems to have designated the hours between seven a. m. and seven p. m. as the time for holding the election, it can not affect the result or render the vote a nullity, and even if it had been an election contemplated by the Constitution, and required to be conducted as elections for county officers, such an informality would not render the election void. Where there has been a fair and free expression of the popular will a mere irregularity in conducting an election will not invalidate it, and while the taxing power should be confined within the power authorizing its exercise the fact that the length of time in which to cast the vote has been prolonged by an oversight on the part of the judge, and the hours fixed between seven and seven, instead of between six a. m. and seven p. m., affords no reason for the inteprosition of the chancellor.

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There is nothing indicating that a fraud was practiced or any improper methods resorted to by any of the parties interested in obtaining the vote either for or against the tax. but, on the contrary, the effort seems to have been made in good faith to accomplish the object sought to be attained by the passage of the law. Nor do we perceive any valid objection to the manner in which the vote was submitted. The order of the county judge is in compliance with the statute authorizing the vote to be taken on the question of empowering the commissioners to make the subscription. The report of the judges of the election, or those supervising the vote, shows a vote "for the tax" and a vote "against the tax" and this was probably the manner in which the question was submitted on the poll-book, that is, one column headed "for the tax" and the other "against the tax."

The question in fact was whether the voters of Kenton county, excluding the city of Covington, were for or against the tax by which was to be raised the sum of seven hundred and fifty dollars for each mile of turnpike agreed to be constructed by private subscriptions.

The voters understood the proposition and if submitted, as is said it was by the appellants, it is a substantial compliance with the law.

The power to tax, when given by the legislature, must be exercised within the scope of the authority given, and a departure from any provision of the grant intended for the protection of the taxpayer, or for the accomplishment of the object in view, will defeat the proceedings under which the burden is imposed. A literal compliance is not required, but a material change or departure that affects the rights of those interested in or required to discharge the burden cannot be sanctioned. The power to tax is a higher governmental power and, as said by all writers on the subject, "can only be exercised in strict conformity to the terms in which the power is granted, and a departure in any material part will be fatal to the attempt to exercise it." The commissioners seem to have been satisfied that private subscriptions had been made in every instance sufficient to complete the road for the distance to which the county subscription was applied before the subscription was made, and while there is no record showing that fact, their action with reference to the subject-matter and the facts evidenced not only a satisfaction on the part of the commissioners as to the private subscriptions, but the fact exists that the private subscriptions had been made, and there is no reason for holding that the commissioners acted corruptly or unadvisedly or that they had pledged the county's money for the payment of the amount before the private subscription had been made, or that the levy is void because there is no record evidence showing this satisfaction on the part of the commissioners before they subscribed.

Ludlow and West Covington are small cities on the Ohio river not for distant from the city of Covington, and have their police regulations, improve their own streets, provide for the poor, and like Covington, for such reasons, doubtless have been exempt from paying any county levy. The city of Covington being also within the county of Kenton it is argued that it is manifestly unjust and repugnant to the Constitution to impose this burden on the county outside of that city, and relieve its people from their proportion of the burden.

The legislature saw proper to constitute the county of Kenton a taxing district, excluding the city of Covington, for the construction of these turnpike roads, and in its wisdom has in effect said that the benefits derived from such improvements authorize the

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imposition of the burden. The extent to which those located in a particular part of the taxing district may be benefited can not be made the subject of inquiry in a case like this. Here is a general system of improvements within the district, designed for the benefit of all, and when followed must of necessity be of immense benefit to the entire population. The right to the fund raised by taxation is given to all who, by private enterprise, undertake the construction of a turnpike road, and while some parts of the district may be benefited to a much less extent than other portions, this court can not undertake to measure the benefits received when determining the validity of the act. Nor will the chancellor undertake to say that the boundary of the district should have embraced more territory so as others equally benefited might be compelled to discharge a part of the burden.

Such questions are within the range of legislative power, and this court will not interfere with its exercise. While the city of Covington derives a benefit from these turnpike roads and much greater doubtless than either Ludlow or West Covington, yet the chancellor is powerless to afford relief for any such reason because, in determining that the legislature failed to increase the boundary or to impose the burden on all benefited in a case like this, he is usurping the power belonging to that branch of the government.

In determining this question of taxation, and when fixing the boundary of the district the taxing power evidently looked to the character of the improvements made, and that were required to be made by the taxpayers of the city of Covington. The valuable public buildings of the city, its schoolhouses, court buildings, the immense outlay for the improvement of its streets, all to made out of moneys collected by taxation from its population, and doubtless this influenced their action in not embracing Covington within the taxing district.

That turnpikes leading into a city benefit its population will not be controverted, and that such roads afford facilities for reaching these great centers of trade is equally certain, and that a tax is imposed alone on those whose necessities demand such facilities for travel, excluding the city, is no reason for declaring the act unconstitutional. Ludlow and West Covington may, it is true, desire the travel to those cities instead of Covington, but if so this same argument would apply to every town within the district. This court, in the case of McFerran, &c. v. Alloway, 14 Bush, 583, citing Cooley on Constitutional Limitations, says: "The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department, and over all these objects the burden must be spread or it wll be unequal and unlawful." If direct benefit is to be shown in a case like this it would release many of the taxpayers of the district, and that such improvements, affording greater facilities for travel and trade benefit the entire district can not be doubted.

The fact that the appellants had no voice in the selection of the commissioners appointed to make the subscription is immaterial. The question was as to the imposition of the tax, and on that question the popular vote of the entire district was taken. So there was no taxation without representation, but the people left to tax themselves by a popular vote.

We see no reason for disturbing the judgment below. The same is affirmed.

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STICKROD v. COMMONWEALTH.

(Filed November 10, 1887.)

1. Local option—"An act to prohibit the sale of spirituous, vinous and malt liquors in the county of Fleming," which provides that it shall not apply "to the sale from a distillery in the county by the owner thereof, or his agent, at any one time in a quantity not less than ten gallons, and then not to be drunk on the premises where sold," repeals, as to that county, section 3 of article 2, chapter 106 of the General Statutes, which confers upon distillers the privilege of selling at their residences in quantities not less than a quart.

2. Same—Title of act—An act entitled an act to prohibit the sale of liquor is not unconstitutional because in the body of the act it is made unlawful also to give or loan spirituous, vinous or malt liquors. But even if such an act be unconstitutional, in so far as the body of the act varies from the title so much of the act as makes the sale of liquor unlawful is still in force, and one indicted for an unlawful selling can not call in question the validity of the act because of the variance between the title and the body of the act.

3. The legislature may regulate the sale by retail of intoxicating liquors as a beverage, and an act to prohibit the sale may be applied to a single county, civil district, or other described territory, and its operation made to depend, in each case, upon the popular will, expressed at the polls by voters to be immediately affected by it.

4. A prohibitory liquor law may be constitutionally applied to the sale of liquor manufactured by the seller before the passage of the law.

5 Under the police power to prohibit the sale of liquor by retail the legislature may, in its wisdom, fix ten gallons as the minimum quantity that can be lawfully sold at one time.

Wm. J. Hendrick and Cassidy & McCartney for appellants.

W. A. Sudduth and J. H. Power for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Lewis.

Under "An act to prohibit the sale of spirituous, vinous and malt liquors in the county of Fleming," approved April 19, 1886, appellant was indicted and convicted for selling spirituous liquor in quantity less than ten gallons.

He was, at the time of his alleged offense, a distiller, and the first question to be considered is whether the act had the effect to repeal, as to that county, section 3, article 2, chapter 106, General Statutes, which is as follows: "Distillers of ardent spiirts have the privilege of selling at their residence any spirits of their own manufacture in quantities not less than a quart, but not to be drunk on the premises."

We quote the following sections of the act:

"§ 1. That it shall be unlawful for any person or persons to sell, barter, give, loan or traffic in spirituous, vinous or malt liquors in any quanity whatever within the county of Fleming except as hereinafter provided, and all laws or parts of laws authorizing the county judge of said county or the trustees of any town within said county to grant a license to retail spirituous, vinous or malt liquors are hereby repealed.

"§ 2. This act shall not apply to the procuring or use of wine for sacramental purposes or to a regular resident practicing physician, who in good faith prescribes the same as medicine to his patient or patients, or to the sale from a distillery in the county by the owner thereof, or his agent, at any one time in a quantity not

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less than ten gallons, and then not to be drunk on the premises where sold, or premises adjacent thereto.

"§ 3. Nor shall this act or its provisions apply to those who give or furnish spirituous, vinous or malt liquors to a member or members of their own family or their invited guests at their own household."

Section 4 provides that "any person violating the provisions of the first section of this act, unless within the exceptions named in the second and third sections, shall be fined for each offense," etc.

By the terms of the section of the General Statutes quoted a distiller has the privilege of selling, at his residence, any liquor of his own manufacture in quantity not less than a quart at one time. But the first section of the act we are considering makes it unlawful for any person to sell, barter, give, loan or traffic in liquor of any quantity whatever within the county of Fleming except as provided in sections two and three, and the condition upon which a distiller is authorized by the second section to sell, give or loan is that it shall be done only at his distillery and in quantity not less than ten gallons at one time.

Language more comprehensive and explicit could not be well employed to express legislative intent to regulate the sale and gift of liquor in Fleming county exclusively by the act in question.

It is true that only such existing laws as authorize licenses to retail spirituous, vinous and malt liquors are in terms repealed by section 1, and if no more special reference was made elsewhere in the act to distillers who were not, previous to its passage, required to obtain license to sell, we would have to decide they were not affected thereby. But if they were not intended to be made subject to the act, and thereafter permitted to sell within that county only in the manner and upon the conditions prescribed by it, the words of section 2 relating to them can have no proper or any operation at all, and must, contrary to a well-settled and necessary rule of construction, be altogether disregarded.

In our opinion that section of the General Statutes, to the extent it permits the sale in Fleming county of liquor by a distiller in quantity less than ten gallons, is within the purview of, repugnant to and consequently must be held repealed by the local act.

The cases of Webb v. Commonwealth, 7 Ky. Law Rep., 299, and Robinson v. Commonwealth, 7 Ky. Law Rep., 453, decided by the Superior Court, have no bearing on this. The question in those cases was whether an act passed in 1884, as an amendment to article 2, chapter 92, title "Revenue and Taxation," General Statutes, operated to repeal the section we are considering, which is a part of chapter 106.

The object of the act of 1884 was to supply an omission by the legislature to require tavern keepers, merchants and coffeehouse-keepers to obtain and pay tax for licenses before selling liquors. And as that act made no reference whatever to distillers the Superior Court properly decided it was not intended to take from them the privilege expressly conferred of selling without license.

We will now consider the grounds upon which it is argued the act is invalid:

1st. The sections following those we have quoted contain provisions for the enforcement of the act, punishment for its violation and submission to the voters of the county the question whether it shall become operative, all of which have a natural and direct connection with the subject of it as expressed in the tilte.

The only seeming disregard of the requirement of section 37, article 2 of the Constitution is that while it is entitled an act to

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prohibit the sale, it is in the body made unlawful also to give or loan spirituous, vinous or malt liquors in Fleming county. But in Commonwealth v. Edinger, decided December 10, 1885, 7 Ky. Law Rep., 441, it was held by this court such a variance did not render an act like this unconstitutional. Appellant is, however, not in an attidude to call in question the validity of the act for that reason, having been indicted, not for giving or loaning, but for unlawfully selling. And, therefore, even if the act was invalid in that particular, it would still be a complete law, and the provision he is charged with having violated still in force, because not open to constitutional objection.

2d. The power of the legislature to constitutionally regulate the sale by retail of intoxicating liquors as a beverage, and when in its opinion the peace, health and order of society require it to refuse altogether to license retail traffic in it for that purpose, has been recognized by this court. (Anderson v. Commonwealth, 13 Bush, 483.) It has been also held that an act to prohibit the sale may be applied to a single county, civil district or other described territory, and its operation may, in each case, be made to depend upon the popular will expressed at the polls by voters to be immediately affected by it. (Commonwealth v. Weller, 14 Bush, 218; Saarls v. Commonwealth, 83 Ky., 327.)

The act in question must, therefore, be held valid unless it goes beyond the limits of the police power of the State and violates some constitutional guaranty.

It appears that the particular whisky appellant was indicted for selling was manufactured by him at his distillery before the act was passed, and consequently, as his counsel argue, his right to sell it in the manner authorized by law existing when it was made being vested, can not be taken from him or impaired by the act.

In the language of Chief Justice Shaw, in Commonwealth v. Alger, 7 Cush. (Mass.), 84, "all property is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of the government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor."

Upon the principle that every one is bound to so use his own as not to injure others is based the police power of the State to restrain, punish for and abate nuisances. And as of necessity the power is vested in the legislature to determine and provide by law against what shall be deemed hurtful to individuals or to society, and, therefore, a nuisance, whether it be committed by selling liquor by retail or otherwise, the courts are not authorized to intervene except when the power is exercised arbitrarily and in clear violation of the Constitution.

As said in the case just referred to, "it is much easier to perceive and realize the existence and source of this power than to mark its boundaries or provide limits to its exercise."

No question of the right of property nor of impairing the obligation of contracts in the meaning of the Constitution as argued by counsel arises in the passage or enforcement of what is called a prohibitory liquor law, for each person affected by it has

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acquired whatever property in liquor he may have, whether purchased or manufactured by him, and holds it subject to such regulations and restrictions as to the sale of it by retail, to be used as a beverage, as the legislature may consider it necessary for the health, peace and good order of society to adopt. It is, therefore, manifest that the reason for such legislation, so far from tolerating, forbids discrimination between those who may acquire liquor before and those who do so subsequent to its enactment.

There is a wholesome statute prohibiting the sale of spirituous, vinous or malt liquor to a minor, and another prohibiting such sale to a known inebriate. Although no one would question the power of the legislature to make those statutes, upon their passage, applicable to all persons alike, and to the sale of liquor without regard to the time of its manufacture, still the argument could have been made by a person having it on hand at the respective dates of them that he had a vested right to use and sell it just as it is argued in behalf of appellant.

In a prosecution for a violation of either of those statutes the defendant might have contended that while the legislature had the power to prohibit a manufacturer of liquor selling to a minor or inebriate what should be thereafter made by him, he might, with impunity, sell to them that already owned by him.

The argument in this case is that while those who manufacture liquor after the passage of the act can not lawfully sell, in Fleming county, in quantity less than ten gallons, all persons may sell that previously manufactured by them by the quart for an indefinite length of time, depending upon the supply on hand or the ability of the Commonwealth, in any given case, to prove the new and not the old liquor was sold.

It seems to us that the power of the legislature to porhibit the sale by retail being conceded, the fact that the whisky sold by appellant was manufactured by him before the passage of the act cannot avail him as a defense in this case.

It is contended that the act in limiting the quantities that may be sold or purchased at one time to ten gallons, grants exclusive privileges, inasmuch as many may not have the means of buying or selling that much at one time.

Whether the legislature has the power to prohibit altogether the manufacture and sale of liquor by wholesale is a question not now presented, but under the police power to prohibit the sale by retail, it seems to us the legislature may, in its wisdom, fix ten gallons as the minimum quantity that can be lawfully sold at one time, and the courts can not call in question such exercise of power, for with the policy or expediency of such legislation they have nothing to do.

The theory of prohibitory liquor laws is that by the purcahsé as well as sale of liquor by retail, in the language of the preamble to an act of the legislature, passed in 1820, "industry is checked, purses are drained, constitutions are destroyed, families are distressed, and the people are demoralized."

It can not, therefore, be said that a question of privilege arises when a statute is passed having for its object the prevention of such calamitous consequences.

Judgment affirmed.

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O'GORMAN v. MADDEN, &c.

(Filed November 12, 1887—Not to be reported.)

A homestead is exempt, though additional improvements have been made since the creation of the debt to the payment of which it is sought to subject the property, provided the additional improvements were such as were necessary for the preservation of the buildings or for the comfort of the family, and the property, as improved, does not exceed $1,000 in value. Nor is it material that the debt to which it is sought to be subjected is for borrowed money used in making the additional improvements.

H. Clay White and O. D. McManama for appellant.

O'Hara & Bryan for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Chief Justice Pryor.

The plaintiff in this case is a widow with a family of several children, living in the town of Walton, in Boone county. She owned a homestead valued at seven hundred dollars, that was levied on by the sheriff under an execution in favor of the appellee, Richard Madden, to satisfy the debt amounting to one hundred dollars and the cost. She enjoined the plaintiff in the execution from selling her house and lot, and on the final hearing the injunction was dissolved, and she appeals.

It is conceded that the appellant owned the house and lot, and the proof shows that it was worth, when the levy was made and the case heard, greatly less than one thousand dollars.

The property was appraised at $700, and when levied on her son and an adopted child lived with her. She owned the fee, and was living on the premises before the debt of appellee was created, and the only reason that appellee asserts for subjecting this entire property to sale is that after the debt was created the appellant put a new roof on the building and added to it a small porch and room that added to the comfort and enjoyment of those living upon the premises, but were not such improvements as enhanced the value of the property beyond one thousand dollars.

Section 16 of article 13, chapter 38, General Statutes, provides: "The exemption provided for in this chapter shall apply to all persons of any race or color who are actual bona fide housekeepers (with a family) of this Commonwealth, but shall not apply to sales under execution, attachment or judgment at the suit of creditors if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements threon." This statute was intended to apply to the original improvements placed on the land and not to such improvements as repairing or adding to the improvements already made as necessary for the comfort of the family. To rule otherwise would preclude the owner of a homestead from repairing any part of the dwelling, digging wells or cisterns for water, if made after the debt was created. Such repairs and additional improvements may be made when necessary for the preservation of the buildings or the comfort of the family when the entire property does not exceed in value one thousand dollars.

The loan of the money if used for the purpose of the improvement can make no difference, still there is no proof in the record that the money borrowed was used in making the improvements. The statute gives no such right to the creditor. These exemption

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laws should be liberally construed in order to carry out the legislative intent, and to hold that no addition can be made to the property or repairs had when the entire property, after the repairs have been made, is not worth exceeding seven hundred dollars, is to subvert the purpose of the statute, the object of which is to secure the debtor in a home as against the creditor.

If by the additional improvements made the homestead is enhanced in value exceeding one thousand dollars, then the amount above that sum may be reached by creditors. No such case is presented by this record.

Judgment reversed and cause remanded, with directions to perpetuate the injunction.

MITCHELL v. CLARK, &c.

(Filed November 15, 1887—Not to be reported.)

1. In an action to enforce a vendor's lien, an allegation that the notes are a lien on the land without an averment as to the nature of the contract or the manner in which the lien was created, is insufficient.
2. Same—Nor is it sufficient for the vendor to aver that he is ready and willing to make a deed. He must show title in himself.
3. Same—The attempt of the plaintiff, after failing to produce evidence of title, to rely on an adverse possession of fifteen years, which at best is doubtful, did not authorize the judgment enforcing the contract.

J. A. Rousseau for appellant.

Geo. R. Price for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Pryor.

The petition in this case is fatally defective. There is no allegation that the notes were executed for the land sought to be subjected, or any averment as to the terms of the contract. The statement that the notes are a lien, without an averment as to the nature of the contract or the manner in which the lien was created, is insufficient. Nor is the averment that he is ready and willing to make a deed sufficient. He may be ready and able to make a deed and still have no title in himself, as the facts in this record plainly show. He had only an equitable title when this aciton was instituted, and has brought other parties, of whom he purchased, into the case that he might obtain title from them. Nor does it appear that they had title, and the attempt, after failing to show title or produce evidence of title, to rely on an adverse possession of fifteen years, that at best is doubtful, did not authorize the judgment below. Again, the deed tendered was not acknowledged by either party.

The judgment is reversed and cause remanded, with directions to permit the plaintiff to amend his petition and show, if he can, title in himself and for proceedings consistent with this opinion.

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WALDEN, &c. v. PHILIPS.

(Filed November 15, 1887.)

Descent—Infants—Husband and wife—After judgment had been rendered in favor of husband and wife against the wife's former guardian for the amount found due her upon settlement, the court, upon the application of the wife's mother to have a receiver of the wife's estate appointed, she having married under sixteen years of age, without the consent of her mother or guardian, appointed the husband as receiver, and directed him to collect from the wife's guardian the amount for which judgment had been rendered, and to pay annually to his wife, for her separate use, the interest arising therefrom. Before the husband had entered upon his duties as receiver he and the wife's mother entered into an agreement by which the wife's money was invested in land, which was conveyed to the wife for life, remainder to her children. The wife died, leaving one child, and after her death the child died. Held—That the father, and not the kindred of the mother, inherits the land for the reason—

1. That the father, by investing his wife's money, did not absolutely waive all interest in it, so as to make the land in which he invested it a gift from the wife to her child, and deprive himself of the right of inheriting the land from the child.

2. The action of the court in appointing a receiver of the wife's estate, as provided by the statute, did not affect the husband's marital rights as to the money, but merely postponed his use of it until his wife should arrive at the age of twenty-one years.

3. Where an infant dies without issue, having title to real estate, the title to which has been derived by gift, devise or descent from one of the maternal grandparents, the estate descends to the father of the infant, and not to the mother's kindred, the mother being dead. Section 9 of chapter 31 of the General Statutes applies only to such real estate as the infant has derived from the father or mother.

John Young Brown, Thos. E. Ward and Richards & Hines for appellants.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, Charles Phillips, married Mary Moss in 1882. The former was, at the time of marriage, in the twenty-first year of his age, and the latter was not sixteen years of age. After their marriage, and while the one was under twenty-one years of age and the other under sixteen years of age, they instituted suit against Geo. W. White, the statutory guardian of Mary Phillips, formerly Moss, upon his bond as such guardian. Judgment was rendered in favor of the appellee and his wife, Mary Phillips against Geo. W. White, for the sum of $2,859.82. The appellant, Mrs. Walden, the mother of Mary Phillips, filed a petition and answer in said suit in which she asked that Geo. W. White, as guardian, be directed to pay her the sum of $825 for the board of Mary Phillips.

Mrs. Walden also filed a petition as the next friend of Mary Phillips against the appellee and his wife, Mary Phillips, and Geo. W. White, in which she alleged that Mary Phillips was under sixteen years of age at the time she married the appellee, and that she married the appellee without the consent of her statutory guardian or her mother (her father being dead).

For these reasons Mrs. Walden asked that a receiver be

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appointed to take charge of the money in the hands of Geo. W. White as the guardian of Mary Phillips.

After judgment had been rendered in favor of the appellee and his wife, Mary Phillips, against Geo. W. White, as guardian, for the sum of $2,859.82, the lower court, upon the facts set forth in the pleadings, appointed the appellee as the receiver of his wife's estate and directed him, as such receiver, to collect from Geo. W. White the amount of money found to be due by him to his wife, and to pay annually to his wife, for her separate use, the interest arising from said money. But before appellee executed the bond which the court required him to execute as such receiver, before entering upon the discharge of his duties, an agreement was entered into between him and Mrs. Walden by which $2,400 of money due by Geo. W. White, as guardian, was paid to —— Haynes for a tract of land which he conveyed to appellee's wife, Mary Phillips, for life, with remainder to her cihldren. Tihs arrangement seems to have been approved by the lower court, and the suits were dismissed.

The appellee's wife, Mary Phillips, shortly after giving birth to her first child died, and not long after her death the child died.

The appellant, Mrs. Walden, as the mother of Mrs. Phillips and the grandmother of the child, and the other appellants, as the uncles and aunts of the child on its mother's side, claim this land under section 9, chapter 31 of the Genearl Statutes, which reads as follows: "If an infant dies witohut issue, having title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred, as hereinbefore directed, if there is any if none; then in like manner to the other parent and his or her kindred."

It is the settled law of this State that title to real estate derived by an infant by gift, devise or descent from the maternal grandfather descends to the father of the infant if the infant dies without issue. (Duncan v. Lafferty, 6 J. J. Marshall, 47; Smith v. Smith, 2 Bush, 522.) These cases, and others that might be referred to, but it is unnecessary, decide that the section of the statute supra relates to such real estate as the infant derives title to by gift, devise or descent from one of his parents, but not to such real estate as the infant derives title to by gift, devise or descent from other persons. But the appellants' contention is that the appellee, by purchasing the land with money which came by his wife, and having the title made to her for life, with remainder to her children, waived his martial right to the money, and also waived any direct or ultimate interest in the land purchased with the money, therefore, the remainder interest in the land was in fact from Mrs. Phillips to her children.

The case of Walls, &c., v. Chandler, MS. opinion, 1880 (1 Ky. Law Rep., 402), is relied on as sustaining this contention. The facts of that case were that the husband of Mrs. Walls purchased in her name a tract of land and took a bond for a deed to her and her heirs. The land was paid for with the proceeds of a tract of land descended to Mrs. Walls from her father and the price of a slave which belonged to her. That part of the money which arose from the sale of her land was received by her husband and paid on the purchase money for the land he purchased in her name. The note for the price of the slave was payable to Mrs. Walls, which note was assigned to the vendor of the land to complete the payment for the land. After the land was paid for it was conveyed to Mrs. Walls' husband for the use and benefit of herself and her three children. Two of her children having died after they were twenty-one years old and without issue, the ques-

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tion arose as to whether Mrs. Walls or her husband, who was the father of the children, inherited their interest in the land. It was held by this court, under section 8, chapter 30, of the Revised Statutes, which reads as follows: "When a person dies intestate and without issue, having real estate of inheritance, the gift of either of his parents, such parent, if living, shall inherit the whole of such estate," that Mrs. Walls inherited the interest of her two children in said land because it was a gift by her to them.

The land and slave, the proceeds of which were used in the purchase of the land in controversy in that case, belonged absolutely to Mrs. Walls, and her husband, by the marriage, acquired no title thereto, nor did he, by virtue of the marital relation, acquire any title to the land and slave as the administrator, survivor or distributee of his wife in case he survived her; but the same would descend to her children. Therefore, the husband, having received the money arising from the sale of her land for the purpose of paying it, and actually paying it, on other land purchased for her, did not change its legal status, therefore, this court held that the interest of Mrs. Walls' two children in the land thus purchased was a gift from her. The case at bar is not like the case of Walls v. Chandler, supra.

It is well settled by this court that by the principles of the common law marriage invests the husband with the legal title to all the personal property, including money, which the wife owns and is in the possession of at the time of marriage, or which may be reduced into possession at any time during coverture. It is also equally well settled by this court that the marriage gives to the husband the legal right to reduce the wife's choses in action into possession, and when they are reduced into his possession they, at law, become his absolutely; also before they are actually reduced into his possession he has a qualified property in them, which ripens into a perfect legal title by the act of reducing them into his possession with the intention of making them his own; also that by reason of his qualified property in his wife's choses in action he, in case of her death, is entitled to them to the exclusion of her next of kin, either as her administrator, survivor or distributee.

But, as is well settled, the husband may waive absolutely his right to his wife's choses in action, and consent that the legal title to them may remain in her; and in such case, in the event of her dying first, he will not be entitled to them as her administrator, survivor or distributee, but they will descend to her next of kin.

Therefore, if the appellee did not waive absolutely his interest in the money and consent that it might be hers to the exclusion of his rights by investing it in the land in controversy for her benefit during her life, with remainder to her children, then he did not deprive himself of the right of inheriting the land from his child, who died in infancy and without issue, for it will not be contended that if the appellee had reduced the money into his possession as his own, and then bought the land with it and caused the title to be made to his wife during her life, with remainder to his children, that he would not have inherited the title of his child dying in infancy and without issue.

Here, however, the appellee did not reduce the money into his actual possession as his own, but he did all in that direction that he could do; he obtained judgment for it, but under the authority of chapter 52, article 1, section 21 of the General Statutes, which provides in substance that if any female under sixteen years of age marries without the consent of her father or guardian or of

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her mother, the court having general equity jurisdiction in the county of her residence shall, on the petition of her next friend, commit her estate to a receiver, who shall hold her estate duirng her minority and pay to her separate use the rents and profits of such estate during her minority, and when she shall arrive at the age of twenty-one years the estate shall be delivered to her. The circuit court restrained the payment of the money to him, and while he was under this legal restraint, with the consent of the court, he purchased the land in controversy with the money. If the money had not been thus invested it will not be contended that the appellee, upon the death of his wife, before she attained her majority, would not have been legally entitled to the money as her survivor or distributee. No proposition is clearer, for it was not the object of the law-making power, by the provision supra, to deprive the husband of his marital rights in his wife's property, but simply to postpone his right to the use of it until his wife's arrival at twenty-one years of age, and then, if circumstances justified it, to further postpone his right to the use of it by providing for the further support of the wife out of the estate upon the principle of an equitable settlement. So we think that the action of the circuit court in appointing a receiver did not affect the appellee's marital rights to the money, but was merely intended to postpone his right to the use of it until his wife should arrive at the age of twenty-one years.

As to the proposition that the appellee waived his common law rights by investing the money in the land there are two negative answers: First, the fact that he invested the money in the land, firstf or the benefit of his wife during her life; and, second, for the benefit of her children in remainder, negatives the idea that he intended to surrender to his wife his entire interest in the money, and shows that he intended, out of his interest, to give to her only what was equivalent to a life estate therein, and to give her children the remainder interest therein; second, the appellee alleged in his answer, and the allegation was not denied, that it was not the intention of himself or of his wife to change or alter the course of descent by so investing the money.

For the reasons above indicated we think that the appellee did not waive his common law rights to the money except to the extent of investing the same in the land as a gift to his wife during her life, and at her death as a gift in remainder to her children, and, therefore, he inherited the land from his infant child.

The judgment of the lower court is affirmed.

COMMONWEALTH v. JARRELL.

(Filed November 19, 1887—Not to be reported.)

The local option law was intended to exclusively govern the sale of spirituous, vinous and malt liquors in every district, town or city where it is put into operation, and, therefore, as to every such district, town or city repeals section 8 of article 2, chapter 106, General Statutes, which confers upon distillers the privilege of selling at their residences spirits of their own manufacture in quantities not less than a quart, not to be drunk on the premises.

P. W. Hardin and J. B. Hannah for appellant.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Lewis.

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A. D. Jarrell, having been indicted for the offense of unlawfully selling spirituous liquors without license in civil district No. 1, Elliott county, and upon the trial found, by the verdict of the jury, not guilty, the Commonwealth porsecutes this appeal.

It is alleged in the indictment and shown that the offense charged was committed after an election had been held and a majority of the legal votes of that district cast against the sale of liquor therein in pursuance of "An act to regulate the sale of spirituous, vinous or malt liquors in this Commonwealth," known as the local option law, approved May 26, 1874. The main question in this case is whether it was proper to give the following instruction: "Although the jury may believe from the evidence * * * that the defendant sold the * * * liquor as defined in the first instruction, yet if they further believe, from the evidence that the defendant was a distiller, and that the spirituous liquor sold to the said Click was of his own manufacture and sold at his residence in quantity not less than a quart, and the same, or no part thereof, was drank upon the premises where sold, then the jury will find the defendant not guilty." And the correctness of that instruction depends upon whether the act mentioned operated to repeal section 3, article 2, chapter 106, General Statutes, then in force, which is as follows: "Distillers of ardent spirits have the privilege of selling at their residence any spirits of their own manufacture in quantities not less than a quart, but not to be drunk on the premises."

It is provided by the local option law that after the entry of the certificate of the examining board showing that an election had been held and a majority of the legal votes cast against the sale of liquors, it shall be unlawful for any person to sell any spirituous, vinous or malt liquors in any district, town or city where a majority of the legal votes has been so cast, and any person who sells such liquors in said district, town or city shall, upon conviction, be fined, etc.

The seventh section is as follows: "The provisions of this act shall not apply to any manufacturer or wholesale dealer who, in good faith and in the usual course of trade, sells by wholesale, nor to druggists who sell for medicinal purposes on a prescription made and signed by a regular practicing physician, but no physician shall make or sign any such prescription except the person for whom it is made is actually sick and such liquor is absolutely required as medicine, and any physician who makes or signs any prescription for such liquors, except as provided for in this act, shall be guilty of a violation of the act, and on conviction fined twenty-five dollars for each offense."

Although the repeal, by implication, of pre-existing statutes is not favored, nevertheless if two statutes relate to the same subject-matter, and the subsequent one is plainly intended to prescribe the only rule that shall govern, it will repeal the former.

That the local option law was intended to exclusively govern the sale of spirituous, vinous and malt liquors in every district, town or city where it is put into operation is made manifest by the title of the act, the full and conclusive effect given by it to the decision of a majority of the voters against the sale, and by the particular reference to and enumeration of those excepted from its provisions. And as the only classes in terms excepted are manufacturers and wholesale dealers who sell by wholesale, and druggists who sell for medicinal purposes, it is reasonably certain no others were intended to be. For the exacting condition put upon the manufacturer and dealer to sell only in good faith and in the usual course of trade by wholesale, and upon the druggists to sell even for medicinal purposes only upon a prescription made by a regular practicing physician, show that the pur-

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pose was to prohibit all persons, including distillers, selling in such district, town or city, liquor by retail to be used as a beverage.

In our opinion the act had the effect to repeal section 3, article 2, chapter 106, General Statutes, as to every district, town or city where it has been or may be put into operation by a majority of the voters, and such was in effect the decision of this court in the case of Hodge v. Commonwealth, MS. opinion, May 23, 1882. (Ky. Law Rep., 822.)

It, therefore, follows that the lower court erred in giving the insturction quoted, and the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

BALLARD v. BALLARD.

(Filed October 26, 1887.)

Distribution—The widow or infant child or children of an intestate are entitled to the property set apart to them by the statute as exempt from distribution and sale without its value being taken into account or charged to them in the distribution of the estate.

C. T. Atkinson for appellant.

Wm. Johnson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Ward.

"Where any person shall die intestate as to his personal estate, or any part thereof, the surplus, after payment of funeral expenses, charges of administration and debts, shall pass and be destributed among the same persons and in the same proportions to whom and in which real estate is directed to descend, except as follows:

* * * * * * * * * * * * *

"Fourthly. If the intestate leaves issue his widow shall have one-third and if no issue one-half of such surplus.

"Fifthly. The following list of articles are exempt from distribution and sale, and shall be set apart to the widow or infant child or children by the appraisers of the estate of an intestate, to wit:" (Section 11, chapter 31, General Statutes.) The property to be set apart by the appraisers to the widow or infant child or children is in no sense a part of the surplus of the intestate's estate. It does not pass to the administrator, is not to be sold by him or turned over by him, but by the appraisers separated from the other porperty and turned over to the class of persons named in the statute. Not being a part of the surplus for distirbution, it can not be taken into account in ascertaining the amount of the surplus, nor as to how the surplus is to be distributed. This seems quite obvious from the language of the statute.

This meaning is made more obvious when we read the old statute which provided in substance that the exempted property

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should, in certain states of case, be charged to the widow in making distribution. The omission of the words "and vest" following the words "set apart" in framing the present statute is not significant nor entitled to change the meaning. It is admitted that the words of the present statute vest the title to the property as completely as the old statute, and, therefore, the question is now no more an open one than it was before, as to whether the widow takes the property. But the question is, after she takes it, shall she be charged with it because it is set apart to and vests in her?

The courts in construing a statute may consider its effect if the words do not clearly express the legislative intent, but if they do the courts can not change the words and give the statute a different meaning from that manifestly intended. The legislature has the power to provide that the widow and infant children shall have more of the intestate's property than the adult children or heirs, and it has done so. Whether this discrimination should only be applied when the intestate owned no property except that thought to be necessary to prevent want, or whether this advantage should be allowed them in all cases, is likewise a subject for legislative determination. The legislature has, as we think, very clearly provided that the widow or infant child or children shall have the property set apart by the statute without its value being taken into account or charged to them in the distribution of the estate.

The judgment below, being in accordance with the principles of this opinion, is affirmed.

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SUPERIOR COURT ABSTRACTS.

CITY OF LOUISVILLE v. ROBINSON & CO.

Filed October 5, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

1. Taxation—Repeal of statutes—The act of April 24, 1884, amendatory of the charter of the city of Louisville, which provides that "all taxes already levied or imposed under existing laws, and not yet paid, remain payable as if this act had not been passed," saves all rights which the city then had to enforce the collection of back taxes unpaid, whether or not they had then been levied, as a tax is imposed when the power to collect is given and the mode of assessment provided.

2. Same—The amendment of April 8, 1882, to the charter of the city of Louisville authorized the subsequent assessment, for school and railroad purposes, of property omitted to be assessed at the time provided in the act.

The assessment of a stock of merchandise for the years 1882 and 1883 for school and railroad purposes was valid, although not made until 1885.

L. N. Dembitz for appellant; Lane & Burnett for appellees.

CECIL v. GUNTHER, &c.

Filed November 23, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Landlord and tenant—Lien—March 1, 1882, R. leased premises to F. for five years, rent payable monthly. June 19, 1885, F. mortgaged to C. personalty then on the premises, and which remained there until sold in this action. F. paid the rent up to April 1, 1886. C. sued August 9, 1886, to enforce his mortgage lien. August 10, 1886, G. sued F. to recover a debt, and had an attachment levied on the unexpired term, and also on the mortgaged personalty. August 18, 1886, R. had a distress warrant levied on the mortgaged personalty. By an agreed order all of the property was sold to strangers to the proceedings. The court adjudged that R. had a superior lien on the mortgaged personalty for rent, beginning with May 1, 1886, to the end of the term; that G. had a prior lien on the proceeds of the unexpired leasehold, and that C. had a lien on the personalty subordinate to that of R. That judgment is affirmed, the court holding:

1. That R., the landlord, had a superior lien on the personalty for one year's rent, due or to become due, but not to include rent which had been due for more than 120 days.

2. The superiority of the landlord's lien continued as long as the property remained on the premises notwithstanding the mortgage.

3. G. alone had a lien on the unexpired term, and was entitled to be satisfied out of the proceeds. It seems that under the consent order this interest was sold free of claim for rent, and neither R. nor G. had any right to which C. could be substituted.

John H. McHenry for appellant; Weir, Weir & Walker and R. W. Slack for appellees.

GWIN'S ADM'R v. DUVALL.

Filed November 23, 1887. Appeal from Franklin Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, affirming.

1. New trial—The verdict was returned and judgment rendered November 19. The motion for a new trial was not made until November 23. Held—That motion was too late.

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2. Appeals—As the pleadings formed an issue such that if the plaintiff's contention was sustained by evidence, and the jury was properly instructed, both of which are to be presumed, he was entitled to the verdict rendered, the judgment is affirmed.

Ira Julian for appellant; A. Duvall and Thomas B. Forbes for appellee.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO. v. TRAVES.

Filed November 23, 1887. Appeal from Scott Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. In an action against a railroad company for the killing of stock by its cars the statute creates the presumption of negligence, but the uncontradicted and unimpeached testimony of such employes of the company as are presumed to know the facts, showing there was no negligence, rebuts the presumption, and leaves the burden on the plaintiff to establish it as a fact.

2. Whether the statutory presumption is or is not rebutted is a question of law for the court, and as the evidence in this case was not such as to rebut the presumption it would not have been improper for the court to have so told the jury, and that the only question for them was to fix the damages.

J. E. Cantrill and C. B. Simrall for appellant; Owens & Finnell for appellee.

KING v. SHAW.

Filed November 23, 1887. Appeal from Harrison Chancery Court. Opinion of the court by Judge Barbour, affirming.

Partnership—Lien of partner—While each partner has a lien upon the firm assets to secure not only the payment of the firm debts, but also any final balance in his favor, one partner may, by contract with the other partner, in the absence of any fraudulent purpose, destroy this lien.

K. and S., who had been partners in the mercantile business, dissolved their partnership, it being agreed that S. should take the stock of goods at the invoice price, less 10 per cent., and K. the outstanding claims due the firm at their face value, less 25 per cent., each to pay one-half the debts the firm owed. After the dissolution S. made an assignment of his property, including the stock of goods, and K. now claims that he has a lien upon the goods, which before the dissolution belonged to the firm, for the payment of the firm debts. Held—That the agreement between the parties destroyed the lien which K. would otherwise have had. This is unlike a simple agreement for a dissolution, when one member withdraws from the firm.

L. M. Martin for appellant; A. Perrin for appellee.

BRANNIN, BRAND & GLOVER v. TRENT, &c.

Filed November 23, 1887. Appeal from Barren Circuit Court. Opinion of the court by Judge Ward, affirming.

New trial—Unavoidable casualty—Summons upon a petition filed in the Barren Circuit Court was served upon the defendants in Jefferson county on the 19th of February. On the 20th of February they wrote, as they say, to their attorney in Monroe county "to know what the action meant, and to give it attention at once, and many other things not remembered." The attorney answered their letter on the 24th of February, saying, in conclusion: "If, after you receive this letter, you desire me to go to Glasgow and look after your interest, let me know, and I will do so immediately." This letter appellants say they answered March 4. Court began March 22, and judgment was rendered against appellants by default March 30. After their letter of March 4 appellants took no steps to find out whether it was received, although they had been notified by their attorney that other letters they had written had never been received. Upon an application for a new trial, Held—That these facts do not show casualty or misfortune, much less unavoidable casualty or misfortune.

Dodd & Grubbs for appellants; Lewis McQuown for appellees.

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PUTHUFF v. SEWARDS.

Filed November 23, 1887. Appeal from Greenup Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Bastardy—Agreement to prevent prosecution—A voluntary agreement by the mother of a bastard child with the putative father for a contribution to the child's support, in lieu of the statutory remedy for coercing him, is valid, and will be enforced against the father. But whether the agreement of the putative father to pay to a stranger a certain sum in consideration of his succeeding in having the matter "hushed up" is valid is a more difficult question, not necessary to be determined in this case.

2. Same—Pleading—In an action upon a note the defendant in his answer alleges, as a set-off, these facts: That plaintiff informed defendant that a woman, naming her, who had given birth to an illegitimate child, which she claimed he was the father of, was threatening to swear the child to him, and asked the defendant if he could not have the matter compromised and hushed up; that defendant told plaintiff that he could get it hushed up for $500; that thereupon, the girl being in another county, plaintiff gave defendant $25 to cover expenses, and was to pay the remaining $475 if defendant succeeded in preventing the girl from coming back and swearing the child to the plaintiff. These are all the allegations as to the agreement.

Held—That the answer is fatally defective in that it does not allege that the plaintiff agreed to pay the defendant the $500. If it could be inferred that he was to pay any one, the inference would be that he was to pay the mother rather than the defendant. Nor is it alleged that defendant agreed to prevent the prosecution for $500. The averment is not that he would do it for that sum, but that he thought he could get it done for that amount.

3. Pleading—It is not sufficient that the answer states facts from which it might be argued that there was an agreement. Such argumentative pleading is not good.

B. F. Bennett for appellant; T. H. Paynter for appellee.

MASON & CO. v. COLLINS.

Filed November 23, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

A collateral undertaking to pay the pre-existing debt of a third party is not binding unless based upon a sufficient consideration, and the legal presumption does not arise that it is based upon a sufficient consideration, as it does in the case of an original undertaking in writing.

In this case the letter relied on as a guaranty does not import a consideration, and the transactions between the parties preceding the letter do not show a consideration.

Hallam & Myers for appellants; E. G. Chapin and Collins & Fenley for appellee.

BERGMAN v. VANCE.

Filed November 23, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

1. Usury—When an agreement is made, either directly or indirectly, for the payment of a greater rate of interest than 6 per cent. for forbearance, the contract is void for all that was to be paid in excess of that rate, whatever may have been the reason of the parties for entering into such a contract.

2. Same—The refusal of the debtor to pay more than the legal rate of interest, although he may have contracted so to do, does not work a forfeiture of his right to the purchased indulgence.

3. Same—Vendor and vendee—A vendee, in possession under a deed of general warranty, discovering that his title was defective, in that Mrs. W. had an inchoate right of dower in the land, informed the vendor, and thereupon they entered into an agreement whereby the vendor bound himself not to enforce the payment of an interest-bearing note for the unpaid balance of

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the purchase money, and not to receive any more interest on the note; and in case Mrs. W. should become a widow and enforce her dower right the vendor agreed to make good to the vendee, his heirs and assigns, any equitable loss or damage he or they might sustain by reason thereof, the vendee to hold the note as collateral security against such loss or damage: and in consideration of this agreement the vendee bound himself to pay to the vendor a certain sum every six months until the time Mrs. W. should enforce her dower right or should die, the sum agreed to be paid being in excess of the legal rate of interest. The dower claim was afterward released, and thereafter this suit was instituted to enforce the collection of the note and interest from the time the dower was released, and to recover the sums named in the contract. Held—That the recited contract was for forbearance, and that the sum agreed to be paid therefor, being in excess of 6 per cent., was usurious. Therefore, the defendant is entitled to credit on the note for the sums actually paid. The agreement of the vendor to make good to the vendee any equitable loss or damage he might sustain by reason of the enforcement of the dower right was not a sufficient consideration for the agreement to pay the sums named in the contract, as nothing is included under the description of "equitable loss or damage" that would not be considered as damages to be recovered under the covenant of warranty in the deed.

4. Vendor and vendee—As the facts show that the vendor impliedly consented that the dower claim should be purchased by the vendee and the amount paid therefor credited on the purchase money, and that he consented to give the credit claimed after the dower had been purchased, the vendee is entitled to credit by the sum which it cost him to have it released.

James S. Pirtle and R. T. Colston for appellant; Goodloe & Roberts for appellee.

PEASLEE-GAULBERT CO. v. MOORE, BREMAKER & CO.

Filed November 23, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Transfer of suits—The circuit court ordered a suit pending in the quarterly court to be transferred to the circuit court and heard with a suit there pending, the two suits involving a contest between attaching creditors as to priority of lien upon the same fund. After the order was made the judge of the quarterly court made an order striking the case in that court from the docket. Held—That this was the proper order to make under the circumstances, but even if not, the circuit court had already by its order acquired jurisdiction of the quarterly court case, which could not be defeated by any order made in the quarterly court.

2. Garnishment—An attaching creditor whose attachment was issued and levied prior to the amendment of May 15, 1886, to subsection 3 of section 203 of the Code, acquired no lien as against other attaching creditors as to a debt due by a garnishee, there being no notice to the garnishee of the particular debt sought to be subjected. A notice that the purpose of the suit was to attach any debt was not sufficient.

Joe McCarroll for appellant; John Phelps for appellees.

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KENTUCKY COURT OF APPEALS.

FLANNARY v. UTLEY, &c.

(Filed March 3, 1887—Not to be reported.)

1. A surety's right of subrogation is confined to the rights and securities of the contract for which he was surety.
2. Same—Vendor's lien—If a surety for the price of land is made responsible, the chancellor will give him the benefit of the lien of the vendor; but this doctrine can not be extended so as to embrace this case.

A wife, in order to pay off a vendor's lien upon land which she had purchased, applied to her husband for money which she had loaned to him, but which had vested in him absolutely by virtue of the marital relation. The husband borrowed the amount asked for, executing his note therefor with personal security, and paid it to the wife, and with it she discharged the lien. The husband's sureties, having paid the note upon which they were bound, seek to be substituted to the vendor's lien upon the wife's land. Held—That the land can not be subjected to the claim of the sureties.

Bennett & Blue for appellant.

J. C. Hodge and W. D. Greer for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Holt.

The appellee, Sarah M. Utley, with money derived from the sale of her slave, purchased a tract of land in Union county, which was conveyed to her as her general estate. She sold it in 1869, and thereafter, but during the same year, purchased the land in contest, of one Greer, and it was conveyed to her as her general estate. She used a part of the money arising from the sale of the Union county land in part payment for the land last purchased, and loaned the balance of it to her husband, M. H. Utley, but no writing was executed therefor, and the right to it, by virtue of his marital relation, vested absolutely in him. The remainder of the Greer purchase money, and which was a lien upon the land, becoming due, and the creditor demanding it, Mrs. Utley, in order to pay it, applied to her husband for what she considered he owed her. He not having it, borrowed $400 of one Hitchcock, on September 24, 1872, for which a note was

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executed by him as principal, and by the appellants, Flannary and Barnes, as his sureties. They claim that they borrowed the money and then loaned it to M. H. Utley. One of them says, in substance, that he borrowed it, and that the other became his surety. It was, however, paid off by them equally, and the weight of the evidence shows that the loan was to Utley.

In our opinion, however, it also shows that the latter then represented to them that the money was to be used in discharging the lien upon the land. Also that it belonged to him; that the title was perfect, and that he would secure them from liability as his sureties by giving them a mortgage upon the land. Of all this, however, the wife was ignorant. In fact she had nothing whatever to do with the loan.

Her husband gave her the money thus obtained, and she paid it over to the holder of the Greer lien. Her husband failing to pay the Hitchcock note, one Johnson, to whom it had been assigned, brought suit upon it, and the sureties were compelled to pay the judgment, which was obtained against them and Utley, and which was thereupon assigned to them.

On January 17, 1876, they procured from Utley and his wife a note for the sum so paid and the interest which had accrued upon it, and a mortgage to secure its payment upon a part of the Greer land.

Subsequently they brought suit to enforce it. Mrs. Utley resisted it, upon the ground that the mortgage had been extorted from her by threats, and had neither been properly acknowledged nor certified.

After elaborate preparation the suit was dismissed without prejudice, upon the motion of the plaintiffs as against Mrs. Utley, and so far as it sought an enforcement of the mortgage, but a personal judgment was rendered against her husband for the debt.

The appellants, on January 3, 1882, brought this action, claiming the right of substitution as to the Greer lien, and asking that it be enforced for the payment of their debt. The hardship of the case as to them, and the morality of their claim, entitles it to a patient and kind consideration.

It is the result of kindness upon their part towards M. H. Utley as their preacher. A regard for his sacred calling, and the rule, "whatever ye would that men should do to you, do ye even so to them," should prompt him to right what is beyond question a wrong, and which is the result of his conduct. These considerations, however, must not lead the court away from the law. Subrogation is a creature of equity, born of the civil law. Its object is to secure essential justice without regard to form. Being of purely equitable origin, it is always controlled by equitable principles, and, as between a principal and his sureties, has been applied much more extensively in American than in English jurisprudence. We do not mean to say, however, that its application is controlled alone by the chancellor's conception of right.

The doctrine can not be applied in favor of one who officiously, or as a volunteer, pays the debt of another for which neither he nor his property is liable, and which he is under no obligation to pay, nor is it allowable where it will work injustice to the rights of others.

In the case of a surety, as his liability is limited to the express terms of his contract, so his right of subrogation is confined to the rights and securities of the contract for which he was surety.

It is well settled in this State that a surety who pays the debt of his principal has a right to be substituted to all the liens and

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securities to which the creditor was entitled. (Rice v. Downey, 12 B. M., 45; Havens v. Foudry, 4 Met., 248.)

If a surety for the price of land is made responsible, the chancellor will give him the benefit of the lien of the vendor. (Burk v. Chrisman, 3 Ben. Monroe, 50.)

But this doctrine must be extended in order to embrace the case in hand. The appellants were not liable for the Greer debt. They did not pay it. They were bound only to Hitchcock, and as the sureties of M. H. Utley. They paid his debt. The wife was not a party to the transaction, and she held the title to the land.

Hitchcock, or the assignee of his note, had no lien upon it. There was no agreement, even with the husband, that he or the sureties should be substituted to the vendor's lien. The land was in no way a security for the contract to which the sureties were parties, and they can only be subrogated to such rights as attached to it.

It is urged with force that the Greer lien existed; that the land was liable for it; that the husband was, in law, the agent of the wife to procure its removal; that if the land is now subjected to this claim the wife's interests are not hurt, as the land was, in any event, liable for the purchase money, and that as the money borrowed discharged it, and is, therfore, invested in and traceable to the land, it should be subjected to the claim of the sureties.

Waiving the question whether a husband is so far the agent of the wife that where he, without her knowledge or consent, and upon fraudulent representations made without her knowledge, obtains money by way of loan to pay for land to which she already has the title, whether the loaner may, by reason of the fraud and the fact that the money was so used, look to the land for repayment, yet in this instance Hitchcock loaned the money to Utley by reason of his giving the personal security for its repayment. He was entitled to no equitable lien upon the land. None attached to the contract in his favor, and hence none accrued to the sureties by way of subrogation when they paid the debt.

To so hold would, in our opinion, be extending the doctrine of subrogation unwarrantably, and would as often result in wrong as right.

Mr. Bisham says that subrogation is the equity by which one who is secondarily liable for a debt and has paid it, is put in the place of the creditor so as to make use of all the securities and remedies possessed by the creditor.

The appellants were not secondarily or at all liable for the Greer debt. They merely, as a matter of favor, became the sureties of the husband to another party for borrowed money. They were mere volunteers.

In the case of Reid, &c. v. Jackson, 6 Ky. Law Rep., 743, it was held that one who loans money with which to pay off a vendor's lien is not thereby substituted to the rights of the vendor, and does not acquire a lien, and that, therefore, the sureties of the vendee, in the note executed for the money borrowed for this purpose, do not acquire a lien by substitution to the rights of the obligee, he having none himself

It is said in Sheldon on Subrogation, section 243:

"The mere loaning of money to a judgment debtor to be applied by him in part satisfaction of a judgment which was a lien upon his real estate, does not subrogate the lender in whole or in part to the lien, even though it was understood between the parties to the transaction that it would have that effect. The lender of money which is applied by the borrower in part payment of the

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purchase money of land, is not thereby subrogated to the vendor's lien upon the land."

It is said, however, that the husband, in this instance, has so much money in the land; that he has that much interest in it, and that his creditor can, therefore, to that extent, subject it. When the claim of the appellants, however, arose, the land had been conveyed to the wife. It was her homestaed, and worth less than a $1,000. She has occupied it as such since about October, 1869, and there being no lien upon it in favor of the sureties by way of subrogation to the Greer lien, we fail to see how it can be subjected to their claim.

Judgment affirmed.

Judge Pryor dissenting.

Judge Bennett not sitting.

Chief Justice Pryor delivered the following dissenting opinion:

I dissent from this opinion for the following reasons:

The husband, representing that he was the owner of the land, induced these parties to raise for him money to discharge a lien upon the land, promising to secure them in their liability by a mortgage on the premises. It turned out that the land belonged to the wife. The husband gave her the money that he obtained by the aid of the appellants, and she discharged the lien with it. She now claims that the husband owed her, and denies the right of the sureties to subject the land.

The husband was jointly liable with the wife on the lien note that was paid off. The sureties should be substituted to the lien. The land should be subjected, because the money of the husband was invested in it. It was a fraud on the creditors.

To a petition for rehearing Judge Holt delivered the following response of the court, December 6, 1887:

We have again carefully considered this case upon the petition for a rehearing, and with our feelings strongly enlisted for the appellants.

It is this: A obtains money arising from the sale of his wife's property, promising to repay it to her. To do so he borrows it from B, procuring C and D to become his sureties on the note to B by falsely representing to them that the title to the land upon which he lives is in him and unencumbered, and promising to mortgage it to them as indemnity, when, in fact, it is deeded to the wife. She is no party to the loan transaction. The husband pays the money thus obtained to her, and with it she discharges a purchase money lien on her homestead due to E. The sureties, C and D, having been compelled to pay the note to B, now claim the right to be subrogated to the purchase money lien formerly held by E.

Manifestly, this is not allowable. The sureties (the appellants) were in no way liable for E's (Greer's) debt, and there never was any ageement upon the part of the wife (Mrs. Utley), or even by her husband, with either them or B (Hitchcock), from whom the money was borrowed, as to the Greer debt. We have been referred to no authority, and have been able to find none extending the doctrine of subrogation so far. The courts in this country have applied it more generally than in England, but even as in use here we can not grant the prayer of the sureties.

Thus the surety, who pays the debt of his principal, may in equity be substituted to all the liens and equities held by the

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creditor. If a surety for the price of land is made to pay it, he can obtain the benefit of the vendor's lien.

In Crippen v. Chappel, 35 Kansas, 495, it was held that where a person pays a mortgage debt at the instance of the debtor, with the agreement that the payer shall have a mortgage lien upon the real estate then under mortgage, and a new mortgage is given, but for some reason is void, he is entitled to be subrogated to the rights of the original creditor.

In the case now before us, however, the creditor, whose debt was discharged by the appellants, had no lien.

Subrogation is but an equitable assignment. In our opinion the existence of a contract is not necessary to the right. It may arise from the circumstances of the case. It is an invention of equity, founded upon natural justice, and to be exercised for the protection of the innocent.

The assignee under it acquires, however, no rights, liens or equities, save those heretofore held by the creditor, whose debt he discharges.

No lien, equitable or otherwise, attached to the Hitchcock debt. Neither he, nor the party to whom he had assigned it, had any. The loan was made upon the faith of the personal security. When paid by the sureties they merely stepped into the shoes of the creditor, and he having no lien none could pass to them by subrogation.

We are at a loss to see upon what ground the wife's homestead can be subjected to the payment of this claim, if the sureties are not entitled to be substituted to the Greer lien. Two portions of the land have been sold, one by Mrs. Utley and another under a superior lien. If the asserted equity of the appellants could be upheld, certainly these portions have passed beyond its reach.

The remainder of it is occupied by her as a homestead. It is worth less than $1,000, and if the appellants have no lien upon it, how are they to subject it to their claim against the husband? If it can be said that he has an interest in it equal to the money thus paid, although the wife was equitably entitled to it, and had the title, yet, in the absence of any lien, the homestead right stands in the way of its subjection. It is urged, however, that the false representations made by the husband to the sureties to induce them to become such, rendered the transaction a fraudulent one, and that, hence, the money can be followed as a trust fund into the land.

The rights of a surety, however, are confined to those growing out of his contract. The Hitchcock debt was a valid one. The appellants voluntarily bound themselves for it as sureties. The deed to Mrs. Utley was then of record. They had a right to rely upon the fraudulent representations of the husband so far as he was concerned, but not as to others when their interests are to be affected, and who were not parties to them. Compassion for the sureties must not cause us to forget that the wife has done nothing to put her without the pale of equitable consideration. We are dealing with her property, and not with that of the husband. She is equally innocent with the appellants. Her equity must not be forgotten. She let her husband have a part of the proceeds of a sale of her property, relying in good faith, so far as this record shows, upon his promise to repay it to her. He did so, without any knowledge upon her part as to how he had obtained it, and with it she discharged the lien upon her home for the balance of the purchase money. Under these circumstances the hand of justice, under the plea of subrogation, should not reach forth and deprive her of it. The sureties were equitably

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entitled to any lien or equity held by the creditor for the security of the debt they paid, but the right does not and ought not to extend so far as to give them a right to a lien in no way attached to it, and as to which there was no agreement, and the enforcement of which would injure one equally innnocent with themselves, and who was in no way a party to the transaction by which they were involved. If so, it would no longer be promotive of natural justice.

The petition for a rehearing is overruled.

BRADFORD v. WALKER.

(Filed November 5, 1887—Not to be reported.)

At a sale of land for State taxes the sheriff became the purchaser for the State. The land was afterward sold for county taxes, and appellant, becoming the purchaser, paid off the State's taxes to the auditors' agent, and received a deed for the land from the collector of county taxes. Held—That the sale for county taxes passed no title, as the State was the prior purchaser. The statute allows the owner to redeem within two years, but not a stranger.

C. H. Lee for appellant.

O'Hara & Bryan for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, Walker, sold to Trainer a tract of one hundred and fifty acres of land in the county of Pendleton, and executed his bond for title. Trainer took possession and listed the land in his name for taxation, but failing to comply with the terms of his purchase, surrendered his bond or all claim to the land to his vendor, Walker. The taxes due the State amounted to $16, and not being paid. the land was sold to pay these taxes, and the sheriff, no one else bidding, became the purchaser for the State as authorized by section 16 of article 9, chapter 92, General Statutes (new ed.) There seems to have been no redemption of this land by Walker and after the State had purchased it, the land was sold for county taxes, amounting to $27, and purchased by Bradford, and the latter paying off the State tax to the agent obtained a deed from Clark, the collector of county taxes for Pendleton county, for the land in controversy. Clark had no title to the land either in his own right or by virtue of the sale made to Bradford. The land had been sold to the State, and the redemption authorized by the statute in such cases permits the owner of the land to redeem within two years, but not a stranger. (Section 10, article 9, chapter 92, General Statutes.)

If the time for redemption expired, there is nothing in the record showing a sale by the auditor by which the State was divested of title. The sale for county taxes passed no title, as the State was the prior purchaser.

Judgment affirmed.

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NEWSOM & HAMBLETON v. KURTZ & MILLER.

(Filed November 8, 1887.)

1. A lien acquired by the unrecorded assignment of a deed is not good as against a purchaser without notice.
2. An execution can not be levied upon a mere equitable interest in land. The execution defendant must hold the land by legal title in order to authorize the levy of the execution upon it.
3. An unrecorded deed passes the legal title as between the parties to the deed, and the interest of the grantee may be levied on and sold under execution.

N. McC. Mercer and D. R. Murray for appellants.

Kincheloe & Eskridge for appellees.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Bennett.

The lot of ground, No. 9, in the town of Cloverport, Breckinridge county, Ky., is claimed by the appellants by virtue of a purchase from E. Fisher. On the other had, the appellees claim it by virtue of a purchase at execution sale, as the property of E. Fisher.

The acts relied on by the appellants as the foundation of their title are as follows: LaHert and wife by deed dated the 15th day of August, 1859, sold this lot of ground to E. Fisher. This deed was acknowledged by LaHart and wife on the 21st day of September, 1859, but it was not put to record until the 8th day of April, 1878.

On the 15th day of May, 1869, E. Fisher, by a written endorsement on the back of this deed, assigned it to the appellants to indemnify them against loss by reason of their becoming bound for him as his sureties. This assignment was neither acknowledged by E. Fisher nor put to record.

On the 22d day of February, 1878, E. Fisher acknowledged a deed, dated the 15th day of May, 1869, which conveyed to the appellants this lot of ground, and the deed was put to record on the 8th day of April, 1878.

Quite a number of executions were issued from the Breckinridge Circuit Court against E. Fisher. One of these, Flake's, was certainly levied upon the lot of ground in controversy, for the sheriff's return shows this fact.

It is to be presumed that two of the other executions were also levied upon the same piece of property, for the sheriff's return on the Flake execution shows that it was levied, subject to a levy under these two executions. These two executions were not made exhibits, because they had been lost or misplaced. The other executions were not levied upon this piece of property. On the 15th day of January, 1872, the lot of ground in controversy, and the other property levied on, were sold at one sale to satisfy these executions, and the appellee, Miller, became the purchaser of all the property. E. Fisher having failed to redeem the property within the time allowed by law, the sheriff, on the 24th of June, 1873, deeded the same to the appellee, Miller, and he thereafter deeded the lot in controversy to the appellee, Kurtz.

It is clear that one of these executions was levied on the property in controversy, and it is reasonably certain that two other executions were levied upon it. This was sufficient to authorize the sale of it, and the records, together with the proof, aliunde, show conclusively that this lot of ground was sold by the sheriff

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at the sale under these executions, and that he conveyed the same to the appellee, Miller.

It is also clear, from the proof in the cause, that the appellee, Miller, was a purchaser of this property without notice of the appellant's lien, which they acquired on the property, by reason of the assignment of the 15th day of May, 1869.

It is well settled that this lien not having been recorded, was not good as against a purchaser without actual notice of its existence, and as just said the appellee, Miller, did not have notice of its existence at the time of his purchase

As to the conveyance of this property by E. Fisher to the appellants, it clearly appears that the deed, although it bears date the 15th of May, 1869, was not actually made until long after the appellee (Miller's) purchase.

The endorsement of the levy of the executions upon this property was sufficiently descriptive to create a valid lien upon it. Also the sheriff's deed sufficiently describes this property to pass the title to it. But it is contended that as there was no recorded evidence of E. Fisher's title to the property, it was not subject to levy and sale.

An execution can not be levied upon a mere equitable interest in land. The execution defendant must hold the land by legal title, in order to authorize the levy of the execution upon it. That he must own the land by legal title is all that is required. In this case E. Fisher held the land by absolute conveyance from LaHert and wife. No other writing was required in order to pass the legal title. The conveyance was that of a formal deed. It was acknowledged before a proper officer as the act and deed of the vendor's. Not even other proof of its execution was required. Therefore, as between the vendors and the vendee, the legal title passed to the latter. There was but one other act necessary to make the deed effective as against all persons—the act of recording it in the proper office, and this act would in no wise change the tenor of the deed. It was already an absolute conveyance, and passed the legal title to the vendee, and the requirement of recording it was simply to give notice of what had already been done, so that other persons wishing to purchase the same land might not be deceived. Therefore, the law does not declare that an unrecorded deed does not pass the legal title as between the vendor and vendee, but simply declares that such deed shall not prevail as against a subsequent purchaser, by deed duly acknowledged and recorded, without notice of the prior unrecorded deed. Thus a penalty is fixed upon the vendee by an unrecorded deed for his laches in not having the same acknowledged by the vendor and recorded.

The judgment of the lower court dismissing the appellants' petition is affirmed.

THOMPSON'S ADM'R, &c. v. GEORGE.

(Filed November 17, 1887.)

The redelivery of a mortgage which has been satisfied by the payment of the debt it was executed to secure, upon the agreement that it shall secure another debt than the one originally secured by it, does not create a lien.

In an action upon a note and to enforce a mortgage lien it was developed that the note and mortgage had been satisfied, and that the note had been redelivered to evidence a new loan, and the mortgage redelivered to secure

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its payment. Thereupon an amended petition was filed setting forth these facts. Held—That the plaintiff is entitled to judgment for his debt, but no lien exists.

C. S. Marshall and E. W. Bagby for appellants.

Bigger & Reed for appellee.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

The applelee, George, in December, 1867, loaned to George Thompson $1,000 and took the joint note of Thompson and wife, payable in three months, for $1,076, the amount of money loaned and the agreed interest. To secure the payment of this note a mortgage was executed on a lot in the city of Paducah.

George Thompson is now dead. Before his death he paid off the note and it was surrendered to him by George, and the original mortgage that had been recorded was also surrendered to the debtor.

Some time after the payment of this debt Thompson borrowed of George $1,000 more, that seems to have had no connection in any way with the original borrowing. As evidence, however, of the second loan, no note whatever having been given, the note executed for the first loan was redelivered by Thompson to George, as well as the mortgage, to secure the payment of the second loan. After Thompson's death George brought this action on the first note to foreclose the mortgage, but it being developed during the progress of the action that the note and mortgage had been satisfied, an amended petition was filed by George in which the real transaction is set forth. It is manifest that the old note did not evidence the debt, and that the appellee, George, has the parol agreement only of Thompson, that a mortgage once released and the lien removed, shall stand good for some other debt than the one originally secured by it. It presents a case where the owner has pledged his title papers with his creditor under a parol agreement that the property embraced by them shall be subjected to its payment, or rather that a lien shall exist for the pamyent of the debt. Nor is this so strong a case. The mortgage has answered its purpose and is no longer evidence of title in either the mortgagee or mortgagor. It may be useful to the latter in showing that the lien has been removed, but being invested with the fee it can not constitute a link in the chain of title. It is simply a parol agreement that some other note, fully paid prior to the transaction, shall evidence the liability, and that a mortgage, prior thereto and released, shall be regarded as a security for the payment of a loan on a parol or implied promise to pay. Liens can not be created on land in such a mode, but as Thompson's administrator is liable for the debt and an amended pleading has been filed, presenting the real cause of action, a judgment should go against the administrator, but no lien exists. This case was heard in the Superior Court and the usury deducted. The only question is as to the amount. It is evident that the deduction is not for too much. Judgment should be entered against the administrator for $86.76, with interest from January 1, 1883, to be levied as costs, and the lien denied.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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HESS v. COMMONWEALTH.

(Filed November 19, 1887—Not to be reported.)

1. Reversible errors—Where there is testimony tending to show the guilt of the accused, there can be no reversal upon the ground that his guilt was not proved to the exclusion of a reasonable doubt.
2. Evidence—Leading question—Although questions leading in character were asked a witness by the prosecuting attorney upon his re examination, yet as they related to matters that had, in substance, been brought out upon the defendant's cross examination of the witness, they were not open to objection by reason of their form.
3. There can be no reversal because of the admission of incompetent testimony not objected or excepted to.

Baker, Kinney & Kinney for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Peter Hess, and one Melvin Butler, were jointly indicted upon the charge of robbery.

A severance of trial was had, and the appellant now asks a reversal of a judgment of conviction upon two grounds.

First, bceause the court, at the close of the Commonwealth's testimony in chief, refused to peremptorily instruct the jury to acquit him.

Second, because it permitted the prosecuting attorney to put leading questions to one of the witnesses.

It is doubtful if both these questions are embraced in the grounds for a new trial, but it being doubtful and waiving the question whether, indeed, this was necessary to the consideration by us of the last one, we will lean to the side of the accused and consider them.

The motion for a peremptory instruction appears to have been based upon the fact that the person who was robbed, and who was the only person present at the commission of the crime, save the two robbbers, would not testify in so many words that the appellant was, beyond question, one of the men that robbed him. The substance of his evidence is: "I thiink he is the man —that is my best opinion. I am not sure, but he looks exactly like him." He, however, described, to some extent, the dress of the robber, and especially one article worn by him, and other evidence in chief was introduced by the Commonwealth showing that the accused, upon the night of the robbery, was so dressed. The jury were the judges of the evidence. To say the least there was testimony tending strongly to show his guilt. While a jury ought not to convict unless the guilt of the accused be fully proven and to the exclusion of all reasonable doubt, yet it must be left to them, under proper instructions, to determine whether this has been done; and this court can not reverse a judgment of conviction in a criminal case upon the ground that this was not done and the verdict, therefore, unauthorized. Its revisory power does not extend to such a case. (Kean v. Commonwealth, 10 Bush 190; Johnson v. Commonwealth, 9 Bush, 224.)

The party who was robbed identified Butler positively as one of the men engaged in it. It occurred about midnight. A certain witness, upon examination in chief by the prosecuting at-

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torney, testified that the accused and Butler were together at a certain dance house at a previous hour upon that night.

Upon examination the witness proved that the accused was generally with Butler more than with any one else; that the two were always together, and that the accused was with Butler that night more than with any other person.

Upon re-examination by the prosecuting attorney, these questions were asked and answers given:

"You say that Hess and this man Butler were always together?"

"Yes, sir, more or less always together."

"Run together?"

"Yes, sir, they did."

"You saw them together that night?"

"Yes , sir."

"These men were partners?"

"Yes, sir."

There was no objection to the last question or exception taken to the answer to it. Hence no question is presented as to it. As to the other questions, while of a leading character. yet they relate to matter that had in substance been brought out upon the defendant's examination of the witness, and of which he had spoken without objection upon the part of the defendant. They were not, therefore, open to objection by reason of their form, and if they had been or the answers incompetent, yet, in view of the entire testimony, it is quite evident that their exclusion would not have produced a different result.

Judgment affirmed.

HETSCH, &c. v. COMMONWEALTH.

(Filed November 29, 1887.)

The Commissioners of the courthouse district of Campbell county, and not the city jailer of Newport, are entitled to an allowance for services rendered by the janitor appointed by them in waiting on the Campbell Chancery Court while held in Newport, and for lights and fuel furnished by them.

A. Duvall and John P. Newman for appellants.

John S. Ducker and P. W. Hardin for appellee.

Appeal from Campbelll Chancery Court.

Opinion of the court by Judge Bennett.

By an act of the legislature of this State, approved March 10, 1856, it was provided that the circuit and county courts for Campbell county should be held, at stated times, in Alexandria, the county seat, and in the city of Newport. It was also provided in said act, that the public buildings of the city of Newport, to wit: Court-house, clerk's office and jail should be used for circuit and county court purposes.

Owing to the increase of population and increase of business, and the insufficient accommodations afforded by the public buildings of the city of Newport, to the circuit courts meeting in said city, a new and more commodious court building became necessary.

Therefore, the legislature, by an act approved April 17, 1882, created the court-house district of Campbell county, which dis-

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trict comprises the cities of Newport and Dayton, and the town of Bellevue, and a part of the territory adjacent to these places.

This act also provides that the circuit court shall appoint three commissioners, who shall issue bonds to the amount of $50,000, for the purpose of erecting a suitable court building. These commissioners are expressly made the custodians of the building which they are authorized to erect, and are made responsible for its maintenance. The commissioners caused said building to be erected.

By an amendatory act of the legislature, approved March 18, 1886, it is provided by the second section that the commissioners "shall have the power to appoint a janitor for said court-house, and allow him a monthly compensation for his services, not to exceed $60 per month. Said janitor shall be under the direction and control of the commissioners, and removable at their pleasure."

The third section of the act provides as follows:

"The said commissioners shall have the control of said court-house and grounds belonging thereto; they shall cause the court and jury rooms in said house to be properly lighted and warmed when required for holding of the several chancery, circuit, criminal and county courts; they shall also cause the office rooms of the circuit court and county clerks, the master commissioner and the sheriff in said building to be lighted and warmed when required, and properly attended to by said janitor; they shall also cause the dials of the clock in the tower of said court-house to be illuminated at night, and they shall cause the janitor of said court-house to be in attendance upon said courts during their said terms at Newport. For the light and fuel furnished and services rendered the said commissioners shall be allowed, by said several courts, the same sum per day for the services of said janitor, as are allowed and paid to the county jailers for light and fuel furnished and services rendered in said courts. The allowance thus made the commissioners, when collected, shall be paid over by said commissioners to the treasurer, and take a receipt therefor, and it shall constitute a part of the funds of said district, and be held subject to the order of said commissioners."

This act also authorized the commissioners to pay, out of the funds provided for that purpose, the county judge and county attorney for Campbell county, certain portions of their salaries.

The appellants, as commissioners, appointed by the authority of said act, presented an account to the Campbell Chancery Court for services rendered by the janitor in waiting on said court, while held in Newport, and for lights and fuel. The chancellor rejected the claim upon the ground that the city jailer was entitled to said allowance.

It is agreed that the janitor, appointed by the appellants rendered said services, and that the appellants furnished the lights and fuel.

By the second section of the act supra the appellants were authorized to appoint a janitor, whose duty it was, among other things, to wait upon the courts held in the city of Newport. He was to be paid for his services out of the district fund.

By the third section supra the appellants are entitled to the same pay for the jaintor's services in waiting upon the courts held in the city of Newport, and for lights and fuel furnished said courts, as are allowed county jailers for similar services and for lights and fuel, and said section is mandatory upon the several courts, whenever said services are rendered, to make the appellants the allowance, and when such allowance is collected by the appellants, it is their duty to pay the same to the treas-

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urer of the district, when it becomes a part of the district fund, to be used for the purpose of defraying the general expenses of the district.

We are unable to perceive what right the city jailer has to an allowance for these services, because, first, he did not render the services; second, because whatever duty he was once under to render these services the act of 1886 supra relieved him, and expressly made it the duty of the appellants to render them through the janitor.

As the office of city jailer is the creature of a legislative act, and as the city jailer of Newport had no authority to render these services, except by an act of the legislature, it will not be seriously contended that the legislature could not constitutionally repeal the authority thus given, and confer the authority upon another.

The judgment is reversed and cause is remanded, with directions to allow the appellants' claim.

BROWN v. VANCLEAVE.

(Filed December 6, 1887.)

1. A judgment was final which completely settled the rights of the parties, although there was an order retaining the case on the docket for the purpose of executing the judgment, which was discharged by the payment of the amount of the judgment into court.
2. Proceedings upon an amended petition filed after judgment, and after the judgment had been discharged, were mere nullities.
3. An amended petition which set up a new and distinct cause of action should have been rejected.
4. Cross appeal—Where either party appeals from a final judgment his adversary may have a cross appeal from that judgment for the purpose of correcting any errors therein to his prejudice, or any interlocutory order which has influenced or controlled the final judgment to his prejudice, but he can not have a cross appeal from a judgment wholly distinct from the judgment appealed from.
5. Where the plaintiff has accepted satisfaction of a judgment by withdrawing the money deposited in court in satisfaction thereof, he can not appeal therefrom.

Woolley & Buckner for appellant.

O'Neal, Jackson & Phelps and C. B. Seymour for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellee brought suit in the Louisville Chancery Court against the firm of Noland, Price & Co., the appellant, Brown, being a member of the firm, on two promissory notes for $2,000 each, to each of which the name of said firm was signed.

The defendants were proceeded against as nonresidents, and an attachment was obtained against them, which was levied upon thirty shares of stock as the property of the appellant, Brown. Afterwards appellant, Brown, appeared and filed his answer, in which he pleaded that the notes were given without any consideration, for the liabilities for which they were given were liabilities of the firm of Noland, Price, Joiner & Co., of which firm he, Brown, was not a member, and that the firm name of Noland,

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Price & Co., of which firm he, Brown, was a member, was signed to said notes by Noland without the authority of said firm or of him, Brown.

On the trial of the issue thus presented the chancellor found the facts alleged by Brown to be true, except that $510.99 of the notes consisted of indebtedness due to the appellee by the firm of Noland, Price & Co., for which sum, together with interest thereon, the court gave judgment against the appellant, Brown.

This judgment was rendered on the 29th day of April, 1884.

Besides the formal adjudication of the amount of recovery the judgment contains this provision:

"Unless the defendant, Brown, shall, within ten days tender the plaintiff to pay into court the amount of this judgment and interest and the cost, to be ascertained by taxation of the clerk, the court will proceed to render judgemnt for the sale of the attached property, or otherwise dispose of the same, for which purpose the action is retained."

The appellant, Brown, made a motion for a new trial, which motion was overruled on the 13th of May, 1884. On that day he paid into court $595.10, the full amount of the judgment, interest and cost. This sum he had previously tendered, within the ten days allowed, to the appellant. On the same day that the appellant paid this sum into court in the discharge of the judgment, and after the sum was so paid into court, the appellant filed an amended petition, in which he sought to subject appellant's thirty shares of stock attaches to the payment of the two notes, upon the ground that Noland had appellant's authority to pledge this stock for the payment of said notes, and that Noland did pledge the sotck for the payment of the notes. The appellant objected to the filing of the amended petition, but his objection was overruled. He thereupon filed an answer controverting the allegations of the amended petition.

On the 13th of February, 1885, judgment was rendered on the amended petition in favor of the appellee, and subjecting the stock to the payment of said notes. From which judgment the appellant, Brown, has appealed.

The appellant's appeal was filed in the Superior Court on June 11th, 1886.

The appellee, on the 23d of March, 1887, prayed a cross-appeal from the judgment rendered the 29th of April, 1884. The Superior Court on May 4th, 1887, granted the cross-appeal. Thereupon the appeal and cross-appeal were transferred to this court.

The appellant denies the right of the appellee to a cross-appeal, first, because the judgment rendered on the 29th of April, 1884, is a separate and distinct judgment from the judgment rendered on the 13th of February, 1885, from which he appealed; second, because the judgment rendered on the 29th of April, 1884, is a final judgment, and more than two years having elapsed from the rendition of that judgment to the filing of the cross-appeal, the appellee's right to appeal is barred; third, the appellee having voluntarily withdrawn the money which the appellant deposited in court in discharge of the judgment rendered on the 29th of April, 1884, he has deprived himself of the right to appeal from that judgment.

In the case of the appellee against Noland, Price & Co., the issue joined between the appellant and appellee involved not only the question of the appellant's liability on the two notes sued on, but the extent of that liability. The chancellor resolved that issue in favor of the appellee, and fixed the liability of the appellant at $510.99 and interest thereon and cost, for which

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judgment was rendered against the appellant on the 29th of April, 1884. This judgment was essentially final, from which either party had the right to appeal.

By the amended petition filed after said judgment was rendered, the appellee sought to subject the thirty shares of stock, attached as the property of the appellant, to the satisfaction of the two notes, upon the ground that Noland, by the authority of the appellant, had pledged this stock to the appellee as collateral security for the payment of these two notes. The object of the amended petition was not to subject the stock to the payment of the notes on account of the appellant's liability thereon, because his liability thereon had already been determined by the court, and that liability had been discharged by the payment of the money in court, under its order, in satisfaction of the judgment, but the object of the amendment was to subject the stock to the satisfaction of the remaining portion of the notes, for which it had been adjudged the appellant was not liable. The amendment, therefore, alleged a distinct and new cause of action, which was in no manner germane to the issue joined in the original action between the appellant and appellee. In the original action the judgment against the appellant fixing his liability was complete and final. In the action by the amended proceeding a new, independent and distinct cause of action was presented, which was prosecuted to a final judgment, from which the appellant has appealed.

Where either party appeals from a final judgment his adversary may have a cross-appeal from that judgment for the purpose of correcting any errors in the judgment to his prejudice or any interlocutory judgment or order to his prejudice, which has influenced or controlled the final judgment to his prejudice. But he certainly can not have a cross-appeal from a judgment, although rendered in an action between him and the appellant, which was rendered in an action wholly distinct from the action in which the judgment was rendered and appealed from by the appellant. Also if the cross-appeal might be regarded as an original appeal, which, however, is not conceded, it should be dismissed, because the appeal was not taken within two years from the time of the rendition of the judgment of the lower court. Also the appellant paid in court, pursuant to the order of court, the amount of the debt, interest and costs, for which judgment was rendered on the 29th of April, 1884. This sum was paid in court in discharge of the judgment, and the appellee subsequently withdrew said sum and appropriated it to his use. It must be deemed that the money was paid in court in discharge of the judgment, and that the appellee so received it. Therefore, as has been settled by this court, such payment was, in legal effect, a satisfaction of the appellee's demand against the appellant, and barred his right to appeal from the judgment.

The appellant also contends that the appellee has no right to file the amendment, and that the subsequent proceedings thereon, including the judgment, were void.

As intimated in a preceding part of this opinion, the judgment rendered on the 29th of April, 1884, absolutely settled the rights of the appellant and appellee. The judgment was final. It left no controversy, as between the appellant and appellee, open to be thereafter settled by the judgment of the court. By the judgment the case was to remain on the docket solely for the purpose of ordering the sale of the attached property to satisfy the judgment, in case the appellant did not, within ten days, satisfy the judgment by paying the money in court. But the judgment was,

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nevertheless, final. The order retaining the case on the docket was solely for the purpose of executing the judgment. This order provided that the appellant might execute it by paying the amount of the judgment into court. This the appellant did, and by so doing the judgment was discharged. Upon the payment of the money in court it required no formal order of court to discharge the judgment. The fact that the money was paid into court by the court's order, and the reception of it by the court, was, of itself, a discharge of the judgment.

So, then, after a final judgment had been rendered and after it had been discharged, according to the terms prescribed by the court, the appellee filed an amended petition, in which he set up a new and distinct cause of action against the appellant. The cause of action thus set up was not designed to aid in effectuating the judgment already rendered, for that judgment had been satisfied. But it was designed to subject the appellant's property to the payment of the remaining portion of the two notes, for the payment of which he, according to the judgment of the court, was not bound. It is thus seen that the amendment proposed a new and distinct cause of action, and for that reason alone the amendment should have been rejected.

But, as just said, the rights of the parties had been litigated to a final judgment. After the rendition of that judgment could the appellee, without first having that judgment set aside and the case re-opened, have filed an amended petition, either setting up new plaints or enlarging or perfecting old ones? We think not. Could he, after the judgment was rendered, have filed an amended petition setting up that the appellant was indebted to him in additional sum of money? We think not. By the rendition of the final judgment the power of the court is spent, except for the purpose of setting aside the judgment or modifying it at the same term, as may be provided by the rules of pleading, and the rights of the parties thus settled by the final judgment are at an end. The litigated questions raised by the pleadings are merged in the judgment. The pleadings thus having fulfilled their office there is nothing remaining before the court to be amended, and any amendment thereafter filed over the objections of the adversary, and the subsequent proceedings thereon, including the judgment, are mere nullities.

The judgments are reversed and the cause is remanded, with directions to dismiss the appellee's petition and amended petition.

UREY'S ADM'R, &c. v. UREY'S EX'TX, &c.

(Filed December 1, 1887.)

Construction of devise—Costs—A testator, after making certain special devises to his collateral kindred, provided: "I clearly will and declare that my wife shall have all my property to do with as she pleases, as this is only intended in case we should die while gone," he and his wife being about to start on a journey. He named his wife as executrix, and gave her power to destroy this will if she should choose to do so. After the return of the testator he added a codicil to his will, making additional devises and making changes in the devises made by the original will. This codicil the testator declares to be a part and parcel of his will. The wife of the testator survived him. In this action, brought by the widow for a construction of the will, Held—

1. If the first paper executed by the testator was invalidated by the return

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of himself and wife, it was republished by the codicil subsequently added, and both are to be construed together as one will.

2. It was the intention of the testator that the special devises made by the will and codicil should take effect only in the event his wife did not survive him, and that she should have the entire estate absolutley in the event she did survive him.

3. This action having been brought by the widow for a construction of the will to enable her to sell a part of the estate, and the various claimants under the will having filed answers and asked affirmative relief, it was error to require the widow to pay their attorneys fees.

Wm. Marble and C. T. Allen for appellants.

F. W. Darby for appellees.

Appeal from Caldwell Circuit Court.

Opinion of the court by Chief Justice Pryor.

F. W. Urey, born in Ireland, but a naturalized citizen of the United States, died in the town of Princeton, where he had resided for many years, leaving a last will and testament that was admitted to probate in the Caldwell County Court, his wife, Pernecy Urey, qualifying as executrix. His death took place in July, 1864, and his widow, the executrix, took charge of his estate, and now holds and claims it as her own under certain provisions of the testator's will.

The testator left no children surviving him, but brothers and sisters and their descendants, his father and mother having died long prior to his death. He was the owner, at his death, of considerable estate, consisting of land, bank stock, money, choses in action, etc., all of which has been in the possession of his widow since the probate of his will in August, 1865.

The judgment of the county court declaring the paper in question to be the last will of Urey, was never appealed from, modified or reversed. His will consists of an original paper, dated the 29th of March, 1859, and a codicil attached thereto, on the same paper, dated April 10, 1860. The will and codicil seem to have been executed in the manner prescribed by the statute.

In the year 1884 the widow sold certain parcels of the land devised to her, as she claims, by her husband, and the purchasers questioning her title, this action in equity was instituted in the court below, seeking a construction of the will to which the heirs-at-law of the testator, as well as the devisees, were made defendants. The will is as follows:

"Knowing the uncertainty of life and certainty of death, and being about to take a trip east, I think it proper and right to dispose of what property a kind providence has blessed me with. To this end I make this my last will and testament, to wit:

"1st. I will and bequeath to my former negro woman named Phereby, now in Liberia, and her children, the dividend on my bank stock in the Farmers' Bank of Kentucky during the existence of said bank, and when the bank winds up then my stock in said bank is to go to the said Phereby and her children. But if my executors think best they may invest it in some good bank stock, and the dividend therefrom to go to the said Phereby and her children forever, the dividend to be sent to Rev. Wm. McLain, Washington City, to be sent by him to them if they remain in Liberia, but should they return to the United States then my executor is to send direct to them wherever they may reside.

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"2d. I will and positively direct that all my negroes at my wife's death, young and old, be free and sent to Liberia, and that they shall be well clothed, and a sufficient quantity of clothing in addition be given them, to last two years, after they get there, and that expenses required to send them to Liberia and clothing, etc., shall be paid out of my estate. And I also will that each negro so sent shall have $100 each to give them a start when they get there.

"3d. It is my will that each of the negroes I have already sent to Liberia shall have $100.

"This money is to be sent to the Rev. Wm. McLain, Washington City, to be sent to them by him.

"4th. I will and bequeath to Joseph Henry the land I intended for Jane Kirk, but as she is now dead I give it to Joseph Henry, and in lieu thereof I give to David Kirk, Alexander Kirk and Nancy Kirk $500.

"5th. I will and bequeath to the session of the Presbyterian Church, in Princeton, $500, the interest of which is to go yearly forever towards keeping the church in repair, the principal not to be touched.

"6th. I will and bequeath to my beloved pastor, the Rev. James Hawthorne, $500.

"7th. I will and bequeath to Joseph Henry, in addition to the land, $1.000.

"8th. In case myself and wife should not live to return, I will that all mine and my wife's clothing and silverware to be sent to Phereby and her children, wherever they may be, either in Liberia or in the United States. Also all the bedding.

"9th. I will and bequeath to Francis Harris and her children my town property that I now live on.

"10th. I will that Neicy Perry shall have $500, and that all the furniture and carpets be divided between Mrs. Mary Bond, Francis Harris and Neicy Perry, Mrs. Bond to make the division.

"11th. I will and bequeath to Jane Wallace, in Ohio, $500.

"12. It is my will that this will is not to take effect until my wife's death. But in case my wife wishes to destroy this will she is at liberty to do so, and is at perfect liberty to dispose of any of my property as she pleases while she lives, except all my negroes are to be free and disposed of as stated above.

"I clearly will and declare that my wife shall have all my property, to do with as she pleases, as this is only intended in case we should die while gone.

"Lastly, I appoint my beloved wife my sole executrix, and is to give no security in court. And in case neither myself nor wife should not live to return, in that event I appoint Dr. P. B. McGoodwin and Rev. James Hawthorne my executors, and positively forbid any person from preventing my negroes being free and sent to Liberia.

"Given under my hand and seal this, the 7th day of March, 1859. The word 'have' interlined before signing.

"Witnesses: "F. W. UREY. [L. S.]

"A. C. MAYES.

"T. D. PINNER.

"I make addition to the within will dated the 7th of March, 1859.

"I further will to my four nieces in Philadelphia, namely: Margaret Totten, Sally Bell, Salina Bell and Pernecy McElhenny, $500 each. If Mr. McLain should die, or go out of office, then the money to be sent to Phereby and her children to be sent to

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the secretary of the colonization society, to be sent to them by him. I hereby revoke the $500 given to Pernecy Perry in the 10th clause in the within will. I give to Mary Garrett the note I hold on her father. I hereby will and declare that James Kevil nor his family is not to have one cent of my property in any way, as they have already got as much as I intend them to have. This codicil I declare to be part and parcel of the within will. Given under my hand and seal this 10th day of April, 1860.

"Witnesses: F. W. UREY. [L. S.]

"J. R. HARP,

"WILL. H. MILLER."

The heirs-at-law of the testator maintain that as the effect or vaildity of the instrument as a will is made to depend on the contingency of both the testator and his wife dying while on their eastern trip, and both having returned, the writing became a nullity, and the whole estate descended to them as his next of kin, subjct to the widow's dower and distributive share of the personalty.

The legatees insist that the paper is the last will of the decedent, and the widow took either a life estate, or became entitled to the residum of the estate after the various devises or legacies have been satisfied.

The widow claims the entire estate under the 12th clause of the will. Such are the different constructions placed on the will of the testator by the parties in interest, and if, as contended, the original will was based on a contingency that never happened, and can not be revived, or made effectual by a codicil attached thereto, then the heirs-at-law take the property, subject to the rights of the widow as dowress and distributee. The probate of the will disposes of the question as to its validity, and it must be construed as the last will and testament of the decedent. The will was admitted to probate by a court having jurisdiction of the subject matter, in the county of the testator's residence, in the mode provided by the statute, and if all the devises made in the paper of the 29th of March, 1859, were purely contingent and defeated by the never happening of the event upon which the devises were to take effect, still the codicil written on the paper of April 10, 1860, is "declared to be a part of the within will," and the paper, as first executed, referred to by the codicil, which is but a continuation of the devises made, or intended to be made by the testator. The entire paper, dated, first in March, 1859, and that dated in April, 1860, is the true will of the testator, and both admitted to probate, as required by the statute.

So the contingent devises were made absolute by the codicil that was executed after the testator and his wife returned from their trip east. A new will was in effect then made, and the provisions of the first writing changed in several respects. The provisions of a will may be wholly contingent, and the devise defeated by reason of the nonhappening of the event, or never become effectual in contemplation of law, and such were the devises made in the reported cases of Maxwell v. Maxwell, 3 Met., 109, and Dougherty v. Dougherty, 4 Met., 25. In the case of Beal v. Cunningham, 3 Mon., 390, it was held that a codicil properly executed and attached to or referring to a paper that had never been properly signed or attested as a will would give effect to the entire paper as one will. It is plain, therefore, that the paper dated in April, 1860, made the original paper a part of it, and the two together constituted the will of the testator, conceding that the devises first made were all contingent.

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The will was written by the testator, and is so framed as at first impression leaves the mind in doubt as to the character of the estate vested in the wife by its provisions, but when considering the objects of his bounty, and the circumstances connected with its execution, the intention of the testator is made maifest, and the language used of no doubtful meaning. The testator and his wife had accumulated an estate ample to support them, and in the estimation of both was regarded as a small fortune. They were about to take a trip east, and the testator fearing that he might die, or that both himself and wife might never return, alive, executed the paper dated in March, 1859. He made various special devises to his slaves, as well as those formerly emancipated, also devises to his relations, but made them all depend on the contingency of both himself and wife dying before their return to Princeton. The stock of the Farmers' Bank, amounting to $10,000, was the most valuable part of his estate, and the special deivses to be paid out of his other property would leave his wife of the residuum but a small remnant of his estate, scarcely sufficient for her support and maintenance. She was the principal object of his bounty, and no attempt was made or intention expressed or implied in either paper of depriving her of the absolute title to all of his estate in the event she survived him. His plain purpose was to mancipate his slaves, regardless of the claims of his wife upon him, and by the paper first written he was selecting the objects of his bounty in the event his wife was not living, when they returned, to enjoy his property, but was careful to provide that in the event they returned, or his wife survived him, that she should have the entire estate. In the 12th clause of his will he says, in express words, so as to leave no ambiguity in the language used, and to express the provisions of the will, or the language preceding this sentence: "I clearly will and declare that my wife shall have all my property, to do with as she pleases, as this is only intended in case we should die while gone."

These special devises are not to take effect in the event my wife survives me, and contemplating the fact that this might happen, he makes his wife executrix of his will, with power to destory it, and says she can dispose of the property while she lives as she pleases, and, to indicate what he means by the power conferred on the wife in the last sentence of the 12th clause, he vests in her the absolute estate, and this he clearly wills and declares.

It may well be argued that while the devise in the first paper to his slaves and collateral kindred was conditional, the devise to the wife was absolute and unqualified, yet he says this is only intended in case we should die while gone.

They did, however, both return, and if the fact invalidates the paper of the 7th of March, 1859, as is insisted by one of the counsel for appellants, the testator on the 10th of April, 1860, republished the first paper by having written upon it as follows: "I make this addition to the within will, dated 7th March, 1859. I further will to my four nieces," naming them, $500 each, and then proceeds to change certain provisions contained in the first paper. This addition made both papers the will of the decedent, executed on the 10th of April, 1860, in which we find the entire estate by the 12th clause disposed of by the testator to his wife, and in construing that clause with the other provisions of the will, it simply means that if my wife survives me she is to have the entire estate, but if she does not the property is to go to my slaves and next of kindred, as provided by my will.

And this consturction applies whether the devise to the wife

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was conditional or unconditional by the first instrument, for it is evident that the addition of other legacies to his collateral kindred by the codicil was intended to be subordinate to the devise made to the testator's wife, and placed on the same footing with the special devises made in the paper of March, 1859. While the last clause in a will must control, if repugnant to previous provisions made by the testator, still the intention of the testator must determine the construction, and where there is a seeming inconsistency that can be reconciled, as in this case, in determining the intention of the testator from the entire will, the chancellor will not hesitate to adopt the construction that follows the intention of the testator.

In this will there is an absolute devise to the wife of all the estate, and special legacies given to collateral kindred in the first instrument, made to depend on the wife dying before the testator. Of this there can be no doubt, but after this instrument is prepared the testator, keeping in mind the fact that he had already given to his wife the absolute estate, and provided for his collateral kindred in the event she could not take, he then proceeds to add to his will and to further will certain legacies to other collateral kindred, meaning, when looking to the entire instrument, that they were to take in the same manner as his collateral kindred already provided for.

"The intention of the testator, as expressed in the will, and as gathered from a legal construction of the whole will, including the codicil, and not from outside conjecture or ordinary intelligence, is to govern." (Redfield on Wills, volume 1, 432, 433, 434, 435.)

An express or positive devise can not be controlled by inference or argument from other parts of the will, but on the contrary general words will be controlled in order to make the whole consistent. (3 Jarman, 706.)

If a general devise, including the whole of the estate, be made, and then in other portions of the will specific dispositions, these are to be regarded as explanations or exceptions out of the general disposition, and it makes no difference which comes first. (1 Redfield, 445-46.)

With these rules before us, there would be but little difficulty in determining that the wife held the entire estate, subject to be charged with the payment of the specific legacies, whether created before or after the general devise, but for a contrary intention plainly manifested by the testator.

He gives to the wife power to destroy the will, and what his purpose was in writing such a provision is not easily determined, unless the testator supposed that, by its destruction, she would become the sole owner. He then gives her the power to dispose of any of the property as she pleases while she lives, except the negroes, and then, to make his intention the more certain and explicit, he clearly wills and declares "that my wife shall have all my property, to do with as she pleases."

Such power is inconsistent with a purpose, on the part of the testator, to give to his collateral kindred in either paper these legacies to be paid out of the general estate, giving to the wife the residuum. Nor can it be said, with such an absolute devise and power given the wife, that she is to be confined to a life estate only. In our opinion she is the absolute owner of the entire estate embraced by the provisions of the will in question and now in controversy.

There is a remaining question to be disposed of arising on the cross-appeal of the widow. The court below required the entire costs, including attorneys' fees for the defense, to be paid by the widow as executrix. This, in our opinion, was erroneous.

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The widow, who was also executrix, had sold a portion of her estate devised under the will of her husband, and the purchasers refusing to comply with their contract, it became necessary to have the will construed, as they doubted her title. All parties interested were made defendants, an each defendant, or class of defendants, filed answers and asked affirmative relief. One class, the heirs, insisted that the paper claimed to be a will was a nullity. The negroes asked that the bank stock, or its dividends, be paid over to them.

The widow had been in possession of this estate for over twenty years, undisturbed by any of these parties, and when the action was instituted, it became really an action against the widow to recover the specific legacies. Their claims were hostile, and each had an attorney. These attorneys must be paid by those employing them. The parties to the litigation must pay their own costs.

An attorney's fee should be allowed the attorney for the non-residents, for without his appointment the action could not have proceeded. Neither the attorney for Mrs. Carlisle or the attorney for the administrator of Phereby and her children are entitled to be paid out of the estate, and for the reason that the widow has been required to pay these fees, the judgment is reversed on the cross-appeal and affirmed on the original appeal. The cause is remanded for proceedings consistent with this opinion.

RAY v. JEFFRIES.

(Filed December 1, 1887.)

1. The rule that a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation does not apply to the assessment of the actual pecuniary damages resulting directly from the wrong, and when the damages can be measured, and the injury is such as to demonstrate that, as to the damages, the proof and the law of the case were disregarded, a new trial ought to be granted.

2. Master and servant—Where an employe represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of a dangerous character, and which, if not properly used, are liable to cause injury, he, and not the employer, is responsible for consequences resulting to himself from his unskillful or negligent handling of them.

The plaintiff was employed to blast rock in the defendant's mine or well on account of his professed knowledge and skill in the business, at a fixed price per foot, which was increased when a more dangerous powder was substituted. The injury to the plaintiff resulted from his undertaking to stir the material in a cap used in connection with the powder without first informing himself whether it could be safely done or not. The defendant informed the plaintiff that he had no knowledge or skill on the subject of handling the powder he furnished. Held—That it was the duty of the plaintiff to inform himself how to safely handle the powder if he did not actually know, and that he is, therefore, not entitled to recover.

Wilson & Sprigg, John L. Scott and J. P. Hobson for appellant.

Montogmery & Poston for appellce.

Appeal form Hardin Circuit Court.

Opinion of the court by Judge Lewis.

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Appellant brought this action to recover for an injury to his person while in the employ of the appellee mining, but though the verdict of the jury was in his favor, they fixed the damages at only one cent. Although it is provided in section 341, Civil Code, that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action in which the damages equal the actaul pecuniary injury sustained," yet it has been held by this court, Taylor v. Howser, 12 Bush, 465, that "the reason of this rule does not apply to the assessment of the actual pecuniary damages resulting directly from the wrong," and that where the damages can be measured and the injury is such as to demonstrate that as to the damages the proof and the law of the case were disregarded, a new trial ought to be granted. The injury received by appellant was a severe and permanent one, and the damages actually proved were capable of being measured, and the verdict should have been set aside and a new trial granted, if he was entitled to recover at all, and whether he was or not is the question before us.

From the pleadings and evidence in this case it appears that appellant was, for some time during the year 1884, employed by appellee in blasting rock, the ordinary blasting powder being used. But appellee mentioned to appellant, about the close of operations of that year, that he intended to procure material of greater explosive power, and was informed by appellant he had experience in the use of giant powder in blasting rock.

Before commencing operations in the spring of 1885, appellee procured a quantity of what is called Atlas powder, in the composition of which a considerable per cent. of nitro-glycerine is used, and accompanying the powder to be used with it were caps or exploders, strongly charged with fulminate and also fuse.

The injury to appellant was caused not while he was actually engaged in blasting, though this would make no difference, nor by the explosion of the powder, which was in cartridges, but by the explosion of one of the caps caused by him picking into it with a stick in order to ascertain whether the material it contained was fit for use.

The lower court instructed the jury that it was the duty of the defendant in operating the mining business to ascertain and know the character and quality of the material used for blasting. That is, whether or not it was dangerous, and to impart such information to the plaintiff, and if he failed to obtain such information, or did obtain it and failed to impart it to the plaintiff, and he was injured by such failure, the defendant is liable. But if the plaintiff knew of the dangerous character of the caps, then the defendant is not liable.

They were also instructed that if the plaintiff did not know of the dangerous character of the caps the defendant can not be excused for his failure to know and inform plaintiff of the danger, unless he used reasonable care in obtaining and imparting such information.

There is another instruction, based upon the hypothesis that the defendant knew and intentionally concealed the information of the danger from the plaintiff. But as there is no evidence whatever to support such an instruction, it need not be considered.

The first instruction is objectionable principally because it is abstract and misleading. There is no question that both parties knew of the dangerous character and quality of the material used in this case, for any one of ordinary intelligence knows that any explosive containing nitro-glycerine is extremely dan-

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gerous, and there is no pretense on the part of the plaintiff that he was ignorant on the subject.

The second instruction is wrong, because it might be and probably was understood by the jury as requiring the defendant to know and to inform the plaintiff, not merely of the dangerous character of the caps, but of the manner of using them so as to prevent any injury.

It is not alleged or shown that either the cartridge in which the powder was contained, the caps containing the fulminate or the fuse, was defective, and consequently the simple question is whether an employer is bound in every case to know, not merely the dangerous character of implements or agencies used in his business, but also the peculiar construction and mode of handling each part, so as to make it most efficient, and to avoid injury to his employe, whether the latter is or professes and undertakes to be skilled in that branch of the business or not.

To require of an employer such knowledge and skill, and impose upon him such obligations would, in many cases, put a stop to business.

The owner of a mill operated by steam is bound to use due diligence and care in providing machinery free from defects, and a boiler capable of sustaining the pressure necessary to move it, but in regard to the mode of raising and regulating the steam so as to prevent an explosion and consequent injury, the employer is not required, but the engineer is required to know, and any injury the latter may sustain by reason of his want of the knowledge and skill he undertakes to possess, is to be attributed to himself alone. The correct rule is, that where an employe represents and undertakes that he possesses the knowledge and skill requisite to operate or use machinery or implements of a dangerous character, and which, if not properly used, is liable to cause injury, he, and not the employer, is responsible for consequences resulting to himself from his unskillful or negligent handling of it.

In this case the plaintiff represented that he was a well digger and blaster, and had used what is called Judson's blasting powder, containing a certain, though, as he testifies, not as large a per cent. of nitro-glycerine as the Atlas powder, and had used the caps and fuse in connection with it. On the other hand, the defendant informed the plaintiff he had no skill or knowledge on the subject. The plaintiff was employed to blast the rock in the defendant's mine or well on account of his professed knowledge and skill in the business, at a fixed price per foot, and the price was agreed to be increased when the more dangerous powder was substitutd.

The injury to the plaintiff resulted from his own negligence in undertaking to stir the material in the cap, without first informing himself whether it could be safely done or not, as he testifies could be, and had been done by him with the caps used in connection with the Judson powder.

There is proof by the merchant who sold the material to the defendant that he, at the time, gave him a pamphlet containing directions for the use of it. There is no question but such a pamphlet was, at some time, given to him, but it must have been done before the purchase.

But whether at the time, or before the sale, the evidence is that the plaintiff, at one time, had the same pamphlet in his possession, and could have informed himself of the nature and safe mode of using the Atlas powder. We do not, however, regard this as material, for he represented and agreed he possessed the skill and knowledge requisite to use powder containing

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nitro-glycerine and the cap accompanying it, and demanded increased price per foot on account of the increased risk, and it was his duty to inform himself, if he did not actually know, how to safely handle it, for the defendant did not know or agree to inform him how to do so.

Being satisfied, from the uncontroverted evidence in this case, and the law applicable to it, that the plaintiff was not entitled to a verdict, the judgment, appellee not complaining, must be affirmed.

BOARD OF TRUSTEES OF THE TOWN OF HARRODSBURG v. HARRODSBURG EDUCATIONAL DISTRICT.

(Filed December 1, 1887—Not to be reported.)

1. Towns and cities—Fines and forfeitures—Common schools—Under an amendment of January 12, 1860, to the charter of the town of Harrodsburg, providing that the fines and forfeitures recovered in the name of the Commonwealth in the police court of the town should be vested in the board of trustees for the use of the common schools in the town, the town and not the common schools was entitled to all fines or forfeitures arising from a violation of town ordinances, whether imposed in the name of the Commonwealth or in the name of the town.

2. Same—A subsequent act, passed in 1870, was not intended to legalize the appropriation of the funds dedicated by the act of 1860 to the use of the common schools to any other purpose.

3. Trusts—Limitation—The trustees of the town were, by the act of 1860, made trustees of an express trust, and, therefore, the statute of limitations is not an available defense in their behalf in this action to recover, for the benefit of the common schools, the fines and forfeitures arising from a violation of the criminal and penal laws of the State within the town between 1860 and 1870.

4. Common schools—By an act of March 15, 1876, the town of Harrodsburg was constituted a common school district, and was authorized to establish a system of graded schools in said district, the common school fund and all money belonging to the common schools of the district to be appropriated to the maintenance of the graded schools. Held—That the act is not in derogation of the common school laws of the State, but in aid of them, and is constitutional.

P. B. Thompson, Sr., for appellants.

Thos. C. Bell for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Bennett.

Prior to 1860 the town of Harrodsburg was constituted two common school districts. The trustees of the town were also the trustees of the common schools within said town. As such trustees they managed and controlled the common schools under the general laws and town charter.

By an act of the legislature of this State, amending the charter of the town of Harrodsburg, approved January 12, 1860, it was provided by the second section that the police judge should issue his process in criminal and penal cases in the name of the Commonwealth, and make the same returnable before him as police judge of Harrodsburg. It was provided in this section, however,

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that all prosecutions for a violation of the town ordinances should be in the name of the board of trustees, and that the town should be entitled to the fines and forfeitures arising from a violation of the town ordinances.

By the 9th section of the act it was provided that the fines and forfeitures recovered in the name of the Commonwealth in the police court, except the part allowed to the town attorney, should be vestd in the board of trustees of the town of Harrodsburg, which they were to hold and appropriate to the use of the common schools in said town, and if any of said fund was not needed in sustaining said schools, the board of trustes was to invest the same "in some safe and sure manner" for the use of said schools.

By the proviso in the 2d section of the act, the fines and forfeitures arising from the violation of the town ordinances should go to the town, and by the 9th section the fines and forfeitures arising from a violation of the criminal and penal laws of the Commownealth within the town, should go to the common schools of the town.

The fact that the fine or forfeiture for violating the town ordinances was imposed by the police judge in the name of the Commonwealth, did not have the effect of depriving the town of it, and entitling the common schools to it. The controlling idea in such a case is, did the fine or forfeiture arise from a violation of an ordinance of the town? If it did, then it belonged to the town.

By section 1 of an act approved March 21, 1870, the 9th section of the act of 1860 was so amended as to appropriate the fines and forfeitures recovered in the name of the Commonwealth in the police court of Harrodsburg, to the use of the board of trustees of said town, to be by them expended upon "the streets and other public improvements."

By the second section of this act it was provided that any disposition which the trustees of the town might have made of the fines and forfeitures "consistent with this act, and not inconsistent with the 9th section of the act aforesaid," was legalized. The evident meaning of this section is that the appropriation of such fines and forfeitures as had arisen from a violation of the town ordinances was legalized, but that such fines and forfeitures as had arisen from a violation of the criminal and penal laws within said town as were, by the 9th section, dedicated to the use of the common schools, were not to be otherwise appropriated by said act of 1870, nor was any appropriation of said fund or any part of it to other uses than common school purposes to be legalized.

By an act approved March 15, 1876, the town of Harrodsburg was constitutd a common school district, and was authorized to establish a system of graded schools in said district, in which all white children within common school age, had the right to enter as pupils, free of charge. The common school fund supplied by the State was to be appropriated to the maintenance of these graded schools, and the balance of the fund necessary to maintain them was to be raised by a tax on the white citizens of the district.

By the 10th section of the act it is provided that all money or property belonging to the common schools of said district was transferred to the trustees of the graded school district, to be used for the benefit of the graded schools, and that said trustees were authorized to sue for and recover the same.

Under the act of 1860 the fines and forfeitures arising from a violation of the criminal and penal laws of the State in the town of Harrodsburg were appropriated, first, to the immediate neces-

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sities of the common schools of said district; second, if any part of the fund arising from these sources was not needed for the immediate use of such schools, the same was to be invested in some "safe and sure manner" for the use of said schools. The board of trustees were thus made trustees of an express trust. Therefore, the statute of limitation is not an available defense in behalf of the appellant.

The 10th section of the act of 1876 expressly authorizes the appellee to sue for and recover this fund.

The colored children of the district who appeared in the action in the court below by cross-petition did not appeal from the judgment of the lower court, nor have they entered an appeal here. We can not, therefore, consider the questions raised by them in the court below.

The act of 1876 is not in derogation of the common school laws of the State, but is in aid of them. We see, therefore, no constitutional objection to the act.

The judgment of the lower court against the appellant for the fines and forfeitures arising from a violation of the criminal and penal laws of the State within said town, between the passage of the acts of 1860 and 1870, which fines and forfeitures had not been appropriated to the use of said schools, is affirmed.

GORHAM, &c. v. BETTS, &c.

(Filed October 15, 1887.)

1. Construction of devise—Survivorship—Where there is a devise to several persons, with the provision that if one of them dies, his share shall survive to the others, a share which has once vested by survivorship will not, upon the death of the devisee in whom it has thus vested, so vest again in the survivors, unless it clearly appears from the will that it was the testator's intention that it should so vest.

2. Same—Where there is a devise to several persons with a devise over to the "survivors" in the event of the death of one of the devisees, the word "survivors" will be given its natural and literal meaning, unless it appears from other provisions of the will that the testator used it as synonymous with "others."

3. Same—A devise by testator to several daughters with the provision that "in case either of my daughters above named should die, leaving no child living at her death, then her portion shall be equally divided between her sisters only, my sons taking no part thereof," created a defeasible fee, but the defeasible character of the fee ceased when but one sister remained, and her estate became absolute.

Breckinridge & Shelby for appellant.

J. F. Askew and Jas. E. Cantrill for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Holt.

James Betts died testate in 1856. His will provides inter alia as follows:

"Fourth. I direct that after the death of my wife the remainder of my estate, all debts being first paid, shall be divided among my children, James, Sampson, Sarah, Mary and Charlotte, so as to make them equal, taking into account what each one may have received of me by way of advancements, or charged in my

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estate book, which advancements are to be deducted from the shares of my children respectively, but it is my desire that my three daughters shall have a home where I now reside, and I, therefore, direct that in the division of my land the shares of my said daughters shall be laid off together so as to include the dwelling house, garden, spring lot and the ground near the dwelling house, in such form as will be convenient for them as it can be made without injury to the other shares.

* * * * * * * * * *

"Fifth. It is my will that my children shall have the full title in fee simple to the property I devise them with the following restrictions: First, during the life time of my daughter, Mary's husband, Wm. W. Brown, all her property shall be held and managed by my son, James, in trust for her use and benefit, and for the use and benefit of her daughter, Ophelia, in case of Mary's death while her said husband is living; and, secondly, in case either of my daughters above named should die, leaving no child living at her death, then her portion shall be equally divided between her sisters only, my sons taking no part thereof."

These are the only portions of it that bear upon the question now presented.

After the death of the testator's widow, and in 1867, the daughter, Charlotte, died childless.

In 1877 the daughter, Mary, died, leaving an only child, the appellant, Ophelia Gorham. Up to this time there had been no division of the estate, but it was had after Mary's death, and there was allotted to Ophelia her mother's share and one-half the portion of Charlotte, and to Sarah, the only surviving sister, her original share and one-half of that of Charlotte, the land so allotted to her being the seventeen acres now in dispute, and the right to which depends upon the construction of the above clauses of the will. She died childless in 1885, leaving a will, by which she attempted to devise to and for the benefit of the appellees the land thus obtained. The child of Mary now denies her right to do so, and claims that she, as the representative of her mother, is entitled to the property by virtue of the will of James Betts, her aunt having died childless. The half of Charlotte's portion, which Sarah acquired by survivorship, vested in her in fee. She, therefore, had the power to devise it. In cases of this character it is a general rule that accruing shares vest absolutely.

Mr. Jarman says:

"Where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares that if one of them die before twenty-one or marriage it shall survive to the others, if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." (2 Jarman on Wills, 620.)

True, this rule will give way to a positive indication of a contrary intention in the testator, but it must clearly appear. Indeed Mr. Redfield says:

"It seems to have been early adopted as a rule of construction in regard to shares which had once vested by survivorship that they should not so vest again, unless by force of express words to that effect." (2 Redfield on Wills, *373.)

The rule will only yield to the intention where it is manifest from his will that the testator intended the entire property to pass in a mass to the ultimate object of his bounty, and that an accruing share should be carried over with an original one to

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such object. No such manifest intention appears here. There is nothing in the will compelling such an implication.

The right to Sarah's original share remains to be determined.

The counsel for the appellants urge, with commendable zeal and ingenuity, that upon her death without children it, under her father's will, passed to the appellant, Ophelia Gorham, or if not that it certainly lapsed to his estate, and, therefore, the lower court in any event should not have dismissed the appellant's petition, as Ophelia, in right of her mother, has an interest in it.

The devise over in this instance is not in terms to the "survivor," as in most of the reported cases, but to the sisters, and "sisters only."

There has been much discussion as to the effect of provisions in wills in favor of "survivors." The controversy has been whether the word should have its literal and natural meaning, or whether it should, prima facie, be construed as equivalent to the word "others" in the absence of circumstances or something in the context showing that it was used in a strictly literal sense.

There is a line of older cases, as in Wilmot v. Wilmot, 8 Vesey, Jr., 10, holding to the latter view. Some eminent judges have also held that the words were convertible terms, but where the word "survivor" has been given the force of "other," thus letting in the issue of a deceased member of a class by inheritance from the parent, it has been usually done, as was the case in Harris, &c. v. Berry, &c., 7 Bush, 114, to avoid some consequence which it was quite certain the testator did not intend. It was necessary, in order to effect an intention appearing upon the entire will. The later cases, however, hold that the word "survivor," when unexplained by the context, is to be given its natural meaning and interpreted to its literal import. As this rule may often defeat the unexpressed intention of the testator, courts readily listen to any argument drawn from the context, or other provisions of the will, showing that "survivor" was used by him as synonymous with "other," but unless this appear it may now be regarded as the settled rule that its literal meaning is to be given to it. (Best v. Commonwealth, &c., 10 Bush, 36; Bayless, &c. v. Prescott, &c., 79 Ky., 252.)

Here, however, in the event of one of the class dying childless, her portion is to go to her "sisters only, my sons taking no part thereof." This language is plain and unambiguous. The intention is not left to conjecture. It can not be reached by departing from the plain meaning of its words used, because there is nothing upon which to base such a departure. His language is to be construed and not changed. As the intention is to be regarded, if it be apparent from the entire language of the will, then it must be so construed. In this will, however, there is nothing either expressly or impliedly said as to the children of the devisees taking, and Ophelia was then in being, and in fact named in it. If Charlotte had survived Mary, and then died childless, Ophelia would not have been entitled to any of her portion, because under the plain language of the will it would have passed to the surviving sister, Sarah.

The devise to the daughters was in fee upon condition. A defeasible fee was created, but only so long as there was a survivor of the class named. The devise over was to a surviving sister. When but one remained alive there could be no defeasance, although she might die childless. The devise over was no longer effective. The defeasible character of the fee ended when but one sister remained alive. The defeasance could no longer prevail. The testator declared that if one of the three sisters died childless her portion should go to "her sisters only, my sons

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taking no part thereof." It is but a question of intention, and the testator knew that, under the plain language used by him, the right to the property was limited to the sisters, and that its defeasible character must necessarily end when but one of them remained alive. He must, therefore, have intended that the fee simple should then vest in her. This being so, she had the power to dispose of it by will, and there was no lapse of the devise as to even her original share, although she died childless.

Judgment affirmed.

BLACK v. STEFLE.

(Filed December 3, 1887—Not to be reported.)

1. In an action to set aside a sale of land under execution issued upon a transcript from a justice's court, upon the ground that the execution issued from the justice's court and returned "no property" was not signed, it is held that even conceding it to be a fact that the execution was not signed, yet, as the defendant, after several years' delay, has sought relief in this action instead of moving to quash the execution and sale, the chancellor had the power to require of him to pay the debt, which can not now be made by execution, as a condition of his recovery of the land.

2. The defendant in the execution having slept on his rights so long, it is too late for him to say the sale of the land should now be set aside, upon the ground that the debt was paid before the judgment on it was even rendered.

3. The burden is upon the defendant to show that fifteen years had elapsed from the date of the judgment to the date of the execution, in order to set aside the sale upon that ground.

J. W. Jones for appellant.

Boyd & Craft for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

The allegation that the debt was satisfied by appellant at the time appellee caused the execution to issue from the justice's court, and upon the truth of which the charge of fraud mainly depends, is not sustained, but clearly shown by the evidence not to be true. For long after he testifies his daughters worked for appellee, which work he admits did not fully pay off the debt, he was regularly served with a warrant from the justice's court, and judgment was rendered against him by default, and it stood undisputed and unsatisfied until the execution was issued and returned no property found, and the land was finally sold, under an execution from the circuit court clerk's office, the deed made therefor to the purchaser, and he had been in possession several years. Having slept on his right so long, it is too late for appellant to say the sale of the land, which he knew had been levied on, should now be set aside, upon the ground the debt was paid before the judgment on it was even rendered.

Nor do we think fifteen years had elapsed from the date of the judgment to the issual of the execution. For although the transcript from the justice's court is somewhat obscure and contradictory as to the date of the judgment, it being recited in one place it was rendered in December, 1867, and in another it was in 1861, it is distinctly alleged, in the answer of appellee, that the true date is 1867, the figures being made by mistake in copy-

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ing the record, and that allegation is not denied. Besides, as appellant in this action seeks to set aside the sale by the sheriff and to cancel the deed to the purchaser and recover the land, upon the ground that fifteen years had elapsed from the date of the judgment to the date of the execution, the burden was upon him to show it, which he has failed to do.

From the transcipt of the record purporting to be made out by the justice of the peace, and filed as an exhibit, it appears that an execution was, December 12, 1877, issued and directed to any constable of Laurel county, and there is an endorsement thereon by the constable, in whose hands it was placed, in substance no property found, but the execution, according to the copy before us, does not purport to have been signed by the justice of the peace, and it is contended for that reason the execution subsequently issued by the clerk of the circuit court and the sale of the land under it, are void. On the other hand, appellee denies the execution was not signed by the justice of the peace, but says it was, in due form of law, issued and returned, and such would be the presumpiton, in the absence of proof.

The sale of the land, of which appellant had notice, was made more than four years before the institution of this action, and he made no motion to set it aside, or to redeem the land by paying the debt, although the purchaser afforded him an opportunity to do so, even after the expiration of the time allowed by law. Moreover, appellee, in his answer, offered to still give up the land to appellant, upon the payment by him of the debt, which, beyond question, has never been paid, except by a sale of the land, and the costs of this action, which was refused.

It, therefore, seems to us that, conceding the noncompliance with the statute by the justice of the peace, inasmuch as appellant, after such long delay, has sought relief in this action, instead of moving to quash the execution and sale, the chancellor had the power to require of him to pay the debt, which can not now be made by execution, as a condition of his recovery of the land, and the judgment is affirmed.

LANCASTER v. CLAYTON, &c.

(Filed December 3, 1887.)

1. The legislature may confer the taxing power upon municipalities in such manner as it deems expedient, but it can not confer any greater power than the State itself possesses, and must observe the restrictions and limitations of the organic law.

2. Exemption from taxation—Public service—The legislature can not exempt property from taxation save in consideration of public service, and in determining what constitutes a public service the true test is: Is the object of such a character that the municipality, in the exercise of a governmental function, can aid it?

3. Same—Whatever directly promotes individual interest, although it may also tend incidentally to the public welfare, is essentially a private and not a public object, and it is the essential character of the object of the expenditure and not the degree of the incidental public benefit which must determine the validity of the tax.

4. Same—The fact that one, in order to conduct a particular business for his own profit, must comply with certain regulations or submit to certain

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rules of law, does not so far render him the ward of the government that the exercise of the taxing power can be invoked in his behalf.

5. An agreement by a city to exempt a hotel from taxation, when built, can not be enforced, although the hotel was built upon the faith of the city's agreement. The exemption not being in consideration of public service is not valid.

D. W. Lindsay for appellant.

Owens & Finnell for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Holt.

The appellant, George Lancaster, proposed to the board of trustees of the town of Georgetown to erect at said place a fine hotel, costing not less than a certain sum, if they would exempt the property from the payment of town taxes for ten years. The offer was submitted to a vote of the people, and a majority favoring it the proposal was accepted by the board, and thereupon the hotel was built. The following year, however, they had it assessed for such taxes, and the appellant now seeks to enjoin their collection.

The contract and its performance upon his part are admitted. There is no doubt of the morality of his claim to the exemption, but even a court of equity can not enforce a merely moral obligation. The legality of the contract must be considered, because the appellee has the right to insist upon its strict legal rights.

Section 3, article 1, chapter 92 of the General Statutes, provides:

"All property, real and personal, within this State, not herein expressly exempt by law, shall be assessed, as nearly as practicable according to a uniform rate, in the manner hereinafter provided."

The charter of the appellee authorizes its board of trustees to assess and levy annually a tax upon all the real estate in the town; makes it the duty of the assessor to list all that is liable to taxation, and vests the board with the control of the fiscal matters of the town. (Acts 1879, volume 1, page 357.)

No power to exempt property from taxation is attempted to be given in express words. We shall, however, waive the question whether this has been done by implication, and proceed to a consideration of the power to do so even with attempted legislative sanction in a case like this one. Mr. Dillon says: "In the absence of special constitutional restriction the legislature may confer the taxing power upon municipalities in such measure as it deems expedient. In other words, with such limitations as it sees fit as to the rate of taxation, the purposes for which it is authorized, and the objects (that is the property) which shall be subjected to taxation, but it can not, of course, confer any greater power than the State itself possesses, and must observe the restrictions and limitations of the organic law." (2 Dillon's Municipal Corporations, section 59.)

Our State Constitution has no provision as to taxation eo nomine, but the first section of the Bill of Rights says:

"That all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services."

It is a "public privilege" to be exempt from taxation, and the legislature can only authorize the imposition of a tax when it is

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for a public purpose, so it also passes its constitutional limit when it atttempts to confer exemption from taxation, save in consideration of public service. The courts will not inquire as to the extent of this service. Indeed, they have no power to do so, but only whether the privilege has been given in consideration of such service. If so, it is then a question of policy and not of legislative power.

The burden of taxation is justly a common one. Its object is to provide means for the protection and benefit of all, and this being so, all should help to bear it. An exemption to one person is but additional burden to another.

To take from one and give to another, under the guise of taxation, is, indeed, but robbery under a legalized form, and counter to the spirit and genius of our system of government. It is true the taxing power is a broad and liberal one, and properly so. It extends aid to public schools, because education is a public purpose; to roads, because they are necessary for travel; for police purposes, to preserve the public peace. In short, for all purposes, which, in a liberal sense, can be considered public. It can not be used, however, to take from one person his property and give it to another one more favored, and this, too, although it may incidentally benefit the community.

The incidental benefits of capital do not authorize partial taxaiton. Thus it was vitally necessary to the commercial prosperity of the city of Boston, after the great fire of 1872, that it should be rebuilt, but it was held in Lowell v. Boston, 15 Amer. Reports, 39, that its inhabitants could not be taxed to raise money to loan to the sufferers to enable them to rebuild.

Whatever directly promotes individual interest, although it may also tend incidentally to the public welfare, is essentially a private and not a public object, and it is the essential character of the object of the expenditure, and not the degree of the incidental public benefit, which must determine the validity of the tax.

For this reason the legislature can not constitutionally authorize a municipality to loan its credit to those who, in consideration thereof, will engage in manufacturing for their individual benefit, and it was, therefore, held in Allen v. Jay, 60 Me., 124, that the inhabitants of a town could not be taxed to raise money to give or loan to those who, for their own benefit, proposed to erect a saw-mill, although it was desirable for the public interest that it should be done.

To the same effect is the Commercial Bank v. City of Iola, 2 Dillon, 353, and Curtis' Adm'r v. Whipple, &c., 24 Wis., 350.

It certainly will not be questioned that a municipality cannot be empowered to raise money by taxation to be given away, unless for charity or benevolent purposes of a public character. Such legislation would, beyond question, be unconstitutional. If it can do so, to give to A, then B is equally entitled to it, and the minority is at the mere mercy of the majority without any legal rule to protect them. No such unlimited power exists under our form of government. Now the remisssion of the tax due from a taxpayer is but a gift to him. The effect is the same. It releases him from it and puts it upon his neighbor. It makes no difference to A whether the municipality gives B so much of its funds or releases him from the payment of that much due from him to it. It is partial legislation of the worst character, because it relates to the high governmental power of taxation.

For the same reason, therefore, which forbids a municipality from loaning its credit or giving its funds to individuals for private purposes, although resulting incidentally to the public

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good, it was held in the case of the Brewer Brick Co. v. Brewer, 62 Me., 62, that no legislative sanction could authorize the town to grant an exemption from taxation to an individual carrying on a business for private gain, although the community were thereby incidentally benefitted. It is urged, however, with zeal and ability by counsel for the appellant, that the building of the hotel was not only a public benefit, but that an inn-keeper is under public control and renders a public service, and is, therefore, within the saving of the constitutional provision above cited.

Taxes are burdens imposed by the legislature for public purposes. There can be no lawful tax save for a public purpose.

It is often difficult to draw a line showing clearly the degree of benefit the public must derive from an enterprise in order to sustain an exercise of the taxing power in its favor. So, too, we finnally reach a point where it is troublesome to distinguish what is public service from that which is essentially for private benefit.

Is the object of such a character that the municipality in the exercise of a governmental function can aid it? This is the true test. The keeping of a hotel is essentially a private business, conducted for private gain. It is true the inn-keeper must have a license and in the absence of some good excuse, such as lack of room or the like, must entertain all who conduct themselves properly and are apparently able to pay for it. But the fact that one, in order to conduct some particular business for his own profit, must comply with certain regulations or submit to certain rules of law, does not so far render him the ward of the government that the exercise of the taxing power can be invoked in his behalf. Certainly a tax could not be constitutionally levied to aid one in building or conducting a hotel, and to exempt the keeper from the payment of the tax thereon is but doing indirectly what can not be done directly.

It is unlike a State educational institution or one created by law for the education of the people generally, because it is a mere private undertaking.

In the case of Weeks v. City of Milwaukee, 10 Wis., 242, the city authorities attempted to exempt a hotel from city taxation, "in view of the great public benefit which the construction of the hotel would be to the city," as they declared in their ordinances. The claim to exemption was refused, however, by the Supreme Court of that State upon the ground that it was beyond the limit of legislative power to do so. Indeed the claim to such favor by reason of such partial legislation was treated with little favor, and this case was approved in Brewer Brick Co. v. Brewer, supra.

In the case of the Loan Association v. Topeka, 20 Wall, 655, where the question was whether a city could loan its credit to a manufacturing enterprise and then use the taxing power to meet the liability thus incurred, Justice Miller said:

"If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employes capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions."

The enterprise in which the appellee invested his means was primarily for private gain, and under the test above indicated it must fall within the general law applicable to all alike.

Judgment affirmed.

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RILEY v. SMITH, &c.

(Filed December 3, 1887—Not to be reported.)

1. Homestead—A widow is a housekeeper residing upon land owned by her. Her family consists of her son, his wife and their eight infant children. The son is physically unable to support his family, and his mother not only materially aids him in doing so, but furnishes the house in which they reside. Held—That the mother is entitled to a homestead, it being her moral and natural duty to support her infant grandchildren.

2. Pleading—Relief—In this action by appellant to have all or a part of 226 acres of land owned by her allotted to her as a homestead, the sheriff, who had sold 150 acres of the land under execution against appellant, the purchasers thereof and the execution creditors were made defendants. The defendants did not ask any affirmative relief, but alleged that the remaining seventy-six acres of land was of the value of $1,000. The court allotted to appellant 129½ acres of the land as a homestead, and ordered a sale of the remainder of the land to satisfy the debts of the execution creditors, although they had not asked any affirmative relief. Held—That the case being before the chancellor, the debts unsatisfied and the land confessedly subject to them, it was proper for the chancellor to afford complete relief to both parties and end the litigation by directing the sale.

P. B. Muir and W. R. Thompson for appellant.

F. P. Straus for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Lewis.

Appellant instituted this action for judgment allotting to her as a homestead all or so much of her farm of about 226 acres as amounted in value to $1,000. She made the sheriff, who had previously sold 156 acres of the land under two executions in his hands against her, the purchaser thereof, and the execution creditors defendants to the action.

The court rendered judgment that she was, under the statute, a bona fide housekeeper, with a family, and entitled, as a homestead, to so much of the land, including the dwelling house and appurtenances, as was of the value of $1,000, and directed the master commissioner, with the aid of the county surveyor, to survey and set it apart to her.

It was further adjudged that so much of the residue of the tract necessary for the purpose be sold to satisfy the judgments upon which the executions mentioned were issued.

From that judgment, the plaintiff prosecutes an appeal, and the defendants a cross-appeal.

The evidence shows that appellant is a widow, and has, for many years, owned and resided on the land as a housekeeper. She has no children of her own under age, but has a married son who, with his wife and eight children, all infants, reside with her, and he and his wife have so resided with her, and constituted a part of the household, of which she has been the recognized head and principal support, for many years.

It is not necessary, under the statute, that the family mentioned therein should consist of the infant children of the debtor claiming the homestead exemption. It is sufficient if it be of one or more persons whom he is under a natural or legal obligation to support, and who is dependent upon him therefor, and conse-

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quenlty it has been held by this court that a mother, sister, infant brother, and even a bastard child of the debtor come within the reason of the statute.

The evidence shows that the son of appellant is physically unable to support his wife and children, and appellant not only materially aids him in doing so but furnishes the house in which they reside.

It seems to us that to decide that the moral and natural duty of appellant to support her infant grandchildren does not, under such circumstances, exist, and as a result that both she and they must be deprived of the only shelter they have, would be a perversion of the beneficent object of the law, and the court properly set apart to her a homestead in the land.

But she complains that as the weight of the evidence showed the entire tract to be worth not exceding $1,000, it was erroneous to allot to her a less quantity as a homestead.

The opinions of witnesses as to the value differ so much, some fixing it as low as $800, and others as high as $2,600, that it would not be safe to adopt either extreme as the criterion. The master commissioner, after a survey and examination of the land, set apart, as the homestead, 129½ acres of the best land, upon which was the dwelling house and appurtenances, leaving ninety-four acres subject to appellant's debt, and as the allotment made by him seems to be in accordance with the average value of the land fixed by the witnesses, and no appreciable injustice was done thereby to either the debtor or creditors, we think the exceptions of both to his report were properly overruled.

It is contended that inasmuch as the answer of appellees does not contain a prayer for affirmative relief, the lower court had no power to order a sale of the residue of the land to satisfy the debts, for which 150 acres of the entire tract had been previously sold under execution and purchased by appellee, Straus. It seems that the sheriff, instead of setting apart the homestead, sold 150 acres of the land on the south side, leaving seventy-six acres unsold, which appellees alleged and endeavored to show was worth $1,000. But the effect of the judgment in this case was to set apart 129½ acres, instead of seventy-six acres. It in terms also set aside the sale to Smith, leaving the two judgments against her unsatisfied, and that appellant does not complain of, but as her counsel contends, was asked for by her. In our opinion, the case being before the chancellor, the debts being unsatisfied, and the ninety-four acres of the land confessedly subject to them, it was in his power and proper to afford complete relief to both parties, and end the litigation by directing the sale.

Wherefore, the judgment on the appeal and cross-appeal is affirmed.

KENTUCKY SUPERIOR COURT.

BOHANNAN v. ELLISON'S ASS'EE.

(Filed October 26, 1887.)

1. The filing of a pleading in the clerk's office in vacation, without anything to show notice to the adverse party, is not sufficient to require the adverse party to plead to it or to prepare his case with a view to such a

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pleading. The court can not, by the order allowing a pleading to be filed in vacation, dispense with the notice required by section 108 of the Code.

2. The plaintiff was not entitled to demand a trial if a reply filed by him in vacation, without notice, was to be regarded as a part of the pleadings, since it was by his default in failing to give notice of the filing that the pleadings were not completed ninety days before the term; and the case, if tried, should have been tried upon the petition and answer.

3. A rejected pleading must be identified and made a part of the record by order of court, or bill of exceptions, in order to enable this court to review the action of the lower court in rejecting it.

Thomas J. Barker for appellant.

P. J. Foree for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Ward.

"Equitable actions shall stand for trial at any time if the pleadings have been, or by the provisions of sections 102, 104, 105 and 106, should have been, completd ninety days before the commencement of such term, but if they have not been so completed, though they should have been, by those sections, the party in default as to time shall not be entitled to demand a trial." (Section 364 of the Code.)

No provision is made in either of the sections of the Code referred to in section 364, as to the time which shall be allowed to file a rejoinder to a reply, unless the reply is filed at the time it ought to be, but it is evident from said sections that a party can not be required to rejoin or plead to a reply filed out of time, until he has notice of the fact that a reply has been filed.

By section 107 it is provided that "the court may, for good cause shown, and at the cost of the party applying therefor, extend the time for filing a pleading, but not beyond the next succeeding term."

By section 108 "the filing of an answer, or other subsequent pleading, in the clerk's office during vacation, within the time allowed, with notice thereof to the adverse party, or his attorney, shall be equivalent to a filing in court."

In this case the answer was filed when due. The plaintiff asked for and secured thirty days within which to file a reply, and it was provided, in the order granting the time, that the filing in the clerk's office should have the same effect as if filed of record. But this order the court had no authority to make, except upon condition that the reply was filed within the time allowed and notice of the filing was given to the defendant or his attorney, and even this provision would have been unnecessary, as the law provides the terms upon which a filing in vacation shall be equivalent to a filing in court.

It appears from an endorsement of the clerk, made upon the reply and copied into the record, that the reply was filed in his office within the thirty days. It might be questioned whether the clerk's endorsement, unless made a part of the record by an order of court, or by the giving of notice, as provided in section 107, is any part of the record to be considered by this court, but waiving that question and allowing that it may, there is nothing whatever in the record to show that the defendant, at any time, had any notice that the reply had been filed. No actual notice was given of the filing. No order of court was made noting the filing, which would have given him notice, actual or constructive.

It has been held that a pleading which has been filed in the

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office, and subsequently treated by the parties as filed by responding by counter pleading to its allegations, will be regarded, though never noted of record. (Bowler v. Lane, 3 Met., 312.) But we are aware of no case in which it has ever been held that the filing of a pleading in the clerk's office in vacation, without anything to show notice to the adverse party, is sufficient to affect the rights of such adverse party, either by obliging him to prepare his case with a view to a pleading of which he has no notice, or by pleading to it.

When the case was called for trial the defendant objected to the submission. This objection should have been sustained if the reply was to be regarded by the court as a part of the pleadings, for, if to be so regarded, the time had not then arrived within which defendant had the right to file a rejoinder, and the case could not be submitted on the motion of plaintiff since it was by his default, in failing to give notice of the filing of his reply, that the pleadings had not been completed ninety days before that time. After the case was submitted it was error to allow the reply to be read. The case, if tried, should have been tried upon the petition and answer.

Whether the court erred in not permitting the amended answer to be filed we can not consider, since the pleading is not made a part of the record by order of court or by bill of exceptions. A party wishing to complain of an error in refusing to allow a pleading to be filed, must have the rejected pleading identified and made a part of the record, by order or a bill of exceptions.

But it may not be improper to add that inasmuch as the pleadings have not been perfected, and as the case is not prepared for trial, the defendant should be allowed to amend his answer so as to complete or perfect his defense.

The judgment is reversed and the cause remanded for further proceedings.

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SUPERIOR COURT ABSTRACTS.

HILL v. BECKER.

Filed November 30, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Infancy is not a defense when the action is to recover damages for a pure tort, but is a defense when the action is on a contract, unless it is for necessaries. Between these extremes there is a class of cases involving both contract and tort. In these the defendant can not be made liable as a wrongdoer for such mere negligence as would, in an action on the contract, constitute a breach of it. His act must be "a positive, willful and tortious act," and not merely a failure to exercise proper care and discretion.

Therefore, where an infant hires a horse and injures it by hard driving he is not liable unless he was conscious of the dangerous character of the act.

The recklessness or wilfulness which makes the infant liable must be predicated of the injury and not merely of the act which produced it.

T. E. Ward for appellant; Richards & Hines for appellee.

FINCH v. LOWE.

Filed November 30, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Practice—It is in the discretion of the court to permit pleadings to be filed out of time.

2. Same—There must be an exception to an order allowing a pleading to be filed to enable this court to reverse on that ground.

3. Same—The appellant can not complain of surprise by reason of the filing of an amended pleading, when he did not ask for a continuance upon that ground.

T. P. Makibben and C. J. Helm for appellant; Jesse Arthur for appellee.

REGAN v. CURRY.

Filed November 30, 1887. Appeal from Pendleton Chancery Court. Opinion of the court by Presiding Judge Bowden, affirming.

Executions—Exemptions—The defendant in an execution owned four horses, on one of which the constable levied an execution. The defendant, seeking to enjoin the sale, alleges in his petition that the horse levied on was his favorite horse, and that he then claimed it as exempt, but he does not allege that his preference was made known to the officer, or that he offered to substitute one of the others for it. Held—That there is no ground for enjoining the sale.

J. L. Dougherty for appellant; C. H. Lee for appellee.

THORN, &c. v. HENDERSON.

Filed November 30, 1887. Appeal from Campbell Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Appeals—Record—A paper copied into the record as an amended answer, which is not made part of the record, either by order of court or by bills of exception, can not be considered.

2. In an action to enforce a mortgage lien upon tobacco, and to recover the tobacco from third parties who have taken it into their possession, the defendants claim by their answer to have purchased the tobacco at a sale under an execution against the mortgagor. Held—That the answer is insufficient in that it does not appear that the tobacco purchased at the execu-

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tion sale was the same tobacco covered by the mortgage, and also in that the judgment upon which the execution issued is not set out.

3. Mortgage—Pleading—If a mortgagee sues a party to recover mortgaged personalty, and the defendant asserts title in himself acquired under sale under an execution against the mortgagor made after the date at which the mortgage was executed and delivered to the plaintiff, though before it was recorded, he should set out the judgment upon which the execution issued.

Jesse Arthur and George Washington for appellants; J. R. Hallam for appellee.

MAUER v. BALDWIN & CO.

Filed November 30, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

Conditional sale of piano—Appellees sold to appellant a piano, it being agreed that the piano was to remain the property of appellees until paid for, and that if the appellant failed to pay any of the several notes for the purchase money when due, appellees might resume possession of the piano. Appellees sued to recover the possession of the piano, alleging that, although al the notes for the purchase money were past due, but one of them had been paid. A judgment by default was rendered, adjudging the appellees the possession of the piano. Held—That the contract set out in petition was valid as between the parties, and while a court of equity might afford the vendee relief when he had paid such a part of the purchase price as to make it inequitable for the vendor to claim the specific property, yet no such question can arise here; as four of the five notes were wholly unpaid, and the defendant chose to allow a judgment by default to go against him.

J. W. Rodman for appellant; C. W. Ray, Simrall & Bodley and F. W. Morancy for appellees.

BLACKBURN v. HALLY, &c.

Filed November 30, 1887. Appeal from Powell Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Debtor and creditor—Fraud—It is not fraudulent for a debtor to make a voluntary disposition of his property which is exempt from execution.

2. Same—A creditor can not compel the debtor to work that he may earn wages, which, when earned, will be liable to be taken in satisfaction for debt, and, therefore, a debtor may abandon a contract which he has made to perform labor in order to prevent his creditor from subjecting his wages.

3. Same—A. contracted to make a certain number of brick for B. at an agreed price, but fearing that C., his creditor, might attempt to subject his wages, he abandoned the contract. Thereupon, D., his father-in-law, made a contract with B. to have the brick made for the same price. D. was to pay A. for his work, but at what rate does not appear, though it may be assumed that he was to pay all that was earned by the contract. D. did not understand making brick. A. attended to the making of the brick as if he had made them under his contract with B. At the conclusion of the job, B., after paying the hands, other than A., engaged in making the brick, owed a balance on the work. During the progress of the work D. had made payments to A., which, together with the amount of a note which A. owed him exceeded the balance due by B. This suit was instituted by C. to subject the balance due by B. to the payment of his debt against A., the petition alleging that the arrangement between A., B. and D. was a fraudulent device to cover up A.'s wages, and to prevent the plaintiff from collecting his debt. Held—That the plaintiff is not entitled to the relief sought.

H. C. Lilly & Son for appellant; Riddle & Fluty for appellees.

MILLER, &c. v. RICE, &c.

Filed November 30, 1887. Appeal from Boone Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Illegal contract—An act of the legislature authorized the Boone County

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Court when requested thereunto by a petition signed by a majority of the owners of land in a certain road district, to have a turnpike laid out and constructed, and to levy a tax to pay for its construction. To induce H., a taxpayer, to sign a petition afterward presented to the county judge and acted upon by him pursuant to the provisions of the act, the persons who presented the petition agreed with H. that if the tax should be imposed they would pay all the tax which might be levied upon his property in excess of a certain amount. The tax having been imposed, two of the four persons who thus contracted with H. paid his tax as agreed, and now sue their co-obligors to recover one-half the amount thus paid. Held—That the contract was based upon an illegal consideration and can not be enforced. It was wrong to all the taxpayers of the district for any one to sign the petition for a valuable consideration.

2. An order overruling a demurrer to a pleading on the merits of the action or defense is never final or beyond the control of the trial court until a final judgment is entered It was, therefore, no error in this case to allow the answer to be withdrawn and to set aside an order made at a preceding term overruling a demurrer to the petition, and upon failure to amend to dismiss the petition.

3. Demurrer—Even if error to allow a general demurrer to be made without being reduced to writing and signed and filed as a pleading, such an error was not prejudicial.

J. J. Landram for appellant; F. Riddell for appellees.

DOBBINS v. JACOBS.

Filed November 30, 1887. Appeal from Greenup Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Pleading and practice—An indebtedness growing out of a transaction which has no connection with the matters set up either in the petition or answer can not be set up by reply; but as there was a rejoinder in this case, the court will assume that the parties desired the matters set up by the reply to be settled in this action, which involves a settlement of both partnership and individual transactions between the plaintiff and defendant.

2. Same—Allegations in a reply which are such as can not, under the Code, be presented by reply can not be made good by a simple reference to them in an amended petition with the statement that they are made part of the amended petition.

3. An amended petition filed after an answer had been filed is not a part of the record in the absence of an order of court permitting it to be filed.

4. A partnership was formed for the purpose of getting out, shipping and selling tanbark. One of the partners furnished a boat for the shipment of bark, for the use of which, it seems, he was to be compensated by the firm. When there was not a full load of partnership bark he made out the load with his own property. Held—That the firm should not be charged with the whole cost of towing the boat and other expenses in getting it to market, but these expenses should be apportioned between the firm and the individual partner using the boat.

5. In the absence of a bill of exceptions, showing the evidence heard on the trial, this court can not reverse unless from the pleadings and the judgment itself it appears to be erroneous.

E. F. Dulin and R. E. Roe for appellant; T. H. Paynter for appellee.

FARNAN v. LEXINGTON ICE MANUFACTORY.

Filed November 30, 1887. Appeal from Fayette Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Contracts—Appellant undertook, by written contract, to erect for appellee a still, to be connected with appellee's machinery and used in distilling water. The contract provided that the temperature of the water, when it left the still, should not exceed seventy degrees of heat, and that the appellee should not pay anything for the work unless it should prove satisfactory

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after being tested not less than fifteen days. Appellant brought this suit upon the contract, and by a second paragraph of his petition sued for the value of the work and labor performed, alleging the acceptance and use of the work by appellee for what it was worth to it. The petition alleged that, while the temperature of the water, when it left the still, exceeded the prescribed degree, this was the fault of the defendant in not furnishing a sufficient supply of cold water to make the proper test. The defendant did not allege that the plaintiff had requested them to apply any unreasonable test, or any test beyond the water supply under its control at the time the contract was made, but merely alleged that they had furnished every means and opportunity to plaintiff to test the work. Held—That the only question for the jury as to the test was this: Would the still, if furnished with the water demanded by plaintiff, have produced the water in quantity and temperature prescribed in the contract?

2. Quantum meruit—Even though the work is not such as the contract prescribed that it should be, yet if the defendant accepted it, notwithstanding that fact, and used it, it must pay what it is worth to it not exceeding the reasonable value of the material and labor. And as its only liability on that ground is the value of the thing to it, there is no room for damage because it was not something better.

T. N. Allen for appellant; D. G. Falconer for appellee.

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KENTUCKY COURT OF APPEALS.

WILSON & ADAMS v. HALSTEAD.

(Filed December 6, 1887—Not to be reported.)

Judgment reversed on evidence—In this action by appellees to recover the price of lumber furnished appellants under a contract to buy lumber for them, the court holds that the evidence shows that all the lumber furnished by appellees has been paid for, and that appellants are not indebted to them, and reverses the judgment because it is against the weight of the evidence.

R. D. Hill and Wm. Lindsay for appellants.

C. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

The appellee filed his petition in the Whitley Circuit Court against the appellants, in which he sought to recover $6,544.22 from the appellants, which sum he alleged was due him for the price of lumber furnished the appellants.

The appellants controverted the appellee's allegation.

Upon the hearing of the case the circuit court rendered judgment for the appellee for over $4,000.

The appellants have appealed from that judgment.

On the 19th of April, 1880, the appellee, by written arrangement, agreed to enter the service of the appellants to buy lumber for them, for which he was to receive the sum of $800 per annum, and all expenses incurred by him in the discharge of his duties. His pay was to commence from the first of February, 1880. He also transferred to the appellants all the lumber then belonging to him.

The appellee's headquarters were at Wilmington, Ohio. He was to purchase lumber for the appellants from that vicinity and ship the same to New York, and render to them monthly vouchers of the quantity of lumber shipped and the costs and expenses of the same. The appellants were to deposit money, from time to time, in the bank at Wilmington, upon which the appellee had

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authority to check for the purpose of paying for the lumber that he bought and the expenses concerning the same.

The appellants, becoming dissatisfied with the arrangement, they, on the 12th day of December, 1881, discharged the appellee from their service.

The appellee says in his reply (see record, page 129), that on the 12th day of December, 1880, he and appellants "did make a settlement" of the business matters, which settlement showed that the appellants were indebted to him in a balance of $423.09; that this was all the appellants owed him for lumber that he had shipped to them at that time. He says that at the time of this settlement he had on hand 93,259 feet of ash lumber, 42,033 feet of oak, 174,357 feet of walnut, 4,844 feet of cherry, and 3,053 feet of gum; that it was nearly all his own lumber, and had been purchased by him after he had ceased to work for the appellants.

He says in his deposition that he purchased no lumber for himself during the time that he was in the service of the appellants, except in one or two instances which was with the consent of the appellants. He admits in his reply that $423 was all that was due him for lumber shipped to the appellants down to the 12th of December, 1881. He says that the quantity of lumber mentioned above was on hand at the time of the settlement, and that most of it belonged to him and had been purchased by him after he quit the employment of the appellants.

Charles Adams, one of the appellants, swears that he made the settlement with the appellee on the 12th of December, 1881, and in that settlemnt the appellee was found to be due the appellants all the lumber that he thereafter shipped to them; that he executed bond to the appellants to the effect that he would ship it to them; that the appellants agreed to pay him an agreed sum for his services in shipping the lumber to them. Said Adams is positive and direct that the lumber thus agreed to be shipped belonged, according to the appellee's own showing, to them, and that they had paid for it.

On the 19th of April, 1882, the appellee wrote the appellants a letter in which he stated that he had shipped all of their lumber, and that there was a balance in his favor of $430.20. Charles Adams arrived in Wilmington on the 20th of April, 1882, and the appellee told him the purport of the letter that he had written the day before. Adams expressed surprise at this and told the appellee that he knew he owed him more lumber, and gave him a memorandum of the amount, and he agreed to ship it as fast as possible, agreeing, however, that mistakes, if any were found, should be corrected.

After then the appellants' agent appeared in Wilmington. According to his statements, the books and vouchers were again gone carefully over, and the appellee was found to be due the appellants more lumber, which he agreed to ship. But mistakes, if any were found, were to be corrected. The detailed statements of these witnesses, which show clearly that the appellants are not indebted to the appellee on account of any lumber, were not denied by the appellee, except in a general statement made in his deposition, which was taken before the appellants gave theirs, showing the quantity of lumber shipped, its cost and the amount of money received from the appellants, leaving the balance claimed by him.

Owing to the large size of the record, consisting mostly of evidence and exhibits, it would be almost impossible to give an extended analysis of the evidence within any reasonable space. It is, therefore, sufficient to say that the weight of the evidence is clearly to the effect that the appellants are not indebted to

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the appellee on account of any lumber; that the lumber shipped to them by the appellee after he quit their employment was lumber due them, and for which they had paid.

The judgment is reversed, and the cause is remanded, with directions to dismiss the appellee's petition.

HENDERSON'S ADM'R v. KENTUCKY CENTRAL R. R. CO.

(Filed December 6, 1887.)

Action under statute for wilful neglect—Who may sue—The widow and child, or children, of one who has been killed by the wilful neglect of another have the prior right to sue for, and the exclusive right to what may be recovered in an action authorized by section 3 of chapter 57, General Statutes, for, though the right to sue is given to the personal representative, he can exercise that right only for the use and benefit of the widow and child, if there be any, the word heir, as used in the statute, being intended to mean child, and not to apply to any other description of person.

The personal representative, at the widow's request, instituted this action under this statute. Subsequently the widow instituted another action against the same defendant upon the same cause of action. The defendant chose to defend the action instituted by the widow, and pleaded the pendency of that action in bar of the recovery in this. Held—That the widow, being the sole beneficiary, had the right to institute the second action, and the defendant had the right to defend either of the actions and plead the pendency of either one of them in bar of recovery in the other; though if there had been children of the deceased entitled jointly with the widow to what might be recovered, she could not have defeated this action, instituted at her request, nor prejudiced their rights, by subsequently commencing another in her own name.

What proportion of the amount recovered the widow and children may be respectively entitled to, whether the right belongs to adult as well as minor children, and whether the personal representative may maintain such an action in case there be neither widow nor child of the person whose life has been destroyed, are questions not involved in this case and not decided.

Cleary & Hamilton for appellant.

Geo. C. Lockhart and Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

This is an action, brought under section 3, chapter 57, General Statutes, by the personal representative to recover damages for the destruction of the life of Charles L. Henderson by the alleged willful neglect of the defendant or its agents, which section is as follows:

"If the life of any person is lost or destroyed by the willful neglect of another person, * company, * corporation, * their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person, * company, * corporation, * and recover punitive damages for the loss or destruction of the life aforesaid."

Of the various issues of law presented it is only necessary to consider that made by the second paragraph of the second amended answer and reply thereto, to which a general demurrer was sustained. It is, in that paragraph, stated, in substance, that after this action was commenced and the original answer

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was filed, Louisa Henderson, widow of the deceased, instituted her action, then pending in the same court, against the defendant, in which she seeks to recover judgment for damages alleged to have resulted from the death of the deceased, through the willful neglect of the defendant, under the identical circumstances stated by the plaintiff in this action, and the pendency of that action is pleaded in bar of the further prosecution of this.

For reply the plaintiff stated he was, after the written declination of Louisa Henderson to act, and upon her motion, duly appointed administrator of the estate of the deceased, for the purpose of instituting and maintaining this action for her benefit. He also denied her right to then prevent the prosecution of this action.

As, upon the failure of the plaintiff after the demurrer was sustained, to further reply, the action was dismissed, the question before us is whether the facts stated in that paragraph of the answer are sufficient to constitute a defense to the action, and if so, whether those stated in the reply constitute an avoidance of such defense.

In construing the section quoted several questions bearing on this case arise which it is necessary to determine.

According to the plain language used, either the widow, heir or personal representative may sue, but it is equally clear that each of them can not maintain a separate action for the same cause, for, as held in the case of Louisville & Nashville R. R. Co. v. William Sanders,* decided at the present term, but one recovery can be had.

If, then, there can be but one action maintained and but one recovery had under the statute for the destruction of the life of the same person, the inquiry arises:

1st. Whether there exists any priority of right to sue between those named in the section?

2d. Whether, when the personal representative sues, or in any case, the amount recovered, or any part of it, goes into his hands as part of the assets of the decedent's estate?

3d. Whether the word heir is to be interpreted to mean child, or given its usual and more extensive signification?

While looking alone to the language of the section we would not be authorized to say any one of those named is entilted to precedence, it is not to be supposed the legislature intended the first right to sue, much less the property right to what may be recovered, should become a mere question of vigilance.

Where the person whose life is destroyed leaves no will the widow may, before any other, become the administrator, for in making such an appointment the county court is required by section 3, article 2, chapter 39, General Statutes, to give to her the preference. But, notwithstanding such appointment, she may still sue under the section we are considering in her own right as widow, and not as the personal representative of her deceased husband.

It being thus in her power, in virtue of a statute aleady existing, to take precedence of the pesonal representative, at least where the husband dies intestate, it is a reasonable inference, because necessay to make the statute consistent, that the legislature intended she should have it in every case arising under that section. And, if that be so, it seems to follow that no part of what she may recover in such case is to become assets of the decedent. For, if that had been intended, the personal representative, who is the safest custodian of what belongs to the estate, because required to give bond for the faithful discharge of his

*This opinion has never been published, as the case is still pending upon the petition for rehearing.

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duties, would have been alone invested with the right to sue for and distribute the amount recovered, instead of sharing that right with the widow and heir, neither of whom is required to give any security for the due application of it.

By section 6, chapter 1, General Statutes, it is provided: "The widow and minor child or children, or either, * * * of a person killed by the careless, wanton or malicious use of fire arms, * * * not in self-defense, may have an action against the person * * * who committed the killing * * * for reparation of the injury, and in such action the jury may give vindictive damages."

And by section 1, chapter 32, the widow for minor child of a person killed in a duel may have action against the surviving principal, the seconds and all others aiding or promoting the duel "for reparation of the injury," and the jury may give vindictive damages.

The word "reparation" was evidenlty used in the two sections as the equivalent of compensatory damages which are "those allowed as a recompense for the injury actually received." But the language of section 3, chapter 57, literally interpreted, restricts the recovery in an action thereby authorized to punitive or vindictive damages, about giving which, however, the jury have no discretion. Nevertheless, in the case of the Louisville & Nashville R. R. Co. v. Brooks' administrator, 83 Ky., 129 [7 Ky. Law Rep., 110], it was held by this court that it was evidently intended there should be the same criterion of recovery in an action instituted under that section, as that in terms prescribed in the other two sections referred to, otherwise the purpose of making the General Statutes a harmonious system of laws would, to that extent, be defeated, and, consequently, the plaintiff, upon making out his case, was entilted to compensatory, and, in the discreton of the jury, punitive damages.

The two sections mentioned give to the widow and infant child, or children, and to no others, the right to sue for and recover for the causes therein respectively stated.

The reason for that discrimination is apparent. No others sustain as near relation to, are so dependent upon, or have the same legal right to look for a support to a person as his wife and children, especially those of the latter who may be minors. Therefore the injury resulting from his death at the hands of another to them is actual and direct, while to his collateral heirs it is remote and not immediate, and as to creditors it may not exist at all.

We are unable to perceive any reason for giving to the widow and minor child the exclusive right to sue for and recover damages for the loss of the life of a person in a duel or by the careless or malicious use of firearms, that does not apply with equal force where it is dstroyed by willful neglect.

In each case the widow and child have, been deprived of the society and support of the husband and father by the criminal or quasi-cirminal act of another. And whether the injury has been done in one or another of the three modes denounced in the statute, the consqeuences to them are the same, and it would seem they ought to be entitled to the same reparation.

Therefore, looking to the reason for the statutory right to sue and recover damages for the destruction of the life of one person by the act of another, and to the necessity, when it can be properly done, of so construing each part of the Genearl Statutes, as to preserve the consistency of the whole, we are of the opinion that the widow and child, or children, have the prior right to

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sue for, and the exclusive right to what may be recovered in, an action authorized by section 3, chapter 57. And, though the right to institute such an action is given to the personal representative, we think, for the reasons indicated, he can exercise that right only for the use and benefit of the widow and child, if there be any. It is, we think, also evident that the word heir was intended to mean child, and not to apply to any other description of person.

What proportion of the amount recovered the widow and children may be respectively entitled to, whether the right belongs to adult as well as minor children, and whether the personal representative may maintain such an action, in case there be neither widow nor child of the person whose life has been so destroyed, are questions not involved in this case and not decided.

It is proper, perhaps, to refer to section 1, chapter 57, whereby it is provided that if the life of a person, not in the employment of the railroad company, shall be lost by its negligence or the negligence of its servant, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue.

Why, in the case there mentioned, the personal representative alone is authorized to sue and recover damages is not apparent. But we do not think any inference can be drawn therefrom opposed to the construction we have, for the reasons stated, given to section 3, for section 1 seems to be exceptional in its object and scope, differing from section 3, as well as the two sections heretofore quoted in respect to the cause of action, measure of damages and parties who may be sued.

Under that section an action may be maintained for a less degree of negligence than willful, the jury has not the right in every case to give punitive damages, only a railroad company can be sued, and no action can be maintained for the loss of the life of a person in the employment of such company.

It appears from the pleadings in this case that the deceased left no children, and, consequently, the widow is entitled to the whole amount of what may be recovered.

It is to be taken as true that, as stated in the reply, upon her motion appellant was appointed administrator, and, at her request and for her benefit, he instituted this action. But while if there had been children of the deceased entitled jointly with her to what might be recovered, she could not have defeated this action, instituted at her request, nor prejudiced their rights, by subsequently commencing another in her own name, still, being the sole beneficiary, she had the right to institute the second action. But both actions being for the same cause and for her benefit, could not be maintained, and as we know of no rule of practice that deprives a defendant of the election, under such circumstances, appellee had the right to defend either one of them on the merits, and to plead the pendency of either one of them in bar of recovery in the other. For no agreement between the personal representative and the widow could prejudice his rights, she alone being responsible to appellant for the alleged breach of faith.

As, therefore, the facts stated in the reply were not sufficient to avoid the plea of the pendency of another action for the same cause and for the benefit of the same person, we think the demurrer was properly sustained.

Judgment affirmed.

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DAVIDSON, &c. v. MORRISON, &c.

(Filed December 6, 1887.)

1. Ancient deeds can not be read as evidence against an adverse claimant in possession, with his title of record, to establish, on the part of the plaintiff, a right of entry where no possession prior to the execution of the deed, under the same chain of title, or since its execution, has been shown.

2. Parties to actions—Equitable ejectment—This action by the beneficial owner to have land sold and the proceeds divided as directed by the will under which the plaintiff claims, is, in fact, an action for the recovery of the land, as the relief sought can not be had until the defendants are ousted; and as the defendants failed to demur because the holders of the legal title were not before the court, but accepted the issue tendered, it is now too late to object for the first time that the plaintiff can not maintain the action upon an equitable title.

3. Chancellor's finding upheld—The plaintiff and the defendant claim the land through different persons, each alleging that the persons through whom he claims are the heirs of the original patentee. The defendant and those through whom he claims have been in possession for many years, while neither the plaintiff nor those through whom he claims have ever had the possession. Held—That even if the evidence as to heirship preponderates in favor of the plaintiff, the finding of the chancellor for the defendants will not, under the circumstances, be disturbed.

J. W. Bush, J. K. Hendrick and W. R. Bush for appellants.

W. D. Greer, Wm. Lindsay, John T. Shelby and Geo. C. Kinkead for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is an action in the nature of an equitable ejectment, instituted by E. C. Davidson in the Livingston Circuit Court against the appellees, E. E. Morrison, M. J. Anderson, C. M. Powell and William Talbott, to recover several tracts or parcels of land held and owned in severalty by the above named defendants. The land in controversy is claimed by the plaintiff through the patentee. Christopher Roan, who, it is alleged, held the patents, one for one thousand acres, dated October 1, 1897, and the other for four hundred acres, dated May 30, 1775. The patentee, it is claimed, left at his death two children, who were his heirs at law, named James Roan and William Roan, and by an amendment it is alleged that this was a mistake; that Christopher Roan, the patentee, died without children, and James and William Roan were his brothers and inherited the estate; that James and William being then invested with title, sold and conveyed by deed their land in August, 1797, to one Robert Moore; that Robert Moore devised the land to his son, Archibald Moore, and that Archibald Moore devised it to his wife, Maria M. Moore, during her life, with the power to sell to pay certain legacies, if necessary, and at her death directed that this land might be sold, and the proceeds distributed among such of the children of William Davidson, then in the city of London, as might be living at the period of her death.

The widow (aforesaid Maria), married one Robertson and died in November, 1873. She had no children by her first husband, so the children of William Davidson, who were alive at the death of Maria, took under the will of Archibald Moore. Their names

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were E.C. Davidson, Agnes Sibley and Mary Jane Kyle. E. C. Davidson purchased the interests of Mrs. Sibley and Mrs. Kyle, and thereby became the absolute owner of the property devised to the children of William Davidson by the will of Archibald Moore. In this manner he derives title, and as sole plaintiff instituted the present action.

The defendants deny the title of the plaintiff, and place him, by the issue made, upon his right to recover; plead title in themselves, and also an adverse holding for more than thirty, or at least fifteen years. All the defendants but Talbott say that the one thousand acres of land was patented to Christopher Roan; that he died, leaving two children, John and Elizabeth; that John died without children, leaving a will, by which he devised his interest in the land to his sister Mrs. Lawrence (Elizabeth having married Lawrence), for life remainder to her son Samuel; that Mrs. Lawrence died, leaving as her children Samuel, Louisa Sledge and Mrs. Killough; that Samuel died after his mother childless and his interest passed to his two sisters; that Mrs. Sledge and her husband conveyed her interest to her sister, Mrs. Killough, by deed of record, in the Livingston county clerk's office, and that Mrs. Killough and her husband, on the 15th of March, 1847, conveyed the one thousand acres of land to Harvey Lewis by a recorded deed in same office. In August, 1850, Lewis sold and conveyed the land to L. M. Flournoy. On the 30th of August, 1860, Flournoy conveyed the land, in conjunction with Trabue, Cade and others, to Jennings, and that Jennings then sold a part of this one thousand acre tract to the defendant, Anderson, three hundred acres, and made him a deed, and five hundred and fifty-three acres to M. E. Morrison. All of these deeds, under which the defendants claim, were of record in the Livingston county clerk's office, beginning in the year 1847, and the title passing to the successive vendees from that date until this action was brought against the present defendants, who, with this title, and their respective deeds, were in the actual possession. Talbott, one of the defendants, claims, as the others do, under Flournoy, and he from Harvey Lewis, Lewis having purchased both the one thousand and the four hundred acre tracts of Mrs. Killough, who claimd to be the sole owner by descent and purchased from those claiming under Christopher Roan, the original patentee. The court below, on the hearing, dismissed the petition of the appellant, and he cross-appeals. The facts of this record show that neither the original patentee nor his descendants, who are claimed to be such by the appellant, nor any of the purchasers from them ever entered upon any part of this land at any period of time from the date of the patents (more than a century ago) up to the institution of the action.

It is claimed by the appellant, who is the plaintiff below, that James and William Roan, through whom he derives title, were the children of Christopher Roan, the patentee, and that fact he himslef proves from family tradition, that of his own family, and not those related to or descended from Christopher Roan; those who are claimed to be related to the patentee give but little information as to his family history. One witness states:

"Upon the hypothesis that he was his grandfather's brother, he must have been my great uncle.' He had heard nothing specially from the older members of the family in regard to the matter, but is of the opinion that Christopher Roan died childless. Others say, from family tradition, they are of the opinion that James and William Roan were the brothers of Christopher Roan. They fail to give anything like a history of the family, or to give even the names of any person or persons of their own

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family with whom they conversed on the subject. The weight of the testimony on the subject of heirship might preponderate for the appellant, if aided in any manner by a claim of ownership before this action was instituted. Here was a valuable tract of land located on or near the Ohio river that was being sold to innocent parties for value, and the most of it at its full value. Deeds recorded and farms opened on the land upon which the children and grandchildren of the present occupants, or some of them, have been raised, and no claim of title set up by either Mrs. Moore, the life tenant, or her coexecutor during the half century transpiring between the death of her husband in 1822 and her death in 1878.

Those in remaider must have been aware of their interests, if they had any, and in coming to assert title under one who was of revolutionary fame, we find that family tradition has not only been lost sight of in the attempt to make out the claim of title, but the conveyances from those who are alleged to have been the brothers of the patentee have never yet been recorded, but kept in the family of the present plaintiff and the life tenant, and exhibited for the first time in the trial of the present action as ancient and unrecorded deeds, evidencing title in the plaintiff, who was never in possession, or those under whom he claims, against those who were and had been in the actual possession of the land under a hostile claim for more than thirty years, with deeds of record. The conveyance from William Roan, executed in 1797, was never recorded, and that of James Roan, executed in 1798, was recordetd in the clerk's office of the Court of Appeals, but not properly authenticated; so both deeds, alleged to have been from the two brothers of the patentee, have no virtue, except as ancient writings, and we find no authority holding in a case like this, that they may be read as evidence of title by those who were never in possession against those holding under an adverse title, with a possession long enough to ripen into a title. Mr. Greenleaf, in his work on Evidence, volume 1, says: "Whether, if the deed be a conveyance of real estate, the party is bound, first, to show some acts of possession under it, is a point not perfectly clear upon the authorities, but the weight of opinion seems to be in the negative, as will hereafter be more fully explained." In explanation of this doctrine, he says: "But where unexceptionable evidence of enjoyment referable to the document may reasonably be expected to be found, it must be produced." (Sections 22 and 147, pages 31 and 191, first volume.) In a note to the sections referred to Blackburn, Justice, says: "Inasmuch as, after a long time, all the witnesses who could prove such possession are dead, the law permits ancient documents to be given as evidence, from which the jury may properly draw an inference that there was such possession;" and further says Mr. Greenleaf: "If such evidence, referable to the document, is not to be expected, still it is requisite to prove some acts of modern enjoyment, with reference to similar documents, or that modern possession or uses should be shown corroborative of the ancient documents." Mr. Wharton, in his Work on Eivdence, says: "It has been frequenlty held that there must be accompanying possession to enable a deed over thirty years old to be read in evidence without proof of its execution, but this doctrine can not be sustained on principle. Proof of contemporaneous possession is unnecessary, though without such proof the deeds may be entitled to little or no weight."

We find no reported case in this court holding that such deeds may be read as evidence against an adverse claimant in possession, with his title of record, to establish, on the part of the plaintiff, a right of entry where no possesion prior to the execu-

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tion of the deed under the same claim of title, or since its execution has been shown.

Under our system of registration, the title to realty may be easily traced, and one's entry on land, a title to which is in another, affords him no protection unless he has the prior right. He may even enter under the same title as junior purchaser, without notice of his administrator's claim, actual or constructive, and having thus acquired the legal title hold the land as his own. So the danger of permitting ancient deeds to prove themselves in order to establish title or to evidence the right of entry, or that the parties at one time held possession under them, may be readily seen, and particularly against those with a title of record. The cases of Cook v. Totton, 6 Dana, 108; Thruston v. Masterson, 9 Dana, 228; Winston v. Gwathmey, 8 B. Mon., 19; Burgin v. Chenault, 9 B. Mon., 285, and Taylor v. Cox, 2 B. Mon., 429, all sustain the right of the plainitff to rely on such ancient writings to sutsain their possession. They may be competent to show the extent of possession or to evidence, in some cases, the facts recited in them or even to show the right of entry against one without title, but in the absence of the possession under them the offer to make the chain of title perfect by this character of evidence to defeat a title of record and a possession under it for more than thirty years, will not be listened to by either the common law judge or chancellor. These deeds were read after the lapse of eighty years to show a right of entry only, with the life tenant and the remainderman in the possession of them during the greater part of that period, and no claim of title at any time asserted until this action was instituted. If entitled to any weight as evidence of title, or a former possession, it is so slight as to have authorized the chancellor to disregard them.

The defense claimed to hold and did hold under title deeds from John and Elizabeth Roan or through them by successive deeds dated and recorded as far back as 1847, connected with a continued possession since that time. The fact that John and Elizabeth Roan were the children of the patentee is not shown except by the recitals in the deeds of the defendants, and the proof of the plainitff himself that the patentee left two children.

This long continued possession by the defendants has been under the title of descendants of John and Elizabeth Roan, who, as is alleged, were the two children of the patentee. One set of claimants have been in the continued possession, and the other, the plaintiff, and those claiming under the two brothers of the patentee, never had the possession.

The proof of heirship is, therefore, as persuasive on the one side as the other, and if conceded that the testimony preponderates for the plaintiff on this branch of the case, ought this court to disturb the finding below whether this action be regarded as at law or in equity. It is at least an action for the recovery of the land, as the relief sought is to have the land and the proceeds divided as directed by the will of Archibald Moore. This can not be done unitl those in possession are ousted by a scire facias or the judgment of the chancellor. The beneficiaries are in court asking the relief, and whether entitled to the proceeds or the land itself, the issue as to the will was made and had to be determined before the land could be sold. The appellees failed to demur, either for the want of proper parties or because the holders of the legal title were not before the court, but accepted the issue tendered and it is now too late for the first time to raise the question that the parties with the beneficial interest could not maintain the ejectment upon an equitable title. It

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must be regarded by this court as an action in equity by the beneficial owner against the claimants in possession for the recovery of the land. The case as in this manner prepared and decided, and will be so considered in this court. If this is not in the nature of an ejectment by the parties entitled to the proceeds of the land, to recover it from the defendants, then the appellant has no cause of action against these tenants in possession. If he seeks to recover the proceeds of the land alone, then the surviving executor of Arch Moore, or a trustee appointed by the chancellor (if the executor is dead) should have instituted this action, and such would have been the character of the proceeding required below, but for the failure of the defense to raise the question as to the right of the beneficial owner to maintain the action, at least without making the holder of the legal title a party to the proceeding. While the objection could have been listened to below, the question can not now be raised in this court for the first time. The finding of the chancellor below ought not, therefore, to be disturbed, even if there was a preponderance of testimony for the plaintiff as to who were the heirs at law of the original patentee, and for this more formidable objection, whether at law or in equity, the plaintiff has failed to connect his title with the patent under which he claims. But, viewing this case in either aspect, with the ancient deeds admitted, it is manifest the plaintiff, from the facts, is not entitled to recover. The question raised as to the purchase by Flournoy, of whom the tenants in possession purchased, from the widow of Archibald Moore of her interest in the land, as affecting the present owners, has also been considered. It appears that Flournoy had, prior to his purchase of the interest of the widow of Archibald Moore, bought the land from Harvey Lewis, who had puerhased it from Mrs. Killough, the descendant of, or who claimed to be the descendant of the patentee, on the defendant's side of this controversy. Flournoy obtained title in various ways to the land. He was, evidently, after his purchase from Lewis, trying to buy his peace. He purchased from McCauley's heirs, who had entered a part of this land; also of Crider's, and laid a warrant himself upon part of it. He swears that he did not know what title Mrs. Robertson had, and in fact don't recollect of ever having purchased it. The fact is, that Calvin Pikes, as the attorney in fact of Mrs. Killough, took possession of this land in 1842, and those holding under her have never been out of possession. The title of the defendants must now be regarded as complete, not by the lapse of time, but because the record title, with the long conitnued possession, must defeat a recovery based solely upon the traditional testimony of ownership attempted to be shown by the plaintiff. The judgment of the chancellor is, therefore, affirmed.

Judge Bennett not sitting.

PINE HILL COAL COMPANY v. HARRIS & COMPANY.

(Filed December 8, 1887.)

A final discharge in bankruptcy granted after a judgment was rendered against the bankrupt in the State court operated as a discharge from all liability on the judgment, although the defendant's application to become a bankrupt was filed pending the suit in the State court, the defendant having defended the suit on its merits and failed to file the adjudication of bankruptcy and ask a stay of proceedings.

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W. O. Bradley and Richards & Hines for appellant.

Wm. Lindsay, J. D. Belden and W. S. Knott for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Bennett.

W. R. Dillon, on the 24th of March, 1875, commenced an action against C. Cooke & Co. and R. C. Harris & Co. The latter firm was composed of the appellees, R. C. Harris and J. W. Corley, in which he sought to recover damages for a breach of contract. The defendants to that action defended it on its merits.

On the 2d day of October, 1877, judgment was rendered against the defendants for the sum of $3,500. They immediately appealed to this court. and on the 4th day of June, 1880, this court affirmed the judgment of the lower court.

On September the 1st, 1876, the appellees, after said suit was filed against them, filed their petitions in the U. S. District Court, in which they sought to be adjudged bankrupts. They, notwithstanding they were declared bankrupts, continud to defend the action in the State court, upon its merits, without asking for a stay of proceedings.

On March the 6th, 1878, the appellee, Corley, was discharged in bankruptcy. On December the 20th, 1878, the appellee, Harris, was discharged in bankruptcy,. It is to be observed that both of the appellees were discharged from bankruptcy after the judgment in the circuit court had been rendered against them.

C. Crooke & Co. sold to the appellants certain mining property, and, in part consideration thereof, the appellants agreed to assume C. Crooke & Co.'s liabilities, among which was the judgment rendered in the circuit court in favor of W. R. Dillon against Crooke & Co. and the appellees. The appellants did pay this judgment. They then instituted suit in the Garrard Circuit Court against the appellees for the purpose of recovering one-half of the judgment.

To that action the appellees pleaded the foregoing facts as discharge from all liability on said judgment.

Upon a demurrer to their answer the circuit court decided in their favor, and the case is here on appeal from that judgment.

The case of Boynton v. Ball, which was decided by the Supreme Court of the United States April 24th, 1887 (see Reporter, No. 22, June 1st, 1887), is in every particular, similar to this case. That case decides every question raised by the appellants in this case against them.

It is held in that case that the final discharge of the bankrupt, having occurred after the judgment was rendered against him in the State court, although his application to become a bankrupt was filed after he was sued in the State court, and he defended that suit on its merits and failed to file the adjudication of bankruptcy and ask a stay of proceedings, was a discharge from the payment of the judgment in the State court, upon the ground that the discharge being posterior to the judgment, it operated with the same force upon the judgment as it would have done upon the debt in its original form.

As the rights of the parties are controlled by the act of Congress, we are inclined to adopt the construction given the act by the Supreme Court of the United States.

Therefore, the judgment of the lower court is affirmed.

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BURNSIDE v. LINCOLN COUNTY COURT.

(Filed December 10, 1887.)

1. Constitutional law—Title of act—If all of the provisions of an act of the legislature relate to the same subject, are naturally connected and are not foreign to the subject expressed in the title, this is all that is required as to the body of the act in order to comply with section 37 of article 2 of the Constitution.

2. Same—The subject of an act of the legislature which authorizes a submission to the voters of Lincoln county of the question whether the sale of liquor shall be prohibited therein, and provides that if a majority of them vote in favor of the prohibition, the sale shall be unlawful, etc., is sufficiently expressed in the title: "An act to authorize the people of Lincoln county to vote on prohibiting the sale of liquors, and fixing the penalty for the sale of liquors in said county."

3. Submission of act to voters—An act of the legislature relating to a county may be submitted to its voters for the purpose of determining whether they will accept its provisions.

4. Prohibitory liquor law—The owner of property acquires and holds his property subject to the right of the legislature, under the police power, to control it whenever the public peace, the public morals, or the public health is involved. Therefore, the legislature may not only regulate, but restrict the retail liquor traffic.

5. Same—One can not be heard to say that a law is invalid and unconstitutional upon a ground which in no way affects his rights

One who is seeking to obtain the privilege of selling liquor by retail, or as a beverage, can not question the constitutionality of the law which denies him that privilege upon the ground that it forbids the sale of liquor even for religious or medicinal purposes, as prescriptions are not filled in bar rooms, nor the communion table supplied from such places.

R. C. Warren, W. H. Miller and Welch & Saufley for appellant.

W. O. Bradley and Wm. Herndon for appellee.

Appeal form Lincoln Circuit Court.

Opinion of the court by Judge Holt.

The application of the appellant, E. H. Burnside, to the Lincoln County Court for "a tavern license, with the privilege of retailing liquor," was rejected upon the ground that it was absolutely forbidden by the act of the legislature, approved April 14, 1886, and entitled "An act to authorize the people of Lincoln county to vote on prohibiting the sale of liquors, and fixing the penalty for the sale of liquors in said county." (Acts of 1885-6, volume 1, page 1400.)

The circuit court, upon appeal, affirmed this ruling in so far as it denied the privilege of retailing spirituous liquors, and doubtless, in doing so, was controlled by the same reason that influenced the lower court.

We are now asked, upon several grounds, to declare the law above named unconstitutional.

Section 37 of article 2 of the Constitution provides: "No law enacted by the Genearl Assembly shall relate to more than one subject, and that shall be expressed in the title;" and it is claimed that, in this instance, this provison of the organic law has been disregarded.

It is well settled that legislation will not be declared unconstitutional by the judiciary, if it be merely of doubtful character in

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this respect. It must be clearly violative of the fundamental law to authorize the exercise of such power. The first and second sections of this act authorize a submission to the voters of Lincoln county of the question whether the sale of liquor shall be prohibited therein, and provide how the vote shall be taken.

The third section declares that if a majority of them vote in favor of it, that "then it shall be unlawful from and after the entry of the result of said election, in the order book of the clerk's office, for any person or persons to sell spirituous, vinous or malt liquors in said county, provided, that any person or persons who may, at the time of said election, have license to sell liquor as a beverage, may continue to do so until the expiration of the time for which the license was given."

The fourth, fifth and sixth sections declare the sale a misdemeanor if the provisions of the act are accepted by the voters; provide a penalty and the mode of enforcing it, and for a second vote, if the law be not accepted by the first one.

This is all of it. All of its provisions relate to the same subject, are natuarlly connected, and are not foreign to the subject expressed in the title. This is all that is required as to the body of the act. (Phillips v. Covington Bridge Co., 2 Met., 222.)

It is said, however, that the title does not sufficienlty express the subject or object of the act. Indeed, that it does not do so at all, and that the law is masquerading under a false name.

It, however, states that it is an act to authorize the voters of the county "to vote on prohibiting the sale of liquor," and that it is also one fixing the penalty for a sale in violation thereof.

The act relates to nothing else. Certainly the reading of the title would inform the hearer of the entire nature of the law, and this was the object of the constitutional provision above cited. It was to guard against improvident legislation.

It could not well be supposed by any one that an act so entitled provided only for a vote, by way of direction or advice as to future legislation, upon the subject. The purpose of the body of the act is to forbid the sale of liquor in the county, and it is apparent that the most ordinary legislator in experience and understanding would have undertsood, from the reading of the title, that it related to prohibiting such sale, and a vote by the people as to the adoption of its provisions. In the case of Gayle, &c. v. Owen County Court, 83 Ky., 61 [6 Ky. Law Rep., 789], an act with a title substantially like this one was assailed upon the same ground, but was sustained.

It was settled in the case of the Commonwealth v. Weller, 14 Bush, 218, and the doctrine is supported by the text books and other authorities, that an act of the legislature relating to a county may be submitted to its voters, not for the purpose of determining whether it is a law, but whether they will accept its provisions.

It is insisted, however, by distinguished counsel, with zeal and ability, that liquor is property; that this act forbids its sale, and is, in effect, a spoliation of it; that it is an exercise of absolute arbitrary power over the property and individual right of the freeman, and is, therefore, interdicted by our bill of rights and the fourteenth amendment of the Constitution of the United States.

It is now settled, however, by not only the decisions of the Supreme Court of the United States, but by the highest court of nearly every State in the Union, that the legislature of a State may, under that police power, which is vital to its existecne, not only regulate but restrict the retail liquor traffic. It wolud be

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singular, if it could not do so, if government be instituted for the good of the governed.

If an evil which destroys the morals, the fortunes and the lives of so many of our best citizens; one which is so fruitful of pauperism and misery, and productive of probably eight-tenths of the crime in the country, was not subject to the legislative power, it would be strange indeed. If so, then all manner of crime is to be punished, and yet the people are powerless to wipe out the cause of it. Surely one can not exercise a right, and much less a mere privilege, which may be revoked at any time, if it be destructive of the public morals or public health, or public peace, and yet be beyond the reach of the legislative power. No one has ever had the right to sell whisky in this Commonwealth, save as a privilege. It has always been the creature of license. The police power is properly and necessarily a broad one. It is difficult, if not impossible, to fix its limit. The property owner acquires and holds his property, subject to the right of the legislature under this power to control it, whenever the public peace, or the public morals, or the public health is involved, othewrise the many would be at the mercy of the few; lawlessness and disorder would take the place of law and order, and the appetites and passions of a few persons would imperil the public peace, and endanger our social fabric. The individual profit of the few, arising from the wreck of fortunes, homes and lives, must give way to the happiness and security of the many. It belongs to the legislative department of the government to exercise this necessarily sweeping power, and determine, primarily, what measures are needful for the protection of the public health, the public morals, and the public safety. If a statute upon the subject has in reality no relation to those objects, and is a plain invasion of some private right secured by the organic law, then it would be one of the highest duties of a court to declare it a nullity, but this can not be said of a law which controls and regulates a traffic which is an admitted evil in society.

We have as yet not seen an official copy of the decision of the Supreme Court of the United States in the Kansas liquor cases, quite recently decided, of Mugler v. State of Kansas, and the State v. Zishold and others, but as reported in the public prints the highest court in the land has unanimously declared that this right of protection—this police power—extends so far that the legislature of a State may prohibit the manufactures of liquor for the maker's own use as a beverage, if in its judgment this would tend to defeat its efforts to guard the community against this evil.

The prohibiton of the manufacture or sale of liquors does not deprive the owner of his property. It is not taking it without the process of law. It is not an exercise of the right of eminent domain, by which the owner can be deprived of his property only upon the condition of compensation. A nuisance merely is abated, and the citizen forbidden to do that which is injurious to the comumnity.

It is insisted, however, that the law under consideration is unconstitutional, because of its sweeping character. It not only forbids the sale of liquor by retail, or as a beverage, but for religious or medicinal purposes.

Even if it were true that under it a physician of Lincoln county could not prescribe it as a medicine, or admitting that its proper construction forbids the sale in toto, and not merely as a beverage, yet the appellant is not in a position to call in question its constitutionality upon this ground.

He is asking that it be declared unconstituitonal because it prevents him from obtaining the privilege of selling liquor by

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retail, or as a beverage. Prescriptions are not filled in bar-rooms, nor is the communion table supplied from such places.

We must look at things as they are and not as they might be, in considering questions involving the exercise of the police power. It is unnecessary to decide whether the law-making power in its exercise may forbid the sale of an article for innocent, proper and even useful purposes upon the ground that it will be productive of deceit and in effect defeat its efforts to protect the health, morals and peace of the community, from the ills arising from other uses of the article, since the appellant can not be heard to say that the law is invalid and unconstitutional upon a ground which in no way affects his rights.

It was said in the case of the Commonwealth v. Wright, 79 Ky., 22: "Only those who are prejudiced by an unconstitutional law can complain of it."

Mr. Cooley, who is perhaps the most distinguished writer of the present day upon constituitonal power and its limitations, enforces this view; and in the case of Sullivan v. Berry's Adm'r, 83 Ky., 198 [7 Ky. Law Rep., 449], it was fully considered and reaffirmed upon a review of numerous authorities. (Jones, &c. v. Black, &c., 48 Ala., 540; Williamson v. Carlton, 51 Maine, 449; De Jarnette v. Haynes, 23 Miss., 600; Turnpike Corporation v. County of Norfolk, 6 Allen, 353.)

The appellant only asks that he be allowed "to retail" liquor by opening a bar-room in a hotel. He has no interest, so far as the record discloses, in the sale of it for medicinal or religious purposes. He makes no such question. The right he asks can not be considered as fairly involving it, and the court has neither the inclination nor the right, in this character of a case, to go out of its way in search of such a question, or to consider it at the instance of one who has no right to ask it, because it does not affect his rights and is not involved in the consideration of the privilege sought by him.

Judgment affirmed.

BARNETT v. McCARTY.

(Filed December 10, 1887—Not to be reported.)

Rescission—Fraudulent warranty—Appellee sold to appellant a tract of land and executed to him a title bond therefor in consideration of the sale and delivery by appellant to appellee, of a jack. In this action by appellant to enforce the contract the appellee asked a rescission upon the ground that the appellant had warranted the jack to be a sure breeder, and that he would serve mares readily without a jennet to excite him, alleging that he had returned the jack to appellant. Held—That while the evidence is conflicting it is sufficient to support a judgment rescinding the contract.

McHenry & Hill and W. F. Gregory for appellant.

W. T. Ellis and Edward W. Hines for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Pryor.

We concur with the views of counsel for the appellant that there is only an issue of fact in this case, and the court below having passed on that question, we would be reluctant to disturb

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the judgment, although the pleadings and proof present a case where the judgment must necessarily have been rendered by the chancellor as the appellant could have enforced his contract in no other tribunal. The appellant held the bond of the appellee for title to a small tract of land, the consideration for its execution by the appellee being the sale and delivery to appellant of a jack valued at $400.

The appellee refusing to make title, an action was instituted to enforce the contract and the defense was a failure of consideration, a fraudulent warranty, and that the jack had been returned by the appellee to the appellant. The evidence conduces to show that the jack was worthless, and that the appellant knew it, and furthermore that there was a warranty that he was a sure breeder and would serve mares readily without having a jennet to excite his passion. While there is much conflict in the testimony and proof from many of those who bred to this jack while the appellant owned him of his extra breeding qualities, some of his colts taking the premiums at the best fairs in that portion of the State, still the jack was evidently failing in his procreative powers when sold, and that fact was doubtless known to the plainitff. He could serve no mares after the appellee bought him, and appellant's long and weary statement of the history of the trade indicates that he was attempting (taking his own view of it) to avoid any future responsibility by reason of the sale. We think the testimony fully sustains the judgment rescinding the bond for title and placing the parties in statu quo.

Judgment affirmed.

GIBSON, &c. v. O'BRIEN & OTT.

NORTON v. SAME.

COX v. SAME.

JONES v. SAME.

ROBERTSON v. SAME.

RICHRADSON, &c. v. SAME.

(Filed Decemebr 8, 1887—Not to be reported.)

1. Street improvements—A contract for street improvements in the city of Paducah, should, under the charter, have been signed by the mayor, but its validity is not affected by his failure to do so, the city council having ratified the contract and taken a bond for its faithful performance. Nor is it material that the contract is not dated, the bond and the minutes of the council showing the true date.

2. Same—The fact that there was a discrepancy between the report of the mayor and the contract itself as to when the work was to be completed is immaterial, as the ratification by the council of the contract as presented, and the full compliance by the contractor make it binding on all.

3. Same—The charter of the city of Paducah provides for the improvement of "the whole or any part, not less than one block, of any street." In this action to enforce a lien for the cost of street improvements, it appears that the part of the street improved is equal in length to two blocks, looking to the average length of blocks in the city, and is intersected by streets recognized as such by the public for many years. Held—That the charter has been complied with.

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L. D. Husbands, T. E. Moss and W. D. Greer for appellants.

J. M. Bigger, C. S. Marshall and J. W. Bloomfield for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

These actions were consolidated below, and involve the right of the appellees to enforce a lien on the real estate of the appellants, bordering on Broadway street, to satisfy the appellees for the amounts alleged to be due by each for certain improvements made on Broadway under a contract with the mayor and city council.

The claim is for guttering, grading, curbing and paving the sidewalks on that street.

The lots sought to be subjected border on the street, and no question has been made as to the power of the city council to pass ordinances for such improvements, as the power is especially given by sections 76 and 78 of the city charter, approved on the 16th of February, 1871.

The two sections read as follows:

"Section 76. The common council [now council] of the city of Paducah shall have power to pass ordinances to require the improvement of streets and alleys, * * * either by grading and paving or by grading, paving and macadamizing, or graveling, guttering, curbing and paving or planking of sidewalks, any portion thereof, not less in length than one block, or the whole of any street or alley now established, or which hereafter may be established, within the limits of the city of Paducah, at the cost of the owner or owners of the ground fronting such improvement, and the cost of such improvement to be apportioned according to the number of feet front each may own in front of said improvement, and a lien is hereby created on the said ground for the cost thereof, all of which improvement, when required to be made, the * * * council shall order done by the passage of an ordinance for that purpose, which ordinance shall fully declare and prescribe the kind and extent of improvement to be made; that said council may, in their discretion * * * require, by ordinance, the improvement of any street or alley, simply by grading or graveling, or said council may require, in the first instance, by ordinance, the whole of any street to be improved by grading, graveling, guttering, curbing and paving * * * the sidewalks, the whole or any part, not less than one block, of any street. * * *

"Section 78. That upon the passage of any ordinance requiring the improvement of streets or alleys, or parts thereof, * * * it shall be the duty of the mayor of said city to enter into a contract with any person or persons offering or agreeing to do the work required to be done by such ordinance, upon the best and most advantageous terms for the property owners; and the better to enable him to do this, he shall advertise the letting of said work, in some newspaper, published in said city, for at least ten days, for sealed proposals for the doing of said work, and report such contract in writing, as he may be able to effect, to the council of the city of Paducah for their acceptance or rejection; that all contracts thus made with the mayor and the person or persons proposing to do the work shall not be binding until ratified by the council, and said council shall require of such contractor or contractors bond, with good security, to be approved by the common council, conditioned for the faithful

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performance of said contract. It is further provided that said work contracted to be done shall be performed under the supervision of the mayor and city engineer, and subject to the acceptance of said council; and it shall be the duty of said city engineer to make out and report to the common council complete and accurate estimates and apportionments of the cost of said work and improvements against the owners of the property liable to pay same, designating each one's respective liability."

By section 79 of the charter the liability of the owners of the property becomes fixed when the contract is complied with, the estimate and apportionment made, and the work received by resolution or order of the council. Section 80 gives the remedy in equity to enforce the lien.

It is denied by these lot owners, first, that any contract was made by the mayor and the appellees; second, they say there was no block or city district adjacent or bordering on this property; that the territory embracing it constituted no block or part of a block, and that the entire street must be improved under section 76 of the charter in such a case in order to make the property adjacent liable for the improvement made; third, that another and prior contract had been made with some one else for less money to perform the same work.

The charter provides that it shall be the duty of the mayor to enter into a contract with those agreeing to do the work on the most advantageous terms for the city, subject to be ratified by the council, and when ratified the council shall require bond with good security for the performance of his undertaking.

The mayor in this case reported to the council that he had advertised for bids and accepting that of the appellees had awarded them the contract, and in this report is embodied the plans and specifications for the work, and accompanying it the contract made with the appellees.

The action of the mayor was ratified and the sureties offered were approved, this bond dated 15th of October, 1883. The report of the mayor was made on the same day, the 15th of October, 1883, and the contract was dated the — day of October, 1883. It is manifest that these transactions occurred at the time they bear date, and the fact that the date of the contract is blank affords no argument against such a conclusion. Besides, all this appears from the minutes of the council, that body having possession of the bond and the contract. It was not necessary to spread the bond at large on the record books of the council, and the fact that they approved the sureties shows that a bond was executed, and with that bond in the possession of the obligee or the council, it seems to us there is no room to question the validity of the action on the part of the municipal government. A contract was entered into between the city of Paducah and these appellees to perform this work, with specifications and plans approved by the legislature of the municipality, but for the reason that the name of the mayor is not signed to the contract it is insisted the contract is not binding. While the proper mode may have been for the mayor of the city, as such, to have signed his name to the agreement, yet its validity is not affected by the failure to do so where the real contracting party, the city of Paducah, is the party of the first part, and its mayor says, by his written report, that he awarded the contract to them and gives the specifications embodied in it.

It is the agent entering into the contract for the principal and enclosing it to the principal for his approval. The party to approve it was the city legislature, the body that must at last ratify what it has, in effect, directed to be done. They did ratify

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it, and took a bond for its faithful performance. It is said, however, that, by the report of the mayor, the work was to have been completed in forty-five days, and by the terms of the contract the appellees had from the 15th day of October, 1883, until the 1st of April following to complete it. This was a mere inadvertance on the part of the mayor, or, if not, the ratification of the contract as presented, its acceptance by the council and the full compliance by the contractor makes it binding on all. The papers exhibited correct the discrepancy. Now should such an omission or conflict invalidate any contract where both parties have acted under it as made, and the rights of no one is affected by it. It was read to the council, and that body, as well as the mayor, understood its contents. It was the contract entered into between the parties on the 15th of October, 1883. While this power to impose the burden on the citizen must be exercised in strict conformity to the terms of the grant, it has never been held that such a technical objection, as is made in this case, would destroy or be fatal to its exercise for the reason there has been no substantial departure from the letter or spirit of the grant.

As to the remaining question necessary to be considered, if it be conceded that the charter permits the improvement of any part of a street equal in length to one block, then it is apparent from the testimony that the distance on each side of Broadway street, from Churchill Avenue to the railroad, or to Enders Avenue, is equal to two blocks. Some of the blocks in the city are a much greater distance in length than others, but looking to the average, and there is at least two blocks from the beginning of this improvement to its terminus. The length is nearly 900 feet.

The definition of block is not given by the charter, and whether, in the sense used, a block is constituted by having a street on each side, as a square surrounded by streets, or that the improvement is not to be less in length than that of the average block, still, in either event, the charter has been complied with.

The recorded map of the city, as the proof shows, makes Mocquot and Enders Avenue, both public streets, and they have been recognized by the public as streets for many years. The map made by the city engineer, which we assume is a correct copy of the recorded plat, or at least of the streets and alleys in the locality of the improvement, also shows that these streets exist; and, while no formal acceptance by the city is shown, and some obstruction and non-user of these streets appear, by the defense, yet this subdivision of the territorial boundary has been and is now recognized by the city authorities, and when looking to the question of taxation for the purpose alone of making this improvement, the chancellor will not stop to inquire as to the rights of the original owner of the land composing either street, as against the city, or the lot owners bordering on them, but will look to this subdivision, recognized as such by the city for years, in determining the question as to the equality and uniformity of the burden, and in doing so we find it approximates as near equality in the burden as can well exist between the exercise of this sovereign power, and the citizen to be affected by it. Lots have been sold, calling for each of these streets, and Hopkins states that the map made by Harrington in 1877 has been used and recognized by all the city authorities and the people, and is an accurate representation of the streets and alleys within the city boundary. Besides, the witness states, that he has known Enders avenue since 1867, and Mocquot street for ten years, and they have been recognized as streets all that period; and not only so, the city in making other improvements, has assumed

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control of them, and the intersection of both was paid for by the city in making improvements on other streets. Such a subdivision, recognized by the city, not only in making this improvement, but prior thereto, leaves no room to question the right, as well as power of the council, to order the improvement. The improvement may extend some distance further, a few feet, on the one side of the street than the other, but this does not affect the appellees.

With these two streets recognized as such, it settles the question as to the block or blocks bordering on the improvement.

That a prior ordinance had been passed, under which some one else had entered into a contract to do the work for less money, constitutes no defense. That ordinance had been repealed, and if not the failure of the city to abide its contract under it is with the party to the contract who has sustained damages by its breach; and, besides, reasons deemed sufficient by the city council existed why that contract should not be carried out. There is nothing in this case of which the appellants can complain. No rule of equality has been violated nor injustice shown the taxpayer, and the council have kept within the boundary of legitimate, municipal legislation authorized by its charter. Other questions have been made not necessary to be considered.

The judgment in each case is affirmed.

STAPLETON v. COMMONWEALTH.

(Filed December 10, 1887—Not to be reported.)

Self-defense—No necessity or apparent necessity existed for the accused acting in self-defense, and, therefore, he can not complain of an error in an instruction upon that subject.

P. W. Hardin for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Chief Justice Pryor.

This record shows the accused guilty of either murder or manslaughter, and there is nothing contained in the facts that would authorize an acquittal on the ground of self-defense. The accused, in an intoxicated condition, voluntarily undertook to wrestle with the man he killed, and because he was thrown to the ground by his friend became angry with him, and in a few moments after took his life. The necessity, or apparent necessity, for acting in self-defense at no time existed, but the defendant, maddened by the whisky he had drunk, and in that condition, with his passion subordinated to his judgment, and mortified at the result of the wrestling that he had caused by seizing his friend and attempting to throw him, shot the latter, causing his death in a short time. He appeared at the house of his neighbor on the Sabbath day, with the weapon of death in his pocket, full of whisky, and by his own conduct on that occasion merited the punishment awarded him by the verdict of the jury. That he retired back of the house, and while there, the fact that his anger momentarily passed away with the expression made by him that he had nothing against the deceased, did not mitigate

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or lessen his offense. He left this position that he had sought and entered the house where the deceased was with pistol in hand, and the latter had the right to believe that he would be assaulted with it by the accused; and the readiness with which he handled it, when he shot the unfortunate man, evidenced his plain purpose. The deceased was the party acting on the defensive, and when he saw the accused entering the door with the pistol in hand, had reasonable grounds to believe that he was in great danger, and would have been justified in every proper effort to save his life, even to taking the life of his adversary, if necessary for that purpose.

There is no self-defense in this case, and the instruction No. 4, with the qualification, was as favorable to the accused as he could ask. A verdict of acquittal, while it would have relieved the accused from punishment, would have been palpably against the testimony.

Judgment of conviction is affirmed.

VAUGHAN v. COMMONWEALTH.

(Filed December 13, 1887.)

Dying declarations—In cases of homicide the statements of the deceased as to the killing are not admissible in evidence as his dying declarations, unless it appears that they were made under a sense of impending death. Something more must appear than a mere belief upon the part of the deceased that he would ultimately die from his injuries.

In this case the statement of the deceased that "he believed he would have to die," was nothing more than the expression of an opinion that the wound he had received would ultimately cause his death, and was not sufficient to make his statements as to the killing competent evidence.

Walter S. Harkins for appellant.

P. W. Hardin for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted in the Floyd Circuit Court for the murder of Robert Stephens. His trial resulted in his conviction of the crime of manslaughter. His motion for a new trial having been overruled, he has appealed to this court.

Richard Ward was the only witness for the Commonwealth that saw the difficulty between the appellant and Robert Stephens.

This witness states that he and Robert Stephens, on Sunday morning, were on their way to church; that they had left the public road, and were walking along a small pathway which lead near the house of the appellant; that this pathway was just outside of the fence which enclosed the appellant's premises; that as they were traveling along the path, near the appellant's house, the appellant presented himself, with gun in hand, just fronting Robert Stephens; that Stephens asked appellant what he meant. To this inquiry the appellant replied, "you get out of this path into the road;" that Stephens started to go towards the road, and had gone as far as ten or fifteen steps, when the appellant shot him in the back; that Stephens, as he was walking along the path before he met the appellant, and at the time of the

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meeting and shooting, had a pistol in his hand, but never attempted to use it, nor did he make any hostile demonstrations towards the appellant.

On the other hand the appellant swears that there had been previous trouble between him and Robert Stephens; that Stephens had frequently threatened to take his life; that he had previously forbidden Stephens to come on his premises; that the path was on his premises and Stephens knew it; that he saw Stephens from his house, coming along the path, with his pistol in hand; that he took his gun and went to Stephens for the purpose of ordering him off his premises; that, when he got near, Stephens asked him what he meant; "I told him to go in the road off my premises;" that Stephens said "he would not do it;" that he immediately presented his pistol and snapped it at appellant, and made another effort to shoot; that after Stephens snapped his pistol, but while he was still endeavoring to shoot, the appellant shot him.

There was other evidence which showed that the appellant and Robert Stephens were enemies, and that each had threatened the life of the other, but, according to the evidence, it seems that Stephens' threats were direct and violent, while the appellant's threats were generally conditional, such as, what he would have to do, or what he would be justified in doing.

The lower court permitted the Commonwealth to prove, by Turner Branham, what purported to be the dying declarations of Robert Stephens. His evidence is as follows:

"He, Stephens, said that he believed he would have to die. He said, 'I thought I would get away from Burin,'" meaning the appellant, '"without any trouble. I thought he was trying to bluff me as he had always tried to do.'"

This evidence tended to strengthen the evidence of Richard Ward as to what occurred at the time of the killing, and to throw the blame upon the appellant in the previous difficulties between him and Robert Stephens. We can not say that this evidence did not influence the verdict of the jury. On the contrary, it is probable that it did have weight in determining their verdict. Therefore, if the evidence was incompetent, the case must be reversed.

In cases of homicide, where the death of the deceased is the subject of the charge, his dying declarations as to the circumstances of his death are admissible in evidence.

But "it is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death." * * * "It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible."

On the other hand, a mere belief that he will not recover from his injuries, but that he will ultimately die from them, is not sufficient to admit his declarations in evidence. (Greenleaf on Evidence, volume 1, section 158.)

The language of the deceased to the effect that "he believed he would have to die" was nothing more than the expression of an opinion that the wound which he had received would ultimately cause his death.

We are clearly of the opinion that this evidence was incompetent, and that its admission was prejudicial to the rights of the appellant.

The judgment of the lower court is reversed, and the cause is remanded, with directions to grant the appellant a new trial.

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McGINNIS v. PETERS, TRUSTEE.

(Filed December 13, 1887—Not to be reported.)

Sale of estates in remainder—Parties to action—A testator devised certain real estate to be held in trust for his daughters for life, and at their death to pass to their children, and if no children, to the surviving devisees of their children. The estate of one of the daughters becoming unprofitable, she and her husband, together with her sisters, who are still living, and the trustee, filed a petition in equity against her infant children, who were served with process, asking a sale of the land and a re investment of the proceeds, which was adjudged by the chancellor. The purchaser's exception to the report of sale having been overruled, he appeals. Held—That such proceeding against the infant remaindermen is authorized by section 491 of the Code, and it was not necessary in this case that the children of the sisters of the life tenant should be parties to the action.

Wm. Carroll for appellant.

B. J. Peters for appellee.

Appeal from Henry Chancery Court.

Opinion of the court by Chief Justice Pryor.

Nathan Divine died, leaving a last will, by which he devised certain property to his daughters, to be held for life, and at their death to pass to their children, and if no children, to the surviving devisees or their children. After the devise of certain legacies the devisor directed his executor to sell his land and pay them, as directed by the will, and the balance of the proceeds to be held in trust for the benefit of his daughters, they to be entitled to the annual profits. The trustee was authorized to invest in real estate, if he saw proper, and this he did for the appellee, Julia White, a daughter of the testator, in the land described in the petition, she holding a life estate, with remaider to her children, or to the survivors and their children, if the particular devisee died childless. The land in which the investment was made becoming unprofitable, and in a dilapidated condition, the trustee, B. J. Peters, and Julia White and her husband, together with her sisters, who are still living, Mrs. Well and Mrs. Owens, filed a petition in equity against the children of Mrs. White, who were served with process, asking a sale of the land and a reinvestment of the proceeds.

The chancellor, upon hearing proof as to the condition of the land, ordered a sale, and the appellants, becoming the purchasers, excepted to the report of sale, on the ground that the title was defective, because, first, such a proceeding is not authorized by statute; and, secondly, that the life-tenant, Mrs. White, might yet die without leaving children, and if her sisters should die before she did, leaving children, they would be entitled to the land.

We think section 491 of the Code authorizes this proceeding against the infant children of Mrs. White. That section authorizes the tenant of the particular freehold estate to bring the action, and have the property sold for reinvestment, and if the remainder be contingent against the person in being in whom it would have vested, if the contingency had happened before the beginning of the action.

In this case Mrs. White is the life-tenant, with the title in her children in remainder, and if she had died before bringing the action without children, her surviving sisters would then have

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been entitled. They are still before the court. Her sisters as plaintiffs and her children as defendants. The land is to be sold and the proceeds reinvested.

The chancellor has made no disposition of the proceeds, but holds them or the notes of the purchasers. The title becomes perfect on the confirmation of the sale, and the purchasers must pay the money. The chancellor and not the purchasers will look to the investment.

The judgment below is affirmed.

KENTUCKY SUPERIOR COURT.

KELLY v. DAVIS.

(Filed June 2, 1886.)

1. Where one fails to deliver possession of a farm which he has contracted to rent of another, the disappointed party is not in every instance limited to the difference between the rental value and the agreed price, but may allege, and recover damages for, such special injuries as legitimately and directly arise out of the breach, such as expenses incurred in preparing to remove to the premises; but profits which might have been made are too remote to be recovered.

2. Verdict tested by instructions—A party can not assail a verdict against him as contrary to law if it is justified by the instructions given to the jury as the law; he must assail the instructions.

Carroll & Barbour and W. P. Thorne for appellant.

B. S. Robbins and A. H. Pollard for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Presiding Judge Bowden.

The appellee recovered a judgment against the appellant for $250 on account of her failure to deliver possession of a farm which she had contracted to rent to him for one year.

The court instructed the jury that the only damages they could find for the plaintiff was the difference between the price agreed upon and its rental value, but that in any event the plaintiff was entitled to nominal damages.

There was no evidence from which it could have been inferred that the rental value was any greater than the agreed price. There was no support, whatever, for the verdict within the restriction of the rule given by the court to the jury. The instruction given constituted the law of that case. It precluded counsel from asserting that a different measure of damages should be applied, and it made it unnecessary, if not indecorous, for the appellant's counsel to argue that she would not be liable for more than nominal damages or any other rule that might be laid down. That was a question not before the jury, and which they had no right to consider. A party can not assail a verdict as contrary to law, if it is justified by the instruction given to the jury as the law. He must assail the instruction as the author of his calamity. The jury have no right to disregard instructions and base their verdict on considerations which the parties had no right to argue. It

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leaves them without remedy. It would be mere nonsense to complain that the instruction is erroneous, when it is manifest that the jury utterly disregarded it. Nothing could have been more harmless. The question would always be whether the verdict is according to law, conceding that the instruction is not, but this, by a well settled rule, is never the question.

In this case it seems clear that the verdict was flagrantly wrong, if it is to be tested by the law as given by the court. That it must be so tested we have no doubt.

It may be also true that the instruction was erroneous, and it may be that matters were stricken from the petition that should have remained in it. But if that is so, it furnishes no reason why the jury, in their private consultation, should be permitted to restore the stricken matter or to correct the erroneous instruction, and then decide the case on issues that had not been tried. We do not mean to say that the court erred in regard to either of these matters, as neither is before us. The instruction clearly lays down the general rule. It seems, however, that the disappointed party is not in every case limited to the difference between the rental value and the agreed price, but may allege, and recover damages for, such special injuries as legitimately and directly arose out of the breach—such as expenses incurred in preparing to remove to the premises. (Giles v. O'Toole, 4 Barb., 261; Williams v. Oliphant, 3 Ind., 271; Yeager & German v. Weaver, 46 Pa. St., 425; Cilley v. Hawkins, 48 Ill., 309; Adair v. Boyle, 20 Iowa, 238.) And in the last case it was held that there could be special recovery for time lost in seeking another place or other employment, where it is done diligently, and there is a similar view taken in Newbrough v. Granger, 8 Grattan, 16, but this is conceded to be quite near the line which divides proximate from remote and consequential damages. But all the cases agree that profits which might have been made are clearly beyond the line.

The judgment is reversed, and the cause is remanded, with directions to set aside the verdict and judgment and to grant the appellant a new trial.

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SUPERIOR COURT ABSTRACTS.

KENTUCKY CENTRAL RAILROAD CO. v. HIGGINS.

Filed December 7, 1887. Appeal from Harrison Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Appeal—Bond for costs—A corporation, which was a defendant in the lower court and asked for no judgment except such costs as a defendant is entitled to, is not required to execute a bond for costs in order to prosecute an appeal to reverse the judgment obtained against it.

2. Landlord and tenant—The fact that a landlord, in adjusting the rent with his tenant, deducted the value of growing grass destroyed by a railroad company, does not give him a cause of action to recover damages for its destruction, the growing grass being the property of the tenant.

L. M. Martin for appellant; A. H. Ward for appellee.

MILLER, &c. v. NATIONAL BANK OF LANCASTER.

Filed December 7, 1887. Appeal from Boyle Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Ejectment—Mesne profits—A successful plaintiff in ejectment is entitled to recover, in a subsequent action, rents and profits accruing after the commencement of the action in ejectment, if there was no prayer in that action for such a recovery.

A prayer for damages "for being unlawfully kept out of possession and for all relief, general and special, to which plaintiff may be entitled," is not a prayer for the recovery of rents and profits accruing after the commencement of the action.

2. Same—Attorneys' fees—A successful plaintiff in ejectment is not entitled to attorneys' fees paid by him in such action.

W. O. Bradley, John W. Yerkes and S. M. Burdett for appellants; Anderson & Herndon and R. P. Jacobs for appellee.

HOTOPP v. HOTOPP, &c.

Filed December 7, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Ward, affirming.

Insurance—Assignment of policy—A policy of insurance can not be taken out by one having no interest in the life of the person insured, nor, if taken in the name of the insured, can it be afterward transferred or assigned to any one who has not an insurable interest.

A member of the order of the "Knights of the Golden Rule" assigned his certificate of membership, which was payable to his daughter, to appellant, his sister-in-law, or had a new certificate issued naming her as beneficiary, "in consideration of her furnishing a home and necessaries and other comforts." In this action by appellant to recover upon the certificate, the insured having died, Held—That as the appellant had no insurable interest in the life of her brother-in-law, the assignment was void.

It is suggested that if the case had been argued upon that ground, the court would be inclined to hold that the member would have had no power by assignment, with or without the consent of the lodge, to divert the beneficiary fund from his family.

M. A. & D. A. Sachs for appellant; E. E. McKay for appellees.

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HODGE, &c. v. QUIRY.

Filed December 7, 1887. Appeal from Crittenden Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Receivers—It is the duty of a receiver of court to dispose of funds in his hands as ordered, and it is not his province to intervene and dispute the propriety of the order.

2. Same—A receiver is not liable for interest on funds in his hands, unless he has refused to pay when ordered, or has been ordered to make interest, or has made it.

In this case, the receiver having used the money in his hands, he may properly be charged with interest as the price of the use.

3. Same—A judicial sale of land was set aside and the money paid by the purchaser to the commissioner ordered to be repaid to him, but not until the further order of the court, the delay being manifestly in view of an appeal which was prosecuted. On the next day after this order the commissioner was ordered to give bond as receiver to secure, manifestly, the payment of this money, but time having been given until the next term, the bond sued on was then executed. The bond stipulates that the principal "will perform all duties imposed on him by law and the order of the court, not in conflict with the orders heretofore made in the above action directing him to pay out money, and will pay to the persons entitled to the same any money as ordered by the court." Held—That this bond was intended to secure the payment of money theretofore received and not paid out under order of court, for which the surety is liable.

James & Cissell for appellants; W. P. D. Bush for appellee.

SMITH'S ADM'R v. SMITH.

Filed December 7, 1887. Appeal from Grayson Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Fraudulent transfer—Those claiming as volunteers under a fraudulent grantor are as much estopped by the deed or transfer as the grantor himself would be.

In this contest between the administrator and the widow of an intestate over the proceeds of a note executed to the wife in the husband's lifetime, it is immaterial whether the intestate permitted the note to be made to his wife, to defraud his creditors, or whether he was indebted to her in that amount, as in either event the transaction is conclusive against the administrator representing the heirs only.

2. Tender—The defendant admitted in her answer that plaintiff was entitled to judgment for a certain amount, and tendered the sum to plaintiff and paid it into court, but upon plaintiff's refusal to accept it in satisfaction of the demand sued on withdrew the money from court. Held—That the withdrawal of the money from the possession of the court was a waiver of the tender or offer of compromise, if it was such, and plaintiff is entitled to judgment for the amount admitted to be due and costs. It is not sufficient that the judgment recites "that plaintiff is adjudged to accept the $25 tendered as the balance in the hands of defendant," the amount tendered having been withdrawn.

J. C. Graham for appellant; J. S. Wortham for appellee.

EVANSVILLE, CAIRO & MEMPHIS PACKET CO. v. REHKOPH.

Filed December 7, 1887. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

Carriers—Act of God—Appellee sued appellant to recover the value of a buggy, sample trunks and contents, which he placed on board one of appellant's steamers to ship from Paducah to Smithland. The defense was that the property was lost by "act of God," in that it was blown off the boat by a violent and unusual wind. The evidence is conflicting as to whether the wind was more violent than may be expected in the ordinary course of nature, and is not conclusive that the means adopted for the security of the buggy and contents were such as to protect it against the ordinary perils of

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the voyage. Held—That in this state of case these questions were properly submitted to the jury.

Husbands & Husbands for appellant; J. W. Bloomfield for appellee.

ROBBERTS & CO. v. NICKLIES.

STUCKY v. SAME.

Filed December 7, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Assignments for benefit of creditors—When a debtor is confessedly insolvent and has made an assignment, conveying all his property to an assignee in trust for the payment of his debts, one creditor will not be allowed by an attachment to seize the trust goods, and thereby acquire a preference over all other creditors, upon the ground that the debtor and assignee are acting fraudulently. The chancellor will, when called upon, take control of the trust estate and see that it is properly administered for the benefit of all the creditors.

2. Fraudulent conveyances—A fraudulent grantor can not be allowed to attack his own deed, and his administrator is in no better condition than he was.

3. Appeals—Presumptions—The record in another suit having been read in evidence upon the trial of this case, and nothing of that record, except the petition, appearing in this, it must be assumed that the evidence afforded by that suit sustains the judgment.

Abbott & Rutledge for appellants; Bacon & Stites for appellee.

KING v. MIZE & ROGERS.

Filed December 7, 1887. Appeal from Madison Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Partnership—M. and K., partners under the firm name of M. & Co., dissolved partnership, M. becoming the owner of the firm's assets and agreeing to pay K., two years thereafter, a certain sum, with interest. On the same day that the agreement for the dissolution took effect M. and R. formed a partnership, M. agreeing, in consideration of $1,500, to let R. have one-half interest in the stock of goods formerly owned by M. & Co. This amount was paid by R. to M. the day before the partnership was formed. K. now seeks to recover of the firm of M. & R. the amount which, upon the dissolution of the firm of M. & Co., M. agreed to pay K. Held—That the fact that the $1,500 was paid by R. to M. before their partnership agreement was entered into and before the dissolution of the firm of M. & Co. took effect did not operate to make R. a partner with M. in the latter's purchase of K.'s interest, as it may fairly be inferred that the $1,500 was paid in advance to enable M. to adjust his matters with K. preparatory to the formation of the new partnership.

2. Act of 1856—An agreement entered into between M. and R. dissolving their partnership, whereby M. simply surrendered to R. the firm property for the purpose of settling the firm business, did not operate as an involuntary assignment under the act of 1856.

3. Upon the dissolution of partnership and the departure of one of the partners from the State the other partner had the right, and it was his duty, to settle the partnership affairs.

W. B. Smith and John Bennett for appellant; T. J. Scott for appellees.

DODSON v. SCOTT.

Filed December 7, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Appeals—Reversible error—There can be no reversal for an error in refusing to allow a witness to answer a particular question propounded to him, unless it appears from the bill of exceptions what answer was expected from the witness.

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2. A motion for new trial upon the ground of newly-discovered evidence must be sustained by affidavit, as required by section 347, Civil Code.

Ira Julian and Frank Chinn for appellant; A. Duvall for appellee.

SMITHSON'S ADM'R v. BAKER.

Filed December 7, 1887. Appeal from Fayette Court of Common Pleas. Opinion of the court by Judge Barbour, overruling motion for appeal.

1. Appeals from Superior Court—In an action for recovery of money or personal property, where the value in controversy is less than $2,000, a party can not demand as a matter of right an appeal from this court to the Court of Appeals. This rule applies where the judgment below is reversed as well as where it is affirmed.

2. Same—This court can not certify that the question involved and decided by it in a case is novel when the same question has been clearly so decided by the Court of Appeals, even though it be conceded that the opinion of the Court of Appeals is in conflict with an earlier case, as the later case must be regarded as settling the question.

J. D. Hunt for motion; G. B. Kinkead contra.

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KENTUCKY COURT OF APPEALS.

COMMONWEALTH v. KING.

SAME v. HARPER.

SAME v. MAHIN.

SAME v. McCLUSKY.

SAME v. WEEDER.

SAME v. NEAL.

(Filed December 17, 1887.)

1. Local option—The voters of a civil district having, by a vote under the general "local option" law, prohibited the sale of liquors within the district, the voters of a town forming a part of the same district can not, by a separate vote under the same law, permit the sale of liquor within the town limits; and a license to retail liquor issued by the county judge, because of such a vote, affords the licensee no protection.

2. Same—Election—Where a vote is to be taken in a city or town under the local option law, the order to hold the election should be addressed to the city or town authorities, and the election held under their supervision at the next regular town or city election, and not at a State election, under the supervision of the sheriff.

H. L. Stone for appellant.

J. H. Hazelrigg and Wood & Day for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court bv Chief Justice Pryor.

These appellees were indicted for selling spirituous liquors in violation of the local option law. A district known as District No. 5 had been created by legislative enactment, embracing the city of Mt. Sterling and much of the territory, including many voters, outside the city boundary. A vote was taken in this district in 1882 for and against the sale of liquors, resulting in a majority favoring local option. After this, in the year 1884, a part of this distirct, viz: The city of Mt. Sterling, without any

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other or further legislative power or change in the district, again voted on the question, and a majority being against local option, the county judge, regarding the former law or vote no longer effectual, granted to these appellees license to retail liquor. They were indicted, and the circuit judge, concurring with the county judge, dismissed the indictments, and the State has appealed. In the local option law it is provided that on the petition of at least twenty legal voters in any district, town or city, it shall be the duty of the county judge to make an order, at the next regular term after receiving the petition, directing the sheriff or other officer, whose duty it may be to hold the election, to open a poll in said district, town or city at the next regular State, town, city or county election held therein, for the purpose of taking the sense of the legal voters in said district, town or city on the proposition whether or not spirituous, vinous or malt liquors shall be sold therein.

This character of legislation originates from the police power of the State, and the legislature, in looking to the exercise of the power in this case, saw proper to create a districts including the city of Mt. Sterling, in which the vote should be taken, and so long as that district remains it can not be severed except at the will of the legislature, so as to take another vote in parts of the district on the same question. A town or city may become a part of a district where this vote is to be taken, where the legislature, in its wisdom, deems it necessary for the public good in the particular locality, and the courts are powerless to change it. It, therefore, results that the vote last taken did not, in any manner, protect the parties licensed in what they supposed to be their right to sell. It may present a case for executive clemency but not for judicial interference.

Again, it seems to this court, that if the right to order the election existed, the order to conduct and hold the election should have been addressed to the city authorities, in order that the election might be had by the city officers appointed or already designated for that purpose under the powers of the city charter, the election to be held at the next regular city election. In this case the election was held by the sheriff or the coroner at a State election and the entire municipal authority ignored. The qualification of the voters in the city being altogether different as to age, citizenship and residence, it is essential that such an election should be held under the supervision of the city authorities. They are directly interested in the result, and the interests of the municipality certainly require that, in questions affecting the particular city or town, to be determined by the popular vote, the mode of conducting the election, when ordered, should be with the municipal power and not with the sheriff, unless otherwise directed by the act under which the vote is to be taken. The county judge is required to direct the sheriff or other officer, whose duty it may be to hold the election, to open a poll in said district, town or city at the next regular State, city or county election. The act evidently meaning that when in a city or town, the vote is to be taken at a regular city or town election, and not to mingle the one election with the other, or to vest in the sheriff, by the order of the county judge, the exercise of a municipal power that has already been lodged in those who have the control of, and are directly interested in, the conduct of municipal elections. For these reasons, and without considering the other questions raised, these judgments must be reversed, and are now remanded for a new trial in conformity with this opinion. Neither the law nor the facts, or both combined, authorized the judgment renderd. It was, therefore, not necessary to separate the one from the other in the proceedings below.

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NEWMAN v. NEWMAN.

(Filed December 17, 1887—Not to be reported.)

Sale of infants' real estate—The sale of real estate in which the father, who was also the guardian of an infant, owned a life estate and the infant the remainder, was properly ordered by the chancellor in a suit by the father and guardian against the infant.

Micajah Fible for appellant.

E. J. McDermott for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellee is the father and statutory guardian of the appellant. The appellee filed his petition in the Louisville Chancery Court against the appellant, in which he alleged that Jacob Ernwine and wife, in consideration of $4,875, $1,500 of which was paid down by him and the balance was secured by three promissory notes signed by the appellee and his wife, for $1,125 each, conveyed by deed a certain lot of ground in the city of Louisville to the appellee's wife; that the conveyance to his wife was for her accommodation, and the payment of the $1,500 cash was in the nature of a loan to her, and the signing of the notes by the appellee was as surety for his wife; that his wife was dead and the appellant was her only heir; that he had paid off, with his own means, one of said notes; that said lot was subject to the vendor's lien for the payment of the remaining notes; that the appellant owned no estate except this lot; that the same was not profitable and was going to waste. He asked that the same be sold, subject to the vendor's lien for the unpaid purchase money, and that he be allowed the cash value of his life estate therein and the balance be invested in some safe stocks for the benefit of the appellant. Upon the proof of the appellee's allegations the chancellor ordered the sale of said property, and the appellee bought it at the price of $2,000 and paid the money into court. The property was sold subject to the vendor's lien.

The chancellor affirmed the sale and allowed the appellee the cash value of his life estate therein, and the balance he directed to be paid to the appellee as the statutory guardian of the appellant, to be invested in some safe manner for the appellant.

The necessary steps to entitle the appellee to a decree for the sale of the land seem, from the record before us, to have been taken, and the proof as to the propriety of selling the land for the benefit of the infant seems to be sufficient.

The judgment of the lower court is affirmed.

STANLEY, &c. v. COMMONWEALTH.

(Filed December 17, 1887.)

Criminal law—Defense of others—Where one may kill in his own defense, because of danger, either real or apparent, another may do so for him; but one who thus interferes is guilty of murder, if the person in whose defense he acts was in fault.

The instructions in this case were erroneous in restricting the defendant's

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right to act in defense of another to the existence of actual danger to the later.

John Feland & Son, R. W. Henry and D. L. Johnson for appellants.

P. W. Hardin for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Holt.

The appellants, Ranzy and Harmon Stanley, seek to excuse the killing of Rufus Ebling upon the ground that it was done by them to save the life of William Stanley, who is the brother of the one an the uncle of the other.

It is a general rule that whatever a person may lawfully do in his own defense, another may do for him. Mr. Bishop, in speaking of the right to assist others in defense of person and property, says: "The doctrine here is that whatever one may do for himself he may do for another; * * * and on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." (1 Bishop on Criminal Law, section 877.)

Another writer uses this language: "A well grounded belief that a felony is about to be committed will extenuate homicide committed in prevention, but not in pursuit, by a volunteer. * * * A bona fide belief that a felony is in process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable, but the belief must be honestly entertained and without negligence, and if nonnegligent it will excuse the homicide. * * * A person has a right to repel a felony threatened to be perpetrated either on himself or others. * * * The intentional infliction of death is justifiable when it is inflicted by any person in order to defend himself or any other person from immediate and obvious danger of instant death or grievous bodily harm, if he, in good faith and on reasonable grounds, believes it to be necessary when he inflicts it. * * * Self-defense will justify a person in defending those with whom he is associated, and in killing if he believes life is in danger, and the right may be exercised by the servants and friends of the party assaulted, or any one present, in repelling an attempted felony." (Desty's American Criminal Law, sections 125d, 126 and 126a.)

The courts were slow to adopt this doctrine in its full extent, doubtless for fear that it might be abused, and sometimes serve as a shelter to those who, under the plea of protecting the lives of others, merley executed their own guilty purposes. It was, however, declared by this court in the unpublished opinions in the cases of Roberts v. Commonwealth (1876), and Smith v. Commonwealth (1877), and is not open to this objection when properly applied.

The right of self-defense rests upon necessity, and apparent reasonable necessity is the whole law and reason of it. It was not derived from society. It is a natural right, instinctive in the person. Man, when he came into society, brought it with him in all its freedom and broadest sense. It has been restricted by law in its exercise to cases of necessity, but can not be altogether denied. If it were possible it should not be, because, as now restricted, it serves to protect right against wrong in emergencies where the law would not avail.

It is the duty of a man who sees a felony attempted by violence

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to prevent it if possible. This is an active duty, and hence he has a legal right to use the means necessary to make the resistance effectual. If A be unlawfully assaulted by B and his life thereby endangered, he may, by reason of not being in fault, defend it even to the extent of taking the life of the person who is in fault, and as the right is a natural one, rules of law restricting it must, in order that it may still be effective, be adopted to his character and nature. He may, therefore, act upon appearances, if he acts reasonably, and if assailed by another and he believes and has reasonable ground to believe that his life is thereby endangered, he may even take life in its apparent necessary defense. So great, however, is the law's regard for human life that he must be careful and not violate the restriction that law and society have placed upon this right of self-defense, to wit: He must act from necessity or reasonable apparent necessity and not be in fault.

Not only, however, may he do this, but another may do it for him. This other person in such a case steps into the place of the assailed, and there attaches to him not only the rights but also the responsibilities of the one whose cause he espouses. If the life of such person be in immediate danger, and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault. He interferes at his peril if the person slain was not in fault. In the language of Mr. Wharton, "a person interferring, particularly if he be a stranger, should act with much caution." This necessarily follows, because he takes the place of one of the combatants, and can only do for him what he had the right to do under the circumstances in defense of himself. Thus if A unlawfully assails B, endangering the latter's life, C has no right, because he may come upon the scene of conflict at a time when, during its progress, A is in danger, to kill B. This would be murder in C just as it would in A. Any other rule could not be tolerated. The innocent can not be sacrificed to save the guilty. This would be paradoxical. A volunteer must not kill in behalf of one in fault. This would be what some writers have termed a negligent killing. He may, however, do so for one not in fault, if the impending danger thus brought about be either actual or apparent. In other words, as the person not in fault may, if he believe, and has reasonable grounds to believe, that his life is in immediate danger, defend it to the extent of taking life, so another may act upon the like appearances as to such danger, and defend it for him to the same extent. Here a felony is attempted, and in killing the attempter, through the necessity to save an innocent person, the one so doing is in the condition of se defendendo in defending the one not in fault. In such a case the doctrine of self-defense, in all its principles, extends to the accused, just as it would if the felony had been attempted upon him, or as it would apply to the one in danger if he had done the killing.

Applying this rule to the case in hand the judgment can not stand. The fourth instruction reads thus: "The court instructs the jury that in addition to the right of self-defense as defined in instruction number three (relative to the right of self-defense upon the part of the accused when he is in danger), that if they believe from the evidence that at the time of the killing of Rufus Ebling by Harmon and Renzy Stanley, if they did so kill him, the said Ebling was then unlawfully, willfully and feloniously, and not in his own necessary self-defense, about to kill William Stanley, or about to inflict great bodily harm upon him with a

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deadly weapon, maliciously and unlawfully, and not in his own necessary self-defense, then the said Harmon and Renzy Stanley might lawfully interfere to prevent said injury, and might even take the life of said Ebling, provided such extremity be necessary to prevent such killing of, or injury to, William Stanley; and provided further, that said Harmon and Renzy Stanley had not, theretofore, and in said rencounter been engaged in an unlawful attack with force and arms on said Ebling."

After what we have said, it is unnecessary to comment at length upon this instruction. It is evident that it confined the right of the appellants to act in defense of William Stanley's life to the existence of actual danger to it. It did not allow them to act in good faith upon appearances, however reasonable. Under it they could only act if as a matter of fact, in the judgment of the jury, the life of William Stanley was, at the time of the killing, in actual danger at the hands of the deceased, and an actual necessity existed for the killing.

We intimate no opinion as to the character of weight of the evidence. As there must be another trial it would not be proper to do so. It is sufficient to say that there was sufficient testimony to authorize the submission of this ground of defense to the jury, and, as indicated above, it was not done in proper form.

Judgment reversed and cause remanded for further proceedings in conformity to this opinion.

WELLS v. COMMONWEALTH.

(Filed December 17, 1887—Not to be reported.)

1. Former conviction—New trial—Where a new trial has been granted to the accused upon his own request, he can not plead the former trial and conviction in bar of further proceedings, even though the indictment under which the first trial was had may have been dismissed, the charge resubmitted to the grand jury and a new indictment found.

2. Time of trial—Continuance—Where an indictment was dismissed, the charge resubmitted to the grand jury and a new indictment found, it was not error to try the defendant five days after the finding of the new indictment, both indictments charging substantially the same offense, and there having been one trial under the former indictment and a continuance from term to term.

3. False swearing—The law forbids a conviction for false swearing, save upon the testimony of two witnesses, or one and strong corroborating circumstances, but two witnesses are sufficient to convict without strong corroborating circumstances, although they may differ some as to the language used by the accused, and one may remember more of his testimony than the other.

J. W. Bush for appellant.

P. W. Hardin for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Holt.

The appellant, E. Newton Wells, was convicted of false swearing upon a defective indictment. Upon his motion a new trial was granted. The court then, upon the motion of the prosecuting attorney, dismissed the indictment, and resubmitted the charge to the grand jury, who reindicted him, and he was again

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convicted. Upon the last trial he relid upon the former conviction, and his having been once in jeopardy as a bar to any further prosecution.

Where, however, a new trial has been granted to the accused, upon his own request, he can not plead the former trial and conviction in bar of further proceedings. Equally as well could he, after a reversal by an appellate court, at his instance, of a judgment of conviction, rely upon it in bar of another trial. When he, upon his asking, obtains a new trial, the case stands as if it had never been tried, and it follows, of course, that the trial court may dismiss the indictment, resubmit the charge to the grand jury, and, upon the finding of a new indictment, retry the case. This question was decided by this court in the case of Haskins v. Commonwealth, 8 Ky. Law Rep., 419.

Section 243 of the Criminal Code says:

"The attorney of the Commonwealth, with permission of the court, may, at any time before the case is finally submitted to the jury, dismiss the indictment as to all or a part of the defendants, and such dismissal shall not bar a future prosecution for the same offense."

In the case of Williams v. Comomnwealth, 78 Ky., 93, this provision was held to be unconstitutional only so far as it attempted to authorize a dismissal after jeopardy had attached, without its operating as a bar to a further prosecution of the same charge. Here, however, the granting of the new trial placed the parties in the same condition as if there had been no trial, and before the commencement of a second one and before jeopardy attached, the indictment was dismissed.

The first indictment was found in February, 1883. The case was tried once and continued from term to term, and several times upon the motion of the accused, until August, 1887, when the indictment was dismissed and a new one found. It was presented upon one day and the next day the accused filed his affidavit and asked a continuance of the case until the next term of the court. The court overruled the motion and set the case for trial upon the fourth day thereafter. It awarded to the accused all the process he asked to compel the attendance of the two witnesses, on account of whose absence the continuance was sought, and one of them was, upon the subsequent trial, introduced by the Commonwealth and testified against the appellant. When the day set for the trial arrived, he again asked a continuance upon an affidavit, but not on account of the witnesses named in the one presented four days previously, and it is evident from the last affidavit that he had no good reason to suppose that the two persons therein named would testify as therein stated. It was undoubtedly an application for delay merely.

He was indicted for testifying falsley upon the trial of one charged with murder. The last indictment contained all that was in the first one, save a single statement as to a particular fact. The first one was defective, save as to this sinlge statement. It, however, also contained all the matter charged in the last indictment. The accused claimed that, knowing all the matter in the first indictment was defectively stated, save what purported to be the one portion of his testimony, he had only prepared his case as to it, and that, by reason of the finding of the new indictment, he should have until the next term to find his testimony and prepare his case. The testimony he had given, however, was at one and the same time, and we can not well conceive how testimony applicable to a trial under the one indictment would not have been material to a trial upon the other. Both charged substantially the same offense. The accused, in preparing for

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trial under the one indictment, would necessarily almost prepare for it under the other, or at least become informed of all testimony likely to benefit him. The motion for a continuance was properly overruled.

The law forbids a conviction for false swearing, save upon the testimony of two witnesses, or one and strong corroborating circumstances.

In this case the jury were told:

"The accused must be acquitted, unless it is proven that he swore falsely by two witnesses, or by one witness and strong corroborating circumstances."

The defense asked an instruction, which substantially told the jury, or which was calculated to lead them to believe, that if, upon the trial of one charged with giving false testimony, one witness testifies to what the accused swore, but another witness is only able to detail a part of it; or, in other words, one testifies to one portion of it and the other to another, that then there can be no conviction in the absence of strong corroborating circumstances. This, it seems to us, would have been a misapplication of the law. If not then the conviction of a perjurer or false swearer would be rare and often impossible. Two witnesses and more testified to what the accused substantially swore. They, of course, differed some as to the language used by him, and one recollected more of his testimony than another, but when considered together there can be no doubt of the correctness of the verdict.

The instruction as given was a correct statement of the law, and fully as favorable to the accused, upon the circumstances of the case, as he had a right to expect, if not more so, and the judgment is affirmed.

Judge Bennett not sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. FINLEY.

(Filed November 15, 1887.)

1. Railroads—Right to change public road—A railroad company has no right in constructing its road to change the location or grade of a public way so as to deprive the adjoining owner of his right to enjoy his premises by preventing ingress or egress, and if it does so, must answer in damages therefor.

2. Bills of exceptions—Depositions used as evidence upon the trial of an ordinary action can not be considered upon an appeal, unless embraced in the bill of exceptions or identified by an order of court. A statement by the clerk interpolated in the bill, attempting to identify the depositions read on the trial, will not suffice.

3. Same—An express statement in a bill of exceptions that it contains all the instructions, is not required. If it shows that certain instructions were asked by the plaintiff, and either given or refused, and there is alike showing as to the defendant, then, in the absence of anything in the record showing that others were given or refused, the bill will be regarded as complete in this respect.

Wm. Lindsay and Hill & Alcorn for appellant.

Hargis & Eastin and A. Duvall for appellee.

Appeal from Whitley Circuit Court.

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Opinion of the court by Judge Holt.

This action is in the nature of case to recover damages from the Louisville & Nashville Railroad Company, by reason of the construction of its road over and near the property of the appellee, H. F. Finley. It consists of three tracts, lying near to each other, but not adjoining. Over two of them he sold the right of way to the company. The road, as built, runs through one of these, dividing it, and as to it the claim for damages is for the nonbuilding of crossings, as required by the appellee's charter, to enable the owner to pass from one portion to the other, where it has been thus divided. It does not clearly appear, from the plat on file, whether the other one of these two tracts is cut in two by the road, or whether it merely cuts off from one corner of it so much land as is taken for the right of way, but in any event the court, by its instruction, restricted the right of recovery as to it to any earth taken therefrom, if any, by the company, and not embraced by the grant to it.

The main controversy is as to the third lot of land. The damage awarded by the jury, save a comparatively small amount, relates to it. It is situated in the suburbs of the town of Williamsburg, and at the junction of the Jacksboro and Pine Knob roads, and consists of two acres of land.

Upon it the appellee had, prior to the construction of the railroad, erected a valuable dwelling house, with necessary outbuildings, such as a stable, etc., and was occupying it with his family as his home. The Jacksboro road bounds the lot on the east side, and upon it the house fronts, while up to the time of the building of the railroad, the Pine Knob road ran along the south side. It does not appear whether at that time these roads at that point were a part of the streets of the town or not. It is admitted that the lot was within the town, and that the Jacksboro road was its principal street. We shall assume, however, as do the appellant's counsel, that they were at that point ordinary public roads.

Prior to the building of the railroad the grade of the lot was higher than either of the roads abutting it.

The railroad was constucted upon the Pine Knob road side of the lot, about forty yards from it, and upon land acquired from others. At that point it was built upon a considerable fill, and, therefore, crossed the Jacksboro road at a high grade. This necessitated the raising of the grade of the latter road so that the public, in traveling it, could cross the railroad. The fill thus made extended from the railroad crossing for over a hundred feet in front of the appellee's lot. At the railroad it was about fourteen feet high, and thence gradually declined. By thus raising the grade the Jacksboro road was lessened in width for travel from forty to fourteen feet, and no wall was erected along this embankment next to the appellee's lot to protect it.

The company, without having any authority from the county, removed the Pine Knob road from its old location along appellee's lot to the south side of its road, thus bringing its road and the high embankment upon which it was built between appellee's property and the Pine Knob road.

In this way egress and ingress to his stable lot, and from a good portion of his property, was cut off as to both roads.

He complains of this. Also that it caused his lot to overflow with water, the mud and dirt to spread back over it, a frog pond to form on the lot opposite and near to his house, engendering malaria, and of other actual injuries which we need not mention.

The record shows that certain depositions were used as evi-

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dence upon the trial which are not embraced by the bill of exceptions. The clerk, in copying the record, has interpolated in the bill a statement signed by him for the purpose of identifying them. This cannot be done. It can not be left to him to determine what testimony was offered upon the trial. The depositions are not identified by either the bill or any order of court.

We can not, therefore, consider any questions relating to the testimony offered or introduced upon the trial, as all of it is not before us in legal form.

It is also questionable whether we can consider the instructions. The bill of exceptions shows that the plaintiff asked certain instructions, which were given; that the defendant offered two, one of which was modified and then given, and the other refused. If nothing further appeared it should undoubtedly be presumed that these were all that were given or refused, since an express statement in a bill that it contains all the evidence or all the instructions is not required. If it shows that certain instructions were asked by the plaintiff, and either given or refused, and there is a like showing as to the defendants, then in the absence of anything in the record showing that others were given or refused, the bill will be regarded as complete in this respect.

So if it shows that each side offered certain testimony, the presumption should be indulged that the bill contains all that was offered. In this instance it has, in addition to what we have already stated, a statement in parenthesis by the clerk that it contains in one place the words "instructions hereto attached," and that he is unable to tell what instructions are thus referred to, but that the bill contains all that were asked by either side.

We conclude, however, but not without hesitation, that by fair construction it shows, with reasonable certainty, all the instructions that were given or refused, and we will, therefore, in passing upon them under the pleading, consider the law of the case.

It is said that the charter of the appellant authorized it to cross the public road, provided the public travel was not thereby impeded; that the public duty was, therefore, imposed upon it of so elevating the grade as not to do so, and it is urged that this was a legislative delegation to the company of the public right to change the grade of the public road, and make it conform to that at the railroad crossing; that this delegation of public authority also gave to the company the right to alter the location of the Pine Knob road, and that, having done so in the exercise of delegated public right and by way of discharging a public duty imposed upon it, the company stands, in law, in the place of the public, had it done so.

Undoubtedly the proper authority can change the location of a road or its grade, but even it, in doing so, must not invade private property. It may discontinue a public road altogether, and no one can complain of mere remote or consequential injury.

There was, however, no duty resting upon the company requiring them to build their railroad, or to cross the Jacksboro public road. It did all this of its own accord. It was its duty to preserve the rights of the public in the free use of the public road, but this duty was imposed by its own conduct, and was the result of its own free will in building its road. The public did not produce the necessity for the change of location of one road and a fill in the other. It can not be properly said that it resulted from the exercise of a public duty, and if so private right can not be invaded and sacrificed even for the public good.

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It was rather a result arising from the need or convenience of the company and brought about for its profit.

It is urged with commendable earnestness, however, that the appellee had no right of property in the public roads; that no individual can have; that they are unlike a street in a city, which is dedicated to the adjoining property owners as well as the public, and that as they can be discontinued at will by the proper authority, that, therefore, the abutting property holder can have no right of action if his mere enjoyment of them be disturbed without special injury by an encroachment upon his property.

Grant that an ordinary public way may, by the proper authority, be discontinued or applied to some other public use than that for which it was originally established without any legal liability to the local public or the abutting owner for the reason that there is no right of property in it that is not common to every one; grant also that the same authority may alter its grade so as to interfere with its enjoyment by the adjoining owner without there being any liability, unless there is an actual encroachment upon his property, yet no one will question but what the Commonwealth, with all her power of eminent domain, can not, even for the most important public use, invade private right and encroach upon private property without the owner's consent or paying him a just equivalent. In this case it abundantly appears that there was such an invasion and encroachment.

But even the case we have just supposed is not this one. Here the public did not change the one road and alter the grade of the other.

True legislative authority had been given to the appellant to build a railroad, but individual right requires that such a grant should be so construed as to only authorize the work to be done without interferring with private right. The appellee had the right of ingress and egress to and from his premises. The appellant had no right to prevent this, but it has so constructed its work that he is in a great measure deprived of the use of his property. So long as these public roads existed he had the right, certainly as against the appellant, to use them in connection with his property, and the deprivation of such use is an encroachment upon the use of his own property and his right to its uninterrupted enjoyment, resulting in direct injury.

When the extraordinary privilege is given to certain persons who have formed themselves into a corporation to construct a public work, like a railroad, it must be done without interferring with any right then belonging to or being exercised by any individual. The legislative grant must be so construed, and if not so done and a direct injury results therefrom to the property of the citizen, the corporation must answer in damages. Private right must be regarded. The privilege is not an unlimited and arbitrary one, and it must be exercised with due regard and without invading any personal right of enjoyment. No license is given by the grant to encroach upon private right or to deprive the owner of it, either directly or indirectly. The authority is given subject to the preservation of it, and with the burden of responsibility responding in damages for its invasion and direct injury.

Individual security and natural justice require this rule. We do not mean to determine that the abutting owner may recover for remote or consequential damages, resulting from a change in or the use of the road for the public good. If the work is being done by a corporation by legislative grant and it keeps entirely within the public way, doing no injury except remotely, then there is no redress. But if it deprives the adjoining owner of his

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right to enjoy his premises by preventing ingress or egress, or floods them with water or covers them with dirt or renders them unhealthy by the creation of stagnant pools of water, then the injury is direct and actionable. (L. & N. Railroad Co. v. Hodge, &c., 6 Bush, 141.)

The instructions conformed to this view of the law. They submitted to the jury no element of damage of a doubtful legal character. As to the other two lots they limited the right of the recovery in the one case to any failure to build a sufficient crossing from one part of it to the other, and in the other to any earth that had been taken from it without the leave of the appellee.

Judgment affirmed.

FITZGERALD v. COMMONWEALTH.

(Filed December 17, 1887—Not to be reported.)

1. Res gestæ—Upon the trial of appellant for murder, his statement, made a few minutes after the killing as to how the difficulty occurred, was not competent evidence as a part of the res gestæ, the statement being made after the appellant had made another statement as to how the deceased came to his death.

2. Instructions—Self-defense—As the appellant began the attack upon the deceased, and there was nothing tending to show that he had ceased the attack with the intention of withdrawing from the difficulty, the court properly refused an instruction based upon that hypothesis.

A. Duvall for appellant.

P. W. Hardin for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Bennett.

The indictment, which was found by the Scott county grand jury, charges the appellant with the crime of having murdered Tice Hall. The trial of the charge resulted in convicting the appellant of the crime of voluntary manslaughter, and his punishment was fixed at thirteen years' confinement in the State penitentiary.

In his appeal he relies upon two errors of the lower court as grounds of reversal. The first is, that the lower court refused to allow him to put in evidence his statement, which was made within a few minutes after the killing, as to how the difficulty occurred. He claims that this statement was a part of the res gestæ, and it was, therefore, competent evidence in his behalf.

It is sufficient to say that this statement was made after the appellant had made another statement as to how the deceased came to his death. This statement, therefore, was not competent evidence as a part of the res gestæ.

The second error assigned is that the lower court, in instruction No. 2, failed to modify the latter part of it by telling the jury that although they believed from the evidence the appellant sought the deceased and attacked him "with the intent to kill him," yet if they also believed that the appellant ceased to attack the deceased with the intention of withdrawing from the difficulty, and after he had thus ceased, the deceased attacked the appellant in such a manner as to give him reasonable grounds to believe, and he did believe, that deceased intended to kill him or do him great bodily harm, then the appellant had the right to renew the attack upon the deceased for the purpose of defending himself.

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If there had been any evidence before the jury that the appellant did cease his attack upon the deceased with the intention of withdrawing from the difficulty, or if the facts and circumstances attending the difficulty were such that the jury might have inferred that the appellant ceased to attack the deceased with the intention of withdrawing from the difficulty, and that the deceased, notwithstanding, continued to assault the appellant in such manner as to cause him to believe that the deceased was about to kill him or do him great bodily harm, then the modification contended for would have been proper, but as there were no such evidence, facts or circumstances before the jury, the instruction without the modification was proper.

The evidence in the case shows that the deceased was a reckless, brutal, bad man; that the appellant was much inferior to the deceased in physical strength; that the deceased was prone to impose on persons who were in physical strength his inferiors; that just a short time before the deceased was killed he had, without the slightest justification, assaulted the appellant, and branded him with epithets, the vilest in the English language; that the appellant, while smarting and burning from the effects of the ill usage, armed himself and sought the deceased and killed him.

As it is only for errors of law that this court can reverse in criminal cases, and as we find none in this case, the judgment of the lower court is affirmed.

COVINGTON SHORT ROUTE TRANSFER CO. v. PIEL, &c.

(Filed December 17, 1887—Not to be reported.)

1. Cross appeals—Supersedeas—While an appellee who prosecutes a cross appeal may supersede the judgment on his cross appeal, the bond must be approved by the court and not by the clerk.

In this case, as the court has not approved the bond, or directed the supersedeas to issue, upon the cross appeal, the supersedeas is discharged.

2. The cross appeal must be heard with the original appeal, and, therefore, the motion to affirm the judgment on the cross appeal as a delay case is overruled.

3. In cases of condemnation of property for public use, the execution of bond with surety is such a compensation as authorizes the taking of the possession by those authorized to construct the work.

Hallam & Myers for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Cicruit Court.

Opinion of the court by Chief Justice Pryor.

We find no express provision of the Code authorizing the execution of a supersedeas bond by the appellee on his cross-appeal, but as he is entitled to an original appeal, and may, by a cross-appeal, when the case is in this court by the appellant, obtain all the relief he would be entitled to on an original appeal, we perceive no reason why he may not supersede the judgment on his cross-appeal. A cross-appeal, however, must be obtained from the court. That is, the cross-appeal must be granted by the court in session, and when granted a bond may be offered,

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and if approved a supersedeas awarded. The repeal of the law, in regard to the assignment of errors or cross-errors, obviates the necessity of assigning any error in the court below, and the former practice of praying the cross-appeal in open court prevails, and if a supersedeas is desired a bond must be tendered and approved by the court and not by the clerk.

As the court has not directed a supersedeas to issue in this case, or approved the bond, the same is ineffectual. It must be observed, however, that this court has, in several cases, adjudged that the execution of the bond with surety, in cases of condemnation of property for public use, was such a compensation as authorized the taking of the possession by those authorized to construct the work. (General Statutes, page 283; Jackson v. Winn's Heirs, 4 Littell, 328; 1 Mar., 85; Duncan, Trustee, &c. v. Mayor of Louisville, 8 Bush, 98; Tracy v. E. L. & B. S. R. R. Co., 80 Ky., 259; 3 Ky. Law Rep., 813.)

The motion to affirm the judgment on the cross-appeal as a delay case is overruled. It must be heard with the original appeal. If counsel desires any question he may propose to raise as to his right to supersedeas, can be heard when a bond is offered for that purpose.

ISLE, &c. v. ISLE'S EX'OR, &c.

(Filed December 17, 1887—Not to be reported.)

Executors—A testator owned an interest in two firms. The executor, as executor and guardian of the testator's children, filed his petition in equity, alleging that the surviving partners offered him a certain amount for the testator's interest in the two firms. He asked that he be authorized to sell upon the terms proposed, which was done. The infant children of the testator, by guardian ad litem, appeal, complaining that the amount offered was not enough. Held—That the provisions of the testator's will and the proof as to value authorized the judgment.

L. L. Henson for appellants.

Edward J. McDermott for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

Fred Ilse died in Jefferson county testate. His will was duly probated in the Jefferson County Court. In his will the appellee, Ewdard Schnieldeknecht, is named as his executor, and he was duly qualified as such executor by the Jefferson County Court.

At the time of Fred Ilse's death he was a member of the firms of Wrampelmeier & Co. and the Wrampelmeier Furniture Manufacturing Company. Both of these firms were composed of the same members, and Fred Ilse owned one-fifth interest therein.

He directed his executor to settle up his partnership interest in said firms within three years from the date of his death. In making the settlement with said firms the executor was authorized by the will to agree with the surviving members of the firms upon a fair valuation of the realty and personalty owned by said firms.

After the executor ascertained, by final settlement, the amount that was due the testator as partner of said firms, he was authorized to lend the same to the firms upon such terms as he thought best.

The testator also nominated the executor as guardian of his

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infant children, and he was qualified as such guardian by the Jefferson County Court.

The executor, as executor and statutory guardian of his testator's infant children, filed his petition in the Louisville Chancery Court against said children and the testator's other devisees, in which he stated that the surviving partners of said firms had offered him $32,000 for his testator's one-fifth interest in said firms, which included his surplus and interest in all the assets, personalty and realty belonging to said firms, the terms of payment to be $5,000 cash and the balance in equal installments, payable in one, two and three years, the notes for the deferred payments to be signed only by the individual members of said firms, and no security to be taken and no lien to be retained on the firms' estate or assets as security for the payment of said notes.

The petition alleged that the price offered was fully as much as could be realized out of the partnership assets and property by the usual process of settling such affairs; that said sum was equivalent to a fair cash value of the testator's one-fifth interest in said firms; that the payment of the notes for the deferred payments would be well secured by the names of the members of the firms without other security.

The petition also alleged that the executor was satisfied that the sum offered was a fair price for his intestate's interest in said firms, and that he was satisfied with the terms of payment.

He asked the chancellor to authorize him to accept the price offered and the proposed terms of payment.

This the chancellor did.

From that judgment the infants, by their guardian ad litem, have appealed.

Their only ground of complaint is that the sum of $32,000 for the testator's surplus assets and real and personal property in said firms is not enough.

We think the proof, as it appears in this record, fully sustains the executor's allegations as to the value of his testator's interest in said firms. Also that his testator's will authorized him to make such a settlement and disposal of his testator's interest in said firms, as he, in the exercise of a sound judgment, should deem best for the interest of the estate.

The judgment of the lower court is affirmed.

BUSH, &c. v. LISLE, &c.

(Filed January 5, 1888.)

1. Completion of transcript—Where a transcript filed in good faith, within the time provided by section 738 of the Code, is not complete by reason of an omission of the clerk, the oversight of counsel, or the loss of a part of the record, the defect may, even after the time for filing the transcript has expired, be supplied by the filing of an additional transcript.

2. Supplying lost records—Where an order was entered directing the master commissioner to take proof as to the contents of a lost record, and his report establishing the contents of the lost paper was confirmed, there was a substantial compliance with the provisions of the statute for supplying lost records, although a commissioner was not appointed for that purpose.

3. Same—But whether so or not the statute is merely cumulative, and the judge, whether presiding as a common law judge or chancellor, has jurisdiction to supply the lost records of his court either by motion or by petition, and when parties have notice of the proceeding, and have been heard,

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the judgment of the court, even if erroneous, can not be so determined in a collateral proceeding.

4. A special judge is invested, for the time being, with the same power as a regular judge, and, therefore, an order by a special judge directing the master commissioner to take proof as to the contents of lost grounds for a new trial in this case was proper.

Wm. Lindsay and W. M. Beckner for appellants.

Breckinridge & Shelby and Charles J. Bronston for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Pryor.

Section 738 of the Code provides: "The appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time, as, for cause shown, the court may do."

The penalty for failing to file the transcript is the dismissal of the appeal. (Section 740, Civil Code.)

In the case before us the appellant obtained a transcript of the record in the court below and filed it in this court in a few months after the appeal was granted.

The record as filed was not, however, a complete transcript, as the grounds embraced in the motion for a new trial had been lost and could not be found by the clerk. Still the appellant had brought the whole record, so far as it could be made complete by the clerk below, and filed it in this court. After this had been done the appellants, without asking an extension of time for that purpose, proceeded in the court below to supply the lost paper, and when supplied and offered in this court the time for filing a transcript had passed, and for that reason the appellants moved to dismiss the appeal, insisting that the appellant must have filed in this court, within the time prescribed by the Code, the entire record, or so much of it as would enable the court to hear and determine the questions raised. As the case below was a proceeding contesting the validity of a paper offered as the last will of the testator, the grounds for a new trial were essential to the prosecution of the appeal, as without them the court would necessarily dismiss it, the questions raised calling the attention of this court only to errors of law committed during the progress of the trial. There would be some difficulty in sustaining the right of appellant to further prosecute the appeal, but for the practice heretofore prevailing, and for the additional reason that by the provisions of the Code the appellants may (with few exceptions), bring a partial transcript of the record here, and upon that have his rights determined. It is true the sections of the Code with reference to assignment of errors have been repealed, yet the appellant, as this court has heretofore held, may still bring a partial transcript to this court.

This certainly requires a liberal construction of the provision of the Code as to the time of filing, for if the language of the Code is literally followed, and a complete transcript required, or so much of it as may be necessary for the purposes of the appeal, with no right to offer a supplemental record after the time for filing, great injustice would often be the result, and the litigant turned out of court, for an omission of the clerk to copy some important paper on pleading, or the failure of counsel to notice that he has a defective record until his case is ready for submission. When submitted upon a defective or partial record,

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this court has held that it is then too late to amend it, but it has been the universal practice where a transcript has been in good faith filed and is defective or contains only a part of the proceedings below to permit the filing of a supplemental record at any time before submission. The filing only of the judgment rendered below would not be regarded as the filing of a transcript within the meaning of the Code, but it must be such a transcript as evidences the purpose of the appellant to furnish this court with so much of the record as will enable us to decide the questions of law or fact involved in the litigation. In this case it is manifest that the grounds for a new trial had been lost, a fact known to both parties, but before the case was submitted, the lost record had been supplied, and when offered should be filed, unless valid objections exist as to the mode of establishing and supplying the loss. If the original grounds for a new trial had been found, and a copy tendered when the supplemental record supplying the defect was offered, this court would have permitted the filing. If so, we see no reason for rejecting the record offered. Either party may bring up parts of the record, the appellee as well as the appellant, when the latter has failed to bring as much of the record as in the opinion of the appellee is necessary to an intelligent understanding of the case. The appellant is liable to pay the additional cost, if he brings more of the record than may be necessary, and hence the necessity of following the practice heretofore adopted by this court. The clerk may have omitted to copy the smallest paper in the record, yet vital to the appeal, or to copy a deed evidencing title, and it would be a harsh ruling to say that such defects could not be supplied before submission. So, whether by the omission of the clerk, the oversight of counsel or the loss of a paper, a part of the record, if a transcript is filed in good faith, the defect can be supplied before submission. The proper practice would have been to ask for an extension of time. Still this provision was evidently intended to apply to cases where no transcript could be filed in time, because of the magnitude of the record or the want of time on the part of the clerk to make it, and not to cases where the transcript has been filed, and an omission to make it complete. The appellee may by motion have it dismissed, unless the time is extended, but when the appellant is ready to perfect the record when the motion is made or before the dismissal, the court, in its discretion, will allow the amendment.

It is again insisted that the proceeding below to supply the lost record was not in accordance with the statute. The regular judge of the Clark Circuit Court had called a special term for the transaction of chancery business only, and not being present when the court convened, a special judge was elected, who, on motion of the appellants, had an order entered directing the master commissioner to take proof as to the contents of the lost record. The parties were notified by the commissioner when proof would be taken. They appeared, and at a subsequent term of the court, the regular judge presiding, confirmed the commissioner's report that established the contents of the lost paper.

The parties were all heard. They had their day in court, and while the statute has not been directly pursued by appointing a comimssioner for that purpose, its subsequent provisions have been complied with, but if not in this case the regular judge, who heard the motion for a new trial and overruled it, and who knew, from the statement of parties on both sides and the clerk

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of the court, that the paper had been lost, was presented with the report of his commissioner, made up from the testimony of the parties or their attorneys, showing the contents of the paper, and upon a hearing he confirmed the report and supplied the loss. Whether, therefore, the special chancellor, at the special term, had the jurisdiction to enter the order is immaterial. The regular judge had before him proof sufficient to establish the loss of the paper and its contents. He certainly had jurisdiction of the question and has passed upon it. The statute on the subject of lost records is wisely conservative, and the judge, whether presiding as a common law judge or chancellor, has jurisdiction to supply the lost record of the court, either by motion or by petition, and when parties have notice of the proceeding and have been heard, the court having the jurisdiction, his judgment, even if it be erroneous, can not be so determined in a collateral proceeding. In our opinion, however, the order of reference was proper. If made by the regular judge its validity would not be questioned, and the special judge was invested for the time being with the same power. The chancellor certainly had the jurisdiction to supply the lost paper, and this court will not inquire whether the motion of the appellant was upon the one docket or the other.

The original bill of evidence is not before us, so as we can dispose of the question as to the instructions. If not inserted in the bill or made part of the record below, they will not be considered. An order will be directed to the clerk below to bring to this court the original bill of evidence and exceptions As the question with reference to the instructions can not affect the right to the appeal, that question will be disposed of on the final hearing.

The supplemental records are permitted to be filed and the motion to dismiss overruled. (Commonwealth v. Keger, 1 Duvall, 240; Suggett v. Bank of Ky., 8 Dana, 201.)

WOODWARD v. COMMONWEALTH.

(Filed December 17, 1887—Not to be reported.)

1. Discriminations against foreign corporations—The act of March 2, 1860, which requires foreign express companies to pay to the State auditor a license fee not required of domestic express companies, does not violate that clause of the Constitution which provides that "the citizens of each State shall be entitled to all the immunities of citizens in the several States." That provision of the Constitution does not apply to corporations.

2. Repeal of statutes—That act was not repealed by subsequent acts, the object of which was "to tax" for revenue, the object of that act (March 2, 1860), being "to regulate agencies" and the license fee required being intended merely as compensation to the auditor for his services and not as a tax. Repeals by implication are not favored.

3. Foreign express companies—License fees—Each agent, and not merely each express company, is required by the act of 1860 to obtain a license from the auditor and to pay the fee therefor.

4. A long-continued practice under a statute ripens into an authoritative construction.

Hallam & Myers for appellant.

Helm & Bruce for appellee.

Appeal from Jefferson Circuit Court.

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Opinion of the court by Judge Holt.

The legislature, on March 2, 1860, passed the following act:

"An act to regulate agencies of foreign express companies.

"§ 1. Be it enacted by the general assembly of the Commonwealth of Kentucky, That it shall not be lawful, after the 1st day of May, 1860, for any agent of any express company, not incorporated by the laws of this Commonwealth, to set up, establish or carry on the business of transportation in this State without first obtaining a license from the auditor of public accounts to carry on such business.

"§ 2. Before the auditor shall issue such license to any agent of any company incorporated by any State of the United States, there shall be filed in his office a copy of the charter of such company, and a statement made, under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock, and how the same has been paid, and of what the assets of the company consist, the amount of losses due and unpaid by said company, if any, and all other claims against said company or other indebtedness, due or not due, and such statement shall show that the company is possessed of an actual capital of at least $150,000, either in cash or in safe investment, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it shall be his duty to issue license to such agent or agents as the company may direct to carry on the business of expressing or transportation in this State.

"§ 3. Before the auditor shall issue license to any agent of any express or transportation company incorporated by any foreign government, or any association or partnership acting under the laws of any foreign government, there shall be filed in his office a statement, setting forth the act of incorporation or charter, or the articles of association, or by-laws under which they act, and setting forth the matter required by the preceding section of this act to be specified, and satisfactory evidence shall be furnished to the auditor that such company has on deposit in the United States, or in some safe dividend-paying stocks in the United States, the sum of $150,000, which statement shall be verified by the oath of the president of such company, its general agent in the United States, or has invested in the stock of some one or more of the United States or the agent applying for such license, and upon due filing of such statement, and furnishing the auditor with satisfactory evidence of such deposit or investment, it shall be his duty to issue such license to the agent or agents applying for the same.

"§ 4. The statements required by the foregoing sections shall be renewed in each year thereafter, either in the months of January or July, and the auditor, on being satisfied that the capital or deposit, consisting of cash securities or investments as provided in this act, remain secure to the amount of $150,000, shall renew such license.

"§ 5. Every agent obtaining such license, or renewal thereof, as required by this act, shall, before transacting any business of transportation or expressing in this State, file in the office of the clerk of the county court in which he or they may desire to do business for said company, a copy of the statement required to be filed with the auditor, and a copy of the license, which shall be carefully preserved by the clerk for public inspection, and in case of a renewal shall in like manner file in the office of a clerk of the county court a copy of such renewed statement and license, within thirty days after it shall be filed with the auditor.

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"§ 6. The statements required by the foregoing sections shall be made up to a period within six months preceding the filing of the same with the auditor.

"§ 7. If at any time, after the filing of the statemments by this act required, it shall be made to appear to the auditor that the available capital of any such company has been reduced, by misfortune or otherwise, below the sum of $150,000, it shall be his duty to revoke the license or licenses granted to any agent or agents of such company.

"§ 8. Any person who shall set up, establish, carry on or transact any business for any transportation or express company not incorporated by the law of this State, without having obtained license, as by this act required, or who shall, in any way, violate the provisions of this act, shall be fined for every such offense not less than $100 nor more than $500, at the discretion of a jury, to be recovered as like fines in other cases: Provided, That it shall and may be lawful for any person who has a right of action that has accrued in this State against such foreign transportation or express company, to sue any such company, in any county in this State where its agent may be found: Provided further, That nothing contained in this act shall be construed to release said company from liability as common carrier.

"§ 9. For any license issued by the auditor under this act, and for each renewal thereof, he shall be allowed the sum of $2.50, to be paid by the agent or company taking out such license.

"§ 10. This act shall not apply to any express or transportation company wholly composed of residents of this State, or to any corporation chartered by this State, except to impose the liabilities of a common carrier, nor shall it apply to any person engaged in the ordinary business of transportation as common carrier or otherwise. This act to be in force from its passage." (Myer's Supplement, page 228.)

The appellant, James Woodward, was indicted and convicted in the Jefferson Cicruit Court, under the eighth section, for having, during 1886, acted as the agent, at Louisville, Keptucky, of the Adams Express Company, a corporation not created by the laws of this State, without having any license to do so from the auditor. It is urged, first, that the law is unconstitutional, and, therefore, void, because it discriminates against nonresidents.

The Constitution of the United States declares that "the citizens of each State shall be entitled to all the immunities of citizens in the several States," but a corporation is but a creature of the local law. It has no absolute right of recognition in any State, save that of its creation. It has no extra territorial operation, save by comity. The validity of its action, the exercise of any right whatever by it, indeed even the recognition of its existence in any other State, depend altogether upon its will and consent. One State can not force its artificial creature into another. If it could it would thereby transport its laws for the government of another equal State. If the corporation be accorded any rights appertaining to citizenship in another State, it is, by its sanction, either express or implied. It may forbid its presence altogether, and it, therefore, follows, of course, that it may impose such restrictions as it chooses, provided they are not open to constitutional objection. The "immunities" secured by the organic law to the citizen of one State in the other States are such privileges as are common to the citizens of the latter States under their laws, and do not embrace special privileges created by his local law and enjoyed by him at home. Nor does the term "citizen," as used in the Constitution, include corpora-

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tions. This is, therefore, not a case where a State has imposed a burden upon the citizens of another State not borne by its own.

This rule has been declared not only by this court but also by the Supreme Court of the United States. (Phoenix Ins. Co. v. Commonwealth, 5 Bush, 68; Paul v. Virginia, 8 Wall, 168; Doyle v. Insurance Co., 94 U. S., 535.)

It is next said that the act above cited has been repealed, but even if this be not so that then its proper construction only requires the company and not each of its agents to obtain a license, and that the Legislature, by subsequent legislation, has placed this construction upon it.

In support of these positions we are referred to the following sections of the act of February 20, 1864, entitled: "An act to tax railroads, turnpike roads and other corporations in aid of the sinking fund."

"§ 6. That it shall be the duty of the treasurer, secretary, agent or superintendent of any express company doing business in this State, to report to the auditor of public accounts on or before the 15th day of July, 1864, and on each succeeding 15th day of July thereafter, a full and comprehensive statement of the business of the company within the State for the twelve months next preceding, and shall, on or before the 10th day of October following, pay into the treasury a tax of six per cent, upon the net profits of the business done by it within this State.

"§ 7. That if any of the officers mentioned in sections fifth and sixth of this act shall fail or refuse to report to the auditor of public accounts as therein required, that such officer shall be liable to a fine of $1,000 for each month he may so fail to report, which fine or fines shall be recoverable upon motion in the Franklin Circuit Court, and any execution which may issue upon any judgment rendered on such motion may be levied on the property of any corporation in whose employment such officer may be: Provided, however, That before any such judgment shall be rendered said officer shall have at least twenty day's notice of the motion.

"§ 8. That all laws or parts of laws in conflict or incompatible with the provisions of this act are hereby repealed, and no other taxes than those herein imposed, whether provided for in the charters or otherwise, shall be collectable from the several corporations herein enumerated by this Commonwealth." (Myer's Supplement, page 480.)

Also to the following amendatory act, approved March 2, 1870: "An act to amend 'an act to tax railroads and other corporations in aid of the sinking fund,' approved 20th of February, 1854.

"§ 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That sections six and seven of the act to which this is an amendment, so far as the same applies to foreign express companies doing business in this State, be, and the same are hereby, amended as follows, to wit: All express and transportation and fast freight line companies doing business in this State, and required to obtain a license from the auditor of public accounts under the provisions of the act, entitled 'An act to regulate agencies of foreign express companies,' approved on the second day of March, 1860, shall, on renewing their licenses in each year, severally pay as a tax for the privilege of doing business in this State the annual sum of $500, where the distance over which the lines of such company extend in this State is one hundred miles or less, and the annual sum of $1,000 where the

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distance over which the line of such company extends in this State is more than one hundred miles, and any such company which has taken or may take out the license provided for in said act of March 2, 1860, and shall pay the annual tax provided for in this act, shall not be required by any county, town, city or other corporation or local jurisdiction in the State to take out or obtain any other or additional license, or to pay any other or additional tax or sum of money for the right or privilege of conducting its business in or through such county, town, city, corporation or other local jurisdiction: Provided, Nothing contained in this act shall be construed as exempting said companies from the ordinatry ad valorem tax on such property, real or personal, that they may own or possess.

"§ 2. That the annual report of the statement of the business of such express companies required by the said sixth section of the act to which this is an amendment be, and the same is hereby, dispensed with, and instead thereof it shall be the duty of some one of the representatives of such company enumerated in said section to report, at the time of obtaining the said annual license, a full and true statement of the routes and distances over which the lines of such company extend in this State, and for a failure of such company, or some of its authorized agents to make such annual report, and to pay the annual tax required by this act, for sixty days after the report and payment ought to be made, such company in its corporate, joint stock or partnership name shall be liable to a fine of $1,000, in addition to the tax herein imposed to be recovered, enforced and collected as required in the seventh section of the act to which this is an amendment.

"§ 3. That all laws and parts of laws coming in conflict with this act be, and the same are hereby, repealed, and this act shall take effect from and after its passage." (Acts of 1869-70, volume 1, page 33.)

By an act approved February 12, 1866, entitled "An act amending the law regulating the fees to be paid by foreign insurance and express companies," it was provided that the auditor should receive "for each original or renewal license, with certified copy of statement, $5, which fees shall be paid by the agent or agents or companies before acting under the license." (Myer's Supplement, page 719.)

The sixth section of article 4 of the present revenue law only substantially re-enacts the provisions of the act supra of March 2, 1870, as to the tax to be paid by express companies, the only difference being that it applies to all express companies, and is not confined to foreign ones.

It is true it is therein called "a license tax," but it is for revenue, and was doubtless so termed to distinguish it from the ad valorem tax imposed by the act of February 20, 1864, upon the profits of the business.

The above are all the legislative provisions which, in our opinion, have any bearing upon the question of either the repeal or the proper construction of the act of March 2, 1860.

It is clear to our minds that they point to two distinct lines of legislation, one looking to the protection of the public in the transaction of business with foreign express companies, and the other to the collection of revenue from companies engaged in this business. Two objects were in view. One was "to regulate agencies," and the other "to tax" for revenue. The titles of the acts so indicate. The license act of March 2, 1860, was not expressly repealed by the taxing act of February 20, 1864, and statutory repeals by implication are not favored. One act will not

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be regarded as repealing another by construction, unless their provisions are irreconcilable or there is good reason to conclude that the legislature so intended. Keeping in view the evident purpose of each of these two acts, we fail to see either any such conflict or any such legislative purpose. Nor in our opinion is the theory that the act of March 2, 1860, was repealed by that of February 20, 1864, supported by the act of March 2, 1870. Upon the contrary it shows that it was then recognized as being in force. In amending the law as to the tax which express companies were to pay, it expressly but incidentally speaks of foreign express companies being "required to obtain a license from the auditor of public accounts under the provisions of the act entitled 'an act to regulate agencies of foreign express companies,' approved on the 2d day of March, 1860." This legislative recognition was over six years after the passage of the act, which it is claimed repealed the one of 1860, and the act of February, 1866, raising the license fee was enacted two years after the passage of the socalled repealing act.

The two acts of 1860 and 1864 relate to entirely different subjects, the latter altogether to revenue, while the purpose of the former is to protect the public against dealing with irresponsible companies, and to definitely point out beyond dispute the agent of the company at any place where it may do business.

That of 1860 in no way relates to revenue, and the money required to be paid for the license is not exacted as a tax for the government, but merely as compensation to a State officer for the duties he is required to perform under the law.

The policy of thus paying him is, to say the least, questionable, but this is not for our consideration.

It is a fact of which we must take notice that the State policy in this respect has not been a fixed one. In some instances an officer receives a certain salary and nothing more. In others a certain sum, and by way of making it adequate also certain fees to be paid to him by those for whom the services are performed.

The latter policy has been persued as to the Auditor whose manifold duties are not only important but quite onerous. It is within the power of the legislature not only to thus tax for revenue but to thus provide compensation for the performance of the necessary services. It is done in New York, Ohio, Illinois, Mississippi and other States.

It is urged, however, that by imposition of this license fee upon from 250 to 300 express agents, the auditor receives a considerable sum while the State gets nothing.

If the purpose was to raise revenue this fact would of course be entitled to great consideration, but as we have already seen this is not the object. Upon the other hand, however, it would be equally as improbable that the legislature intended that the auditor should perform the responsible duties required by the act of March 2, 1860, for the sum of $2.50 or $5 as now provided by the issual of one license to the company. His duties under the law are quite important. He not only issues the license but he is required to investigate and know the pecuniary condition of the company. He must not only examine critically its statement of its capital, its assets and liabilities and everything affecting its pecuniary condition, but also the evidence furnished in support of the same, and he can issue the licenses only when, in his opinion, the company have conformed to the standard provided by the law. Moreover, it is his duty to watch the condition of the company.

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If at any time through misfortune or otherwise, its pecuniary condition falls below the statutory standard, he is required to revoke the licenses that have been issued to its agents. Beyond doubt all these requirements are for the benefit of the persons and public dealing with the company, and not for revenue. The agent is required to have his license recorded in the county where he is located. This enables the public to know definitely with whom to deal in transacting business with the company, and the granting of the license is a guaranty of its solvency by the State.

A statute should, however, be construed according to its equity, and while it is the province of the legislature to fix the compensation of an officer of the State, yet we may look to it in arriving at their meaning if it be in doubt.

In view, however, of the duties imposed by the law in question upon the auditor, we can not presume from the compensation allowed for a license to each agent of the company that the legislature in fact intended that but one license should issue, and that to the company. Such a construction would be at war, not only with the purpose of the legislation, but the very words of the statute.

If language can mean anything the act of 1860 certainly requires each agent to have a license. It repeatedly says so. The only ground upon which a different construction can be based is that the act of March 2, 1870, in referring to that of 1860, speaks of the company obtaining "a license." The word, however, is used in the singular number in the act of 1860, and this language was doubtless employed in the law of 1870, relating to and amendatory of that taxing the companies, because the ninth section of the law of 1860 provides that the fee for issuing the license shall be paid by "the agent or company." It was reasonable to suppose that the company would furnish its agents their licenses.

The construction now asked of the act of 1860 has never been put upon it, although it has now been in force for over a quarter of a century.

Neither the executive branch of the government nor those affected by it have ever so construed it. This contemporaneous construction—this communis opinio—is entitled to weight, and should not be departed from unless clearly required by the law.

Such a long continued practice ripens into an authorative construction of a statute, especially when the legislature sits by without dictating a change. Moreover, it must not be forgotten that this has continued for over twenty years since the passage of the act, which it is now, for the first time claimed, repealed the law that authorized it. The agents of the express companies have, during all this time, continued to take out their licenses, and without complaint so far as this record shows, and certainly without complaint in court.

The view above indicated is supported by our legislative policy as to insurance companies. In 1856 the legislature fixed the compensation of the auditor for issuing licenses to insurance agents at $2.50. The law doing so is identical in its provisions with that of 1860 as to express companies. The services required of him in each case were the same. There is a parallel in the legislation. He continued to be thus paid, save that in 1870 the fee was raised to $5, until 1880, when this compensation was taken from him and turned into the treasury, but in lieu thereof for these services as to insurance companies, he was allowed a fixed salary of $900. During all this time, too, the insurance companies were taxed upon their business.

The act of 1860 relates only to the regulation of the agencies of

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foreign express companies. That of 1864, however, imposes a six per cent. tax and relates to all express companies.

The amendment of 1870, to the last named act, only changed the basis of taxation as to foreign companies from this per cent. to a specific sum. The statements which had to be furnished to the auditor under the acts of 1860 and 1864 were different. One was required to enable him to determine whether the foreign company should be permitted to do business in the State, while the other was for the purpose of fixing the company's tax. The two acts looked to different ends, and were evidently intended by the legislature to subserve different purposes.

Every reason requiring the passage of the law of 1860 existed in 1864, when it is claimed that it was repealed. The same public policy which prompted its enactment in 1860, required its continuance in 1864. No reason appears why it should then have been repealed and the judgment is affirmed.

HERROLD v. COMMONWEALTH.

(Filed December 17, 1887—Not to be reported.)

An indictment for willfully shooting at and wounding another, does not state the statutory offense of willfully and maliciously shooting at and wounding another, and a demurrer to such an indictment should have been sustained.

Hallam & Myers and J. F. & C. H. Fisk for appellant.

P. W. Hardin for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

The offense with which appellant is charged in the indictment is for willfully shooting at and wounding another with intent to kill. The offense described in the statute and for which it was probably intended to indict him, is willfully and maliciously shooting at and wounding another with an intention to kill him, so that he does die thereby.

Willfully shooting another may be done in sudden heat and passion, or in self-defense, and is, therefore, not the equivalent of malicious shooting in the meaning of the statute, and as the statutory offense charged is not, as required by the Criminal Code, stated in the indictment, the court erred in overruling the demurrer. The first instruction was erroneous and prejudicial to the rights of appellant, and ought not to have been given. For the jury was not, as told to them by court, authorized to find him guilty of a felony and fix his punishment at confinement in the penitentiary, upon the hypothesis that he willfully shot and wounded the person named therein. To so convict and punish the jury must believe the act was maliciously as well as willfully done.

The instruction in which was stated the circumstances under which the jury were authorized to find him guilty of a misdemeanor, did not aid or explain instruction No. 1, nor are we justified in assuming the jury did or could understand it was their duty to believe the act was maliciously done, before convicting of felony.

The judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

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KENTUCKY SUPERIOR COURT.

MARKWELL v. GRAY.

(Filed November 17, 1887.)

Trusts—When a trustee has, by a purchase of the trust property from the cestui que trust, made a profit, the chancellor should never hesitate to set aside the sale when the effect of so doing is to put the parties in statu quo. In this case a sale by a devisee to the executor of his interest in the testator's estate is set aside at the instance of the devisee.

W. A. Sudduth, W. G. Dearing and E. W. Hines for appellant.

W. J. Hendrick for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Barbour.

E. W. Markwell, who was the executor of his father's will, in 1879 purchased of Geo. W. Gray and his wife the latter's interest as devisee, they executing and delivering to him a writing, reciting that they had, in consideration of $1,000 in cash, sold and conveyed to Markwell all their interest in the estate. The will excluded from any share in the testator's estate several of his children. These excluded children had prosecuted an appeal from the order of the county court probating the will, which was pending at the time the sale was made. A suit was, at the same time, threatened against the estate upon a claim amounting to $1,800. This suit, which was afterwards brought, was defeated. The will was also established. If the will had been rejected, and the suit referred to had been decided against the estate, the share going to Mrs. Gray would have been less than $1,000. In 1883 the executor made his final settlement, which showed that each devisee was entitled to $1,866.98. This action was then brought by Gray and wife, in which they aver that they did not sell their interest, and that the writing was meant to be merely a receipt for $1,900. They also charge that Markwell withheld information, and misrepresented the condition of the estate. The evidence, instead of contradicting, confirms the writing. Therefore, the only question for our consideration is, whether the contract, in view of the relation existing between the parties, is constructively fraudulent. Markwell, as executor, knew the condition of the estate and the merits of the pending and threatened litigation. Gray, a resident of a distant State, in financial distress, came to Kentucky to realize something from his wife's share of the estate in Markwell's hands. Though he endeavored to inform himself, and examined the inventory, he could not have been in a condition to know as much concerning the value of the estate, or of the merits of the appeal from the order probating the will, or the threatened suit, as the executor knew. True, the attorneys employed by Markwell for the estate, say that they fully informed Gray of the condition of the estate, but they do not say what information they gave him concerning the probable result of the litigation. It is likewise true that Gray made an ineffectual effort to sell his wife's interest in the estate to other parties. Markwell says Gray begged him to buy, and he finally consented to purchase. We can not regard Gray's anxiety to sell as prejudicial to his rights in this action, for,

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under the circumstances, Markwell's expression of reluctance to buy was calculated to stimulate Gray to sell. But conceding Markwell's fairness, it is a well settled rule, that an administrator or executor is not allowed to purchase or speculate on the estate confided to him for the purpose of administration. He will not be permitted to make profit out of the estate. As said in Handlin v. Davis, 81 Ky., 42, when the claim is even doubtful, that is the subject of sale, the chancellor will not allow the executor to profit by his purchase, and will cancel the contract, or make him pay over the profits resulting from his speculation.

We recognize the distinction between the cases where the fiduciary and those with whom he stands in that relation deal with one another, and where the fiduciary, acting with reference to his trust, deals with himself in his individual character. The distinction is thus expressed in Price v. Thompson, 8 Ky. Law Rep., 206: "While the same general principle governs all persons occupying a fiducial character, yet there are two classes of cases controlled by different special rules. The first-class includes all those instances in which the fiduciary, and those with whom he stands in that relation, consciously and intentionally deal with each other, each knowingly taking a part in the transaction, from which results a contract or conveyance. Here the contract is not necessarily voidable. It may be valid, but a presumption of its invalidity arises, and that so strong that nothing short of clear evidence of good faith, of full knowledge, of adequate consideration, and of independent thought, consent and action can overcome it.

"The second class is where the fiduciary, acting with reference to his trust, deals with himself in his private or individual character as where a trustee buys at his own sale. Such transactions are voidable at the suit of the beneficiary and not merely presumptively invalid, as in the first class, where good faith, full knowledge, adequate consideration, independent thought, consent and action may be proved, because the sale or purchase, if made privately, is not known, or, if made publicly by coercive authority, can not be controlled."

Can it be said in this case, which falls within the first class, that the evidence of good faith, of full knowledge, of adequate consideration, is so clear as to rebut the legal presumption of the invalidity of the contract? The parties were not upon an equal footing. They were not at arms-length. Gray, a nonresident, a man in financial distress, though coming here for the purpose of realizing his interest in the estate, could not have had that full knowledge concerning the subject matter of the contract which, we must presume, Markwell possessed. If he could have acquired this knowledge, as it is argued he did, by an examination of the inventory, such an examination would have demonstrated that the estate was actually worth what the result proves it to have been worth. And the fact would be that he, on account of his necessities, sold to the executor, for $1,000, what was actually worth over $1,800. But it is insisted that other contingencies entered into the valuation of Gray's share in the estate, i. e., the uncertainty as to the result of the contest over the will and the probability of the estate being sued for $1,800 or $2,000.

How was Gray informed as to these matters? We fail to find in the record any evidence showing that he had any information concerning them, save the bare fact that an appeal was pending and a suit was threatened. The statement of Markwell and his attorneys that Gray was fully informed concerning the condition of the estate, does not imply that he had that knowledge concerning the probable result of those matters that the executor had.

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But, conceding that these matters were such as no one could be satisfactorily informed concerning, that they were in their nature uncertain, it seems to us to follow, therefore, that the rule that an executor can not use the trust property, nor his relation to it, for his own personal advantage, should be applied in its full force. The case is not like that where the character and amount of property belonging to the estate is ascertained, but the time of its distribution or payment is deferred. There the beneficiary, as well as the trustee, may inform himself as to its value, and each has the same opportunities for considering the contingencies affecting its value, which may arise before the time at which the distribution or payment is to be made.

But if the contingencies which are sought to be invoked in this case as a sufficient consideration for a contract whereby the beneficiary sells to the executor an estate which proves to be worth near $1,900, for $1,000, are held sufficient for that purpose, it would destroy all security for good faith and fair dealing upon the part of executors. The rule once established would be disastrous in its consequences. If an executor can, where there is a pending or a threatened suit, buy out a devisee in "an honest case, he may, in a case having that appearance, but which from the infirmity of human testimony may be grossly otherwise." We are of opinion that the character of the transaction in this case is such that the legal presumption of invalidity is not susceptible of being overcome by evidence—in other words, the contract partakes of the nature of a wagering contract, and the circumstances are such that the cestui que trust could not acquire that full knowledge, which would enable him to enter knowingly into the contract. We know of no case where the rule should be more rigorously applied to its fullest extent than to a case where the cestui que trust, in the sale to his trustee, bases the consideration of the contract upon the uncertainty of litigation in which the trust estate is involved. The executor is charged with the conduct of all litigation concerning the estate—the most perfect good faith is demanded and expected of him, and no rule should ever be established which would allow him to place himself in a situation where the temptations to violate duty and conscience are so great. Let it be once understood that, in any case where a litigation is pending or threatened against the estate, that the executor can speculate upon the contingencies attending such litigation, provided he can clearly show fairness, full knowledge and adequate consideration, and the result would be disastrous. In the language of Lord Eldon: "In many instances the power of a court of equity would not be equal to protect it against deception, from the impossibility of knowing the truth in every case. Frauds would lurk in transactions which the eagle eye of the law could not detect." Judge Story, in his work on Equity Jurisprudence, section 322, in speaking of contracts between the trustee and cestui que trust, says: "Indeed the doctrine may be more broadly stated, that executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate." While this declaration is criticised by the courts of some of the States, we think it can be announced as a safe rule, that where a trustee has, by a purchase of the trust property from his cestui que trust, made a profit, the chancellor should never hesitate to set aside the sale, when the effect of so doing is to put the parties in statu quo. That is the effect of the judgment in this case.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. LAWSON.

Filed December 14, 1887. Appeal from Warren Circuit Court. Opinion of the court by Judge Ward, reversing.

1. In an action against a carrier to recover for its failure to deliver goods, which it has undertaken to carry, the plaintiff may recover the value of the goods if there has been a conversion, or if there has been no conversion, he may recover in damages for the injury actually sustained, and it is the duty of the court to instruct the jury as to the rule, in the event they shall find there was a conversion, and also as to the rule, in case they shall find there was simply a neglect to deliver promptly, unless the court can, as matter of law, arising on the pleadings and proof, say there has or has not been a conversion

2. Conversion—A demand of the carrier and its refusal to deliver do not constitute a conversion; they are only evidence of it.

September 11, appellant's agent at Bowling Green notified appellee that a box of goods had arrived for him. Appellee, on the next day, gave a drayman an order to get the goods. The drayman called upon the agent and paid the freight, and with a receipt therefor, demanded the goods of the receiving and disbursing clerk, who, the drayman says, told him the goods were short, and that he would take steps to find them. The testimony tends to show that thereafter appellee demanded the goods, and that appellant, having appellee's receipt for the goods, exhibited it to him; that in December thereafter the goods were found in appellant's depot at Bowling Green, where they had been all the time, and tendered to appellee, who refused to receive them. In this action by appellee to recover damages for the failure to deliver, the court instructed the jury that if they found for the plaintiff at all they must find the value of the goods. Held—That this was error, as the court could not, as matter of law, say there had been a conversion. That question should have been submitted to the jury.

3. Evidence—An opinion expressed by appellant's agent, after the goods were found, that his employer would hold him responsible, was not competent as an admission against the appellant, not being made in the performance of any act as agent; and was not competent to contradict the agent, not being inconsistent with any statement made by him in his testimony.

H. W. Bruce, Wm. Lindsay and Dulaney, Mitchell & DuBose for appellant; John M. Wilkins for appellee.

HERNDON, YOUNG & CO. v. CAMPBELL, &c.

Filed December 14, 1887. Appeal from Logan Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Conversion of mortgaged property—Any one who purchases mortgaged property and converts it to his own use, and refuses or fails to produce it in satisfaction of the lien, can be compelled to respond in damages to the mortgagee for its value to the extent it may be necessary to satisfy the lien.

2. Multiplicity of suits—Where the mortgagee has an action pending against the mortgagor for the enforcement of his lien upon a part of the mortgaged property, he can not have a separate action against one to whom the mortgagor has sold another part of the mortgaged property to recover for its conversion, or to enforce his lien thereon. Subsection 3 of section 92 of the Code was intended to prevent multiplicity of suits, and to compel parties seeking redress through the courts to unite in one action all demands affecting the same parties and relating to the same cause of action.

In this action by a mortgagee against o e to whom the mortgagor had sold

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a part of the mortgaged property, to enforce his lien thereon, it appeared from the petition that the plaintiff had an action pending against the mortgagor for the enforcement of his lien on the remainder of the property. There was a general demurrer to the petition, and a special demurrer upon the ground that there was another action pending "to enforce the same cause of action." The court dismissed the petition absolutely. Held—That as only the special demurrer was good, and it did not involve the jurisdiction of the court, the petition should have been dismissed without prejudice and not absolutely.

W. F. Browder for appellants.

LESLIE v. PURCELL, &c.

Filed December 14, 1887. Appeal from Grayson Circuit Court. Opinion of the court by Judge Ward, reversing.

The heir at law can not maintain an action for the recovery of personal property owned by the intestate, or upon choses in action owned by him, except in certain cases, and even then there must be a personal representative, and reason shown why he can not or will not sue, and he must be made a party.

Wm. R. Haynes and Farleigh & Strauss for appellant; J. S. Wortham for appellees.

SKINNER v. COMMONWEALTH.

Filed December 14, 1887. Appeal from Webster Circuit Court. Opinion of the court by Judge Ward, dismissing.

Appeals—To perfect the appeal in a misdemeanor case, the transcript must be filed within sixty days from the date of the final judgment, which is the order overruling the motion for a new trial.

(Appeal in Hunter v. Commonwealth, opinion by Presiding Judge Bowden, dismissed for same cause.)

Cissell & Dudley and John G. Bailey for appellant; P. W. Hardin for appellee.

HECK v. HECK.

Filed December 14, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Bowden, reversing.

Parent and child—The mere fact that a child continues to live with a parent after coming of age, and continues to labor as before, is not sufficient to create an expectation of payment, and, therefore, no promise to pay can be implied. The child in such a case must go further than a stranger needs to go, and must show that the parent did or said something besides merely accepting the benefit of the services, calculated to create an expectation of reward.

C. B. Seymour for appellant; O'Neal, Jackson & Phelps for appellee.

WYBRANT, &c. v. BRANDS.

Filed December 14, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Bowden, affirming.

Contracts—W. and B. signed a contract whereby B. undertook to build a house for W. "according to the plans and specifications," but the contract did not identify any papers containing the plans and specifications agreed on. B. and the agent of W. had agreed on specifications, and the agent delivered to his principal what purported to be a duplicate of the original, which was delivered to B., but the duplicate did not correspond to the original by reason of the fact that certain erasures and interlineations were made in the original which were not made in the copy, which was prepared before the changes were made in the original. When W., doubtless having in mind his own specifications, insisted on having things done otherwise than as B. was doing them, the latter seems to have considered it as an intentional alteration. Held—That as W. did not agree to pay the contract price for a house built according to the specifications delivered to B., it

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seems that both parties are remitted to the promise implied by law, and that B. may recover on a quantum meriut. At any rate, it does not seem that a contract so misconceived can be relied on to prevent such a recovery.

Elliott & Hemingray and Wm. Lindsay for appellants; Lane & Burnett for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. BERRY, &c.

Filed December 14, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Evidence—It can not be proved that a person did a particular thing on a particular occasion by showing that he had, theretofore, habitually done the same thing under like circumstances. It is only where the intent with which an act was done, or the motive for the act, is in question that it is competent to put in evidence the fact that the party whose act is in question did a similar thing at some other time.

A boy who had accompanied a lady to appellant's depot to see her upon a train was found on the platform at the rear end of the train just as it started, with one of his feet crushed, it having been run over by the wheels of the cars. At the point where the boy was found there was a rotten plank, which was a part of the platform. In this action by the boy by his next friend to recover damages, he testified that he stepped on the rotten plank and one of his feet went down through the platform and the other under the car and was run over by the car and crushed. The defendant offered to prove both by the plaintiff and by other witnesses that he was in the continual habit of jumping on the cars and stealing rides. Held—That the testimony offered was not competent as tending to establish the defendant's theory as to the manner in which the boy was hurt, nor was it competent to impeach the plaintiff or contradict his statement that he was injured by falling through the rotten plank.

2. In support of the motion for a new trial appellant filed affidavits showing that a son of the plaintiff's "next friend" was seen in conversation with one of the jurors during the progress of the trial. Held—That in the absence of any evidence as to what they were talking about, the presumption is that they were not guilty of such misconduct as to authorize a new trial.

Barnett, Noble & Barnett and Wm. Lindsay for appellant; O'Neal, Jackson & Phelps, Baker, Kinney & Kinney and John W. Head for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. McCARTY, &c.

Filed December 14, 1887. Appeal from Logan Circuit Court. Opinion of the court by Judge Barbour, reversing.

Carriers of live stock, are not insurers, but in cases of injury to such stock the legal presumption, prima facie, is that it was caused by the negligence of the carrier; and while this presumption does not exist where, under the special contract, the shipper or his agent accompanies the stock and is in their actual charge, yet the mere fact that the special contract provides that the shipper or his agent shall accompany the stock, does not prevent the presumption of negligence from arising if neither the shipper nor his agent does in fact accompany the stock, and it is understood by the company that neither of them will do so

Appellant undertook to carry for appellees a jack and jennet from Shelby City to Russellville. Both were alive when they reached Russellville, but the jennet in a few minutes after arrival died. A post mortem examination was held, and the physicians testify that the cause of death was congestion of the lungs, which might have been caused by a heavy jar, or lick, or by strangulation, or by pneumonia. There were no marks about the animal to show that it had received a jar or lick, and no evidence of any jar, lick or strangulation occurring upon the journey, the employes of the company testifying that the animals were prudently and safely transported. Held—That the presumption of negligence was overcome.

W. F. Browder for appellant; John S. Rhea for appellee.

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BUSHNELL v. HALL.

Filed December 15, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Sales of personal property—The provision of the statute requiring the actual possession to accompany sales of personal property in order that they may be valid against purchasers without notice or creditors, does not apply as between an attaching creditor and the prior purchaser of bonds or other choses in action.

2. Corporations—Transfer of stock—The provisions of section 11, chapter 56 of the General Statutes, requiring transfers of stock in corporations to be regularly entered upon the books of the company, applies only to such corporations as are organized as provided in that chapter.

3. Same—A by-law of a corporation providing that its capital stock shall be transferred only on the books of the company, was not intended for the protection of creditors of the stockholders, and, therefore, a transfer of stock, although not made on the books of the company, is valid as against a subsequent attaching creditor.

4. Judicial notice—While the court must take judicial notice of the provisions of the charter of a corporation created by act of the general assembly, it can not take notice of the by-laws of such a corporation unless pleaded, and proved if denied.

A. E. Willson and Burton Vance for appellant; P. B. Muir and F. Hagan for appellee.

GWINN'S ADM'R v. DUVAL'LS ADM'R.

Filed December 14, 1887. Appeal from Franklin Circuit Court. Response of the court by Presiding Judge Bowden to petition for rehearing.

1. Appeals—Rehearing—A rehearing will not be granted in order to enable appellant to fill a writing which was not a part of the record below, or upon the ground that all of the record was not copied into the transcript.

2. Same—Where a motion for a new trial was not made within three days after verdict, because there was no court on the third day, the reason of the delay should have been made to appear as a part of the record in the case; but, although it was not made to appear in the record below, yet it seems that before submission of the appeal it might have been made to appear in this court by other means. A rehearing, however, will not be granted in order to enable the appellant to make the fact appear.

Ira Julian for appellant; A. Duvall and Thomas B. Ford for appellee.

MAYSVILLE AND LEXINGTON TURNPIKE ROAD CO. v. LINVILLE.

Filed December 17, 1887. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Barbour, reversing.

Turnpikes—Tolls—Covenant running with land—Gov. Metcalfe granted to a turnpike company the privilege of quarrying rock upon his land, in consideration of which the company agreed to allow him and his family to pass through its gates free of toll, the written contract concluding: "For the faithful fulfillment of this agreement I bind myself and my heirs, and any person or persons to whom I may sell my farm, it being understood that the said company shall extend to my heirs and successors in ownership of my lands the same privileges herein and heretofore granted to me and for my benefit." The appellee, the owner of a small parcel of the land as a remote vendee of Gov. Metcalfe, seeks to enjoin the company from requiring him to pay toll. Held—

1. A burden placed by the owner upon land, such as the right to quarry rock upon it, is not strictly speaking a covenant running with the land, unless it is evidenced by a deed acknowledged and recorded as provided in the statute. Therefore, the vendees who should purchase in ignorance of the contract between Gov. Metcalfe and the turnpike company would have the right to object to the latter quarrying rock upon the land, which destroys the mutuality of the contract and, therefore, its validity.

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2. Even if it be admitted that under the contract the right which Gov. Metcalfe had would pass with the farm to the heir who should become its owner, or to one to whom it should be conveyed, the contract does not mean that each heir or each vendee who may in the future own a parcel of his land shall be given a right equal to that which, as the sole owner of the whole land, he enjoyed, and as appellee does not show that he has succeeded to that right, his injunction should be dissolved.

Ross & Owens and Charles L. Lytle for appellant; Thomas Kennedy for appellee.

COMMONWEALTH v. COLE.

Filed December 17, 1887. Appeal from Boyd Circuit Court. Opinion of the court by Judge Ward, dismissing.

1. Appeals—Practice—The fact that there has been a trial in the lower court and a final judgment can not be made to appear by bill of exceptions. These facts must appear from the records of the court.

2. Same—The transcript in a misdemeanor case must be filed within sixty days after the judgment, in order to perfect the appeal.

A bill of exceptions was filed November 23. The bill shows that the trial was on November 19. There is nothing to show the date of the judgment or of the order overruling the motion for a new trial. The transcript was filed January 22, 1887. Held—That it must be presumed the trial was concluded on the 19th of November, and the grounds for a new trial then filed and overruled, but even if done on November 23, the transcript was not in time to perfect the appeal.

P. W. Hardin for appellant; Moore & Averett for appellee.

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KENTUCKY COURT OF APPEALS.

PICKETT, SUPERINTENDENT OF PUBLIC INSTRUCTION, &c. v. HARROD.

(Filed October 29, 1887.)

1. Compensation of school commissioner—A school commissioner who was elected under the provisions of the General Statutes and held over until a county superintendent was elected and qualified under the present school law, approved May 12, 1884, is entitled to compensation as provided by the General Statutes for reporting the census of the school children of the county for the year 1884, although the service was performed after the present law went into effect.

2. Same—The provision of the statute requiring the commissioner to make his report of the census of the school children on or before the first day of June was directory merely, and the commissioner was entitled to compensation although he did not make the report until after the first day of June.

3. Same—It was not necessary that the report of the commissioner should show that he had visited the schools as required by the statute, the compensation allowed being for reporting the census, and not for that service.

Joseph Desha Pickett and P. W. Hardin for appellant.

Thos. B. Ford and G. C. Drane for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Holt.

The object of this action is to compel the appellant, as Superintendent of Public Instruction, by mandamus, to approve the claim of the appellee, as common school commissioner for Franklin county, for reporting the census of its school children for the year 1884.

It is necessary to a proper undertsanding of the questions presented to cite the following provisions of chapter eighteen of the General Statutes, and then some portions of the present school law, which was approved May 12, 1884. Article 1, section 11, of said chapter is as follows:

"The judges of the county courts in each county are authorized to examine and audit the accounts for services rendered by the

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commissioners of common schools in their respective counties, and for this purpose they shall, between the first and twentieth days of January and the first and twentieth days of July, in each year, hear proof and audit and settle the accounts of the commissioners of their respective counties for services rendered by them for the six months next preceding such settlement; and the amount ascertained to be due to said commissioner shall be certified by the judge to the Superintendent of Public Instruction, and if approved by him he shall certify the same to the Auditor of Public Accounts. * * *

"Section 12. The Superintendent of Public Instruction, when the distributable share due to each county is ascertained, as provided for in section seven, article one of said act, before making a pro rata distribution of said fund to the districts, shall, out of the fund ascertained to be due any given county, deduct the sum of one hundred dollars, and one per cent. on the whole amount due said county, as well as three dollars for each school district reported by the county comimssioner, according to section seven, article four of said law. The fund thus created shall be denominated the county commissioners' fund, and shall remain in the treasury to the credit of the respective counties, subject to the certificates of allowances made by the county judges to the commissioners for services rendered as provided for in section eleven of article one, common school law."

It is evident that the reference above to section seven of article four is a mistake, as it does not relate to any report to be made by the commissioner, but merely declares that copies of records in the superintendent's office shall, when certified by him, be evidence equally with the originals. And after an examination of the entire chapter we are satisfied that the reference intended was to section seven of article five, which reads thus:

"It shall be the duty of each commissioner, on or before the first day of June of each year, to prepare, mail to and cause to be placed in the hands of, the Superintendent of Public Instruction a report certified by the county judge or clerk as having been sworn to by him, showing the whole number of white children between the ages of six and twenty years residing in his county, and the whole number residing in each district, described by its number, of his county. He shall base his report upon the census taken during the month of April, and reports thereof made to him by the district trustees." * * *

The school law, enacted since the adoption of the General Statutes, provides that it shall take effect from its passage, to wit: May 12, 1884; but section 2 of article 6 says:

"The county superintendent shall be elected by the qualified voters of each county at the regular August election in 1884, and every two years thereafter." * * *

And the next section reads thus:

"The commissioners now in office shall hold their offices until the county superintendent is elected and qualified under this act; and those elected under the provisions of this law shall hold their offices for two years, or until their succesors are elected and qualified."

This law, however, provides for the payment of the county superintendent by county taxation, and section 5 of article 2 says:

"Hereafter, except as otherwise expressly provided in this chapter, no part of the common school fund, or of the revenue thereof, shall be used for any other purpose than the payment of teachers of common schools, legally qualified and employed, in pursuance hereof."

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The appellee did not make his census report to the superintendent of Public Instruction until a short time after the first day of June; but it was received, and this provision of the statute is only directory. His claim is for reporting the census of both of the white and colored schools; but his duty as to each was the same, and the manner of reporting is alike, under the law. The work was done by him after the enactment of the present school law, but it provided that he should remain in office, and, by implication, perform the duties pertaining thereto, until his successor should qualify. The latter, by the provision of the new law, could not be elected until August, 1884, and the appellee, therefore, continued to hold the office until September, when his successor qualified. His claim was audited and certified by the county judge in due form; but the superintendent of public instruction, acting, of course, from no personal motive, but from a high, conscientious regard of duty—fidus in officio, atque ad civitatum—refused to approve it for the same reasons that are now presented in defense of this suit.

First, because the claim did not show that the commissioner had visited the schools.

Second, because the services were rendered after the passage of the new school law, which dedicated the school fund to the payment of the teachers.

Waiving the question whether the Superintendent of Public Instruction had the right to refuse to approve the claim if it was correct in form and had been audited and certified by the county judge, it appears to us that the law did not require it to show anything further than that the commisioner had reported the census of the schools. To do so he did not have to visit them, because it was by law made the duty of the trustees to report the number of school children to him. It is true that the law requires him, at least once during each year, to "visit each district school of his county, and investigate and direct the operations of the school system, and promote, by addresses or otherwise, the cause of the common school education;" but the law does not say, either expressly or by implication, that his claim for services, which must be audited by the county judge, shall show that he has done so, or that he shall report whether he has done so to the Superintendent of Public Instruction. It is to be presumed that he has done his duty in these respects.

It is urged, however, that the Legislature could not have intended to allow him three dollars for each school district for merely reporting its census, and that the pay is inordinate to the labor. It is not for us to judge of the reasonableness of the allowance, or whether proper policy dictated that the claim of the commissioner should show that he had performed the duties above named. We can only look to the legislative declaration. It has seen proper to fix a certain sum as pay for the performance of a certain duty; thus the law is written, and it must be obeyed.

The reporting of the school census is highly important, indeed absolutely essential to the support of the schools. The apportionment of the school fund by the State Superintendent is based upon it; and the necessity for its being done may have induced a liberal allowance for the service by the Legislature.

Returning to the other objection, it can not be supposed that the Legislature, when it enacted the new law, intended that the commissioners who were then in office should remain so, and perform the duties incident thereto, without pay from that time until the qualification of the county superintendents, who, by its

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terms, were not even elected until the succeding August. This would have been highly detrimental to the State. It has no more important interest to foster than the education of its children. Intelligence is the very life blood of a republican government. To deprive the commissioner of pay would have led to the vacation of the office. As already stated, they were required to remain in office. They were expected to perform the labor incident to it. It was highly necessary and important that they should do so; and considering all the provisions of the new law it is plain that the Legislature intended to, and in fact did in effect, say to them: "although this law takes effect from its passage, yet from the very necessity of the case you are to remain in office upon the terms and conditions prescribed by the preexisting law until your successors are elected and qualified."

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SANDERS, &c.

(Filed November 5, 1887.)

Limitation—Infants—An action by the heir of one whose life has been lost by the wilful neglect of another, to recover therefor, is barred after the lapse of one year, although the plaintiff be an infant, if there was either a widow or personal representative of the deceased who might have sued. The saving of the statute in behalf of the infant is only intended to apply when there is no other person in being who has power to sue.

Wm. Lindsay for appellant.

Hargis & Eastin and Jas. Montgomery for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

B. G. Sanders was killed in February, 1880, by being thrown from his wagon when his horses were running away through fright at a locomotive of the appellant, which was standing near the public road crossing. His administrator qualified in March following. He left no widow. This action was brought in April, 1885, or more than five years after his death, by his infant children, to recover damages therefor upon the ground that it was caused by the willful neglect of the appellant in leaving its locomotive too near the public road. It, among other defenses, relied upon the statute of limitation; but the court sustained a demurrer to this portion of the answer, and of this, among other things, the company now complains.

It was a rule of the common law that no recovery could be had for an injury resulting in death. The right of action died with the person. This continued to be the law until 1846, when the English Parliament altered the rule by enacting what is known as "Lord Campbell's act," by which the right to sue in such a case was given to the personal representative.

Nearly all the States of our Union have, in substance, copied the English law, and it is by virtue of a statute that the right to sue in such a case exists in this State. It reads thus: "If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, cor-

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poration or corporations, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid." General Statutes, chapter 57, section 3.

Section 3, article 3 of chapter 71 provides that an action for an injury to the person "shall be commenced within one year next after the cause of action accrued and not thereafter," and section 2 of article 4 of the same chapter says:

"If a person entitled to bring any of the actions mentioned in the third article of this chapter, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability, or death of the person, whichever happened first, that is allowed to a person having no such impediment to bring the same after the right accrued."

The question now presented in res nova, and by no means free from difficulty. As the statute giving a right of action is punitive there can, in our opinion, be but one recovery. It is singularly silent as to who shall have precedence in suing. If the legislature intended to give it first to the widow and then to the children and lastly to the personal representative they have failed to say so, either expressly or inferentially. So, also, as to any distribution of the proceeds of a recovery.

The trouble now in hand grows out of the fact that under the statute either of three persons can sue upon a single cause of action. Upon the one hand it can be urged that an infant is especially under the care of the court; that here a right of action is given him by the statute; and that, although the law bars the right in general to sue after the lapse of a year, that yet his right to do so is especially saved to him by the statute for that length of time after arriving at majority; and that it would be absurd to give him a right when he has no legal capacity to enforce it, and then bar it by limitation during the continuance of the disability.

These considerations are not without weight. They not only furnish ground for thought to the intellect, but appeal to the better feelings of our nature, which instinctively well out in behalf of helplessness. Upon the other hand, however, the law evidently looks to a speedy settlement of such claims. This is its policy. It has, therefore, prescribed the shortest period of limitation. If there be no one in esse who has the right to sue then the saving in behalf of the infant would apply by virtue of the express provision of the statute, and his right be preserved for one year after the removal of the disability. But here is but one cause of action. The right to sue upon it is given to either of three persons. If there be one of these in being with the right to sue then does not the policy of the law, and a comparison and consideration of all the statutory provisions upon the subject, dictate that the action must be brought within a year from the accrual of such right to avoid a bar as to all? Public policy and the general quiet must be regarded rather than the individual hardship. Statutes of limitation often, if not always, produce the latter. An existing right is taken away by a statute of repose. Thus where the right to land is, by descent, cast jointly upon persons time runs unless all of them are under disability. Some of them may be helpless infants, and yet the statute runs if any of them could sue. True such a case is unlike this one, as here the right to sue did not exist in the ancestor, but is given originally to either of the

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parties named in the statute; but it illustrates the hardship attendant upon the application of the statute.

Certainly the legislature never intended that actions of this character might be brought twenty years after the accrual of the right—when "some are in the churchyard laid, some sleep beneath the sea"—although during all that time a person was in esse, and laboring under no disability, who could have sued upon the single cause of action and recovered all that the law allowed.

The statute says that the suit should be brought within a year after the cause of action accrues, and not thereafter.

Whenever a party has done an act which makes him liable in damages, and his liability is complete, and there is one in esse who can sue therefor and recover, the cause of action has certainly accrued as against the defendant. But it is said that the cause of action has not accrued to the infant. There is but one cause of action. There can be but one recovery.

If in this instance the administrator had sued and either recovered or been defeated it would have been a bar to a subsequent action by the children. If then the bar from lapse of time has become complete as against him is it not logically a defense to the cause of action, altohugh more than one person could have sued upon it? While we do not undertake to determine any question of right of distribution, as none is presented, or whether any such right exists, yet if so, and there were a widow living in this instance, then in case of a recovery by the children she, if entitled to a distribution, would in effect recover, although her right to sue would be barred beyond doubt.

In determining this question we must keep in mind the legal rights of both the plaintiff and the defendant, and the different provisions of the statute relating to each of them. These provisions must be viewed with an eye to the spirit and policy of the law.

When Sanders was killed the wrong was done. When the administrator qualified there was a person in esse who had the right to sue for, recover and receive the entire damages, leaving no longer in existence the cause of action. The statute then began to run, not only against him but against the cause of action. The statutory saving in behalf of the infant is only intended to apply where there is no one in being who has power to sue. Unless this construction be given to it the statute of limitation is not one of repose, as the cause of action may be kept alive for over twenty years, although there is one in being during the entire time who has the right to sue. If, as is probable, the legislature intended any recovery by the personal representative to be for the benefit of the widow and children, and not for the estate —and the history of legislation in both this country and England fortifies such view—then there is the greater reason for adopting such construction.

The statute of limitation does not look to the character of the plaintiff but to the nature of the action. This is not so as to a saving clause. It contemplates the person and not the action. The claim to exemption is against the current of the law, and not coextensive with its effective provisions. In a case of doubt, therefore, the presumption is against one claiming the exemption. The savings of the statute are not to be as liberally construed as its effective provisions, because they are designed to put an end to strife and litigation and tend to the security of all men. (Conyers v. Kenan, 48 Am. Dec., 226; Clarke v. Bank, 52 Am. Dec., 248.)

Keeping this rule in view, as well as the policy of not only the

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general law but our own statute, as shown by the short period allowed within which to bring an action like this one, we feel constrained to hold, but not without regret in view of the helplessness of the appellees, that the lower court erred in sustaining the demurrer to the defense of limitation; and the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

PAULEY'S GUARDIAN v. DRAINE, &c.

(Filed January 5, 1888—Not to be reported.)

1. Slander—Parent and child—A parent is not liable as such for the wrongful act of his child.

In this action by appellant against L., a twelve-year-old girl, and the appellees, her father and her brother and wife, for a slander uttered by L., it is held that appellees are not liable, as the defamatory words were uttered in their absence, and there is an utter want of testimony showing any knowledge upon their part of the wrong at the time, or that they instigated, procured, indorsed or repeated it.

2. Appeals—Practice—Upon the trial the jury found for appellees, but against L. Upon an appeal by her that judgment was reversed. Appellant now sues out this appeal against appellees upon the transcript filed by L. upon her appeal. It is contended that the court can not conclude that the bill of exceptions used on the appeal by L. embraced all the evidence introduced against appellees. Held—That the bill is sufficient, as it was all one trial, and the bill shows that it contains all the testimony that was introduced.

3. Same—Schedule—As the transcript filed shows that it is a copy of the entire record used in the trial court, the failure to file a schedule is immaterial.

Jas. Montgomery for appellant.

S. H. Bush for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Mary Pauley, by her guardian, brought this action for slander against Lora Draine, an infant about twelve years old. Her father, the appellee, Meredith Draine, and her brother and his wife, the appellees, J. T. and Sarah J. Draine, were also made defendants upon the averment that they instigated and procured Lora to utter the slanderous charge.

At the close of the plaintiff's testimony the jury were peremptorily instructed to find for the appellees, Meredith, J. T. and Sarah J. Draine. A verdict for five hundred dollars was, however, returned by them against Lora Draine. Upon an appeal by her it was reversed. Upon the record then filed the appellant, Mary Pauley, has now sued out this appeal against the appellees, Meredith, J. T. and Sarah J. Draine.

No brief is presented, nor has any argument been made in her behalf. We can conceive no ground for the appeal save that the lower court should not have given the peremptory instruction for the appellees. Indeed this was the only ground upon which a new trial was asked below as to them.

It is urged by the appellees that the judgment must be affirmed: First, because no schedule for this appeal was filed in the lower

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court; and, second, that this court can not conclude that the bill of exceptions used on the appeal by Lora Draine embraced all the evidence introduced against the appellees. It was, however, all one trial. The bill states that it contains all the testimony that was introduced, and the transcript on file here shows that it is a copy of the entire record used in the trial court.

The evidence, however, shows that the defamatory words were uttered by Lora Draine in the absence of the appellees, and there is an utter want of testimony showing any knowledge upon their part, at the time, of the wrong, or that they instigated, procured, indorsed or repeated it.

A parent is not liable as such for the wrongful act of his child. (Townshend on Slander and Libel, page 156, note.)

One witness testifies that in passing by (their house probably) the night after the day when the words were spoken by Lora he heard the appellee, Sarah J. Draine, say to her husband, the appellee, J. T. Draine, that "Lora had said everything she wanted to about Mary Pauley."

This is the only testimony upon which it could be contended that the case should have gone to the jury, as to any of the appellees, without a peremptory instruction to find for them. It was, however, insufficient for that purpose. It evidences no conspiracy between any of them and the utterer of the slander to defame the appellant. It was not a repetition or indorsement of it, nor does it tend, to the slightest extent, to sustain the charge that these appellees, or any of them, instigated the wrong. If it did, however slightly, then the question of their liability should, as has often been held by this court, have been submitted to the jury.

Judgment affirmed.

GRIMES, ASS'EE, &c. v. GRIMES.

(Filed January 7, 1888.)

When an insolvent debtor makes a transfer or payment to one of his creditors with the knowledge that he is insolvent, the design to prefer will be presumed, and the act of the debtor will operate as an assignment for the benefit of all his creditors, under the statute, unless the circumstances accompanying the transaction show plainly that there was no motive or thought of giving an advantage or preference. In that event the presumption will be repelled, and the transaction will not be within the statute.

In this case the creditor to whom the debtor made a payment was a cousin, and had been especially kind, which were the reasons assigned for giving him an advantage over other creditors. At the time the payment was made the debtor knew that he was hopelessly insolvent. Held—That the circumstances not only do not rebut the presumption of an intent to prefer, but confirm it.

Geo. C. Lockhart for appellant.

Turney & Lucas for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Holt.

John B. Grimes, on June 2, 1879, conveyed all his estate save that exempt by law to a trustee for the benefit of his creditors. He was then largely indebted, and among others to his brother, Geo. W.

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Grimes as his guardian. In February previous he had sold a lot of corn to one of his creditors, W. S. Grimes, in part payment of his debt; and on August 22, 1879, George W. Grimes, claiming that this was a preference within the act of 1856, and operated as an equitable transfer of all the property of John B. Grimes for the benefit of his creditors, instituted this action to have it so declared, and to set aside the deed of trust.

The trustee, acting under the deed of trust, subsequently brought a suit to settle the estate; and the two actions were consolidated and heard together, resulting in the success of George W. Grimes. This, by virtue of section 7, article 2, chapter 44 of the General Statutes, secured to him priority of payment over the general creditors of what was due him from John B. Grimes as his guardian.

Section 1, article 2, chapter 44 of the General Statutes, and which is commonly known as the act of 1856, provides:

"Every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor; and shall inure to the benefit of all his creditors (except as herein provided) in proportion to the amount of their respective demands, including those which are future and contingent; but nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution."

The aim of this statute is to prevent insolvent debtors from making preferences in any mode among their creditors. Its terms, as originally passed in 1856, were enlarged by the legislature in 1862, and made to embrace "every judgment which shall be suffered by any defendant, or any act or device which shall be done or resorted to by creditors in contemplation of insolvency;" and as now found in our revision of the statutes it embraces every preference in contemplation of insolvency, however made. In enacting it the legislative eye had in view equality. It should be so construed as to effectuate this intention, and yet so as not to cripple honest debtors and embarrass trade. If the debtor makes the transfer or payment in contemplation of insolvency, and with the design to prefer the creditor, then the transaction is within the statute. To this end two things must concur, to wit: It must be done "in contemplation of insolvency," and "with the design to prefer one or more creditors, to the exclusion, in whole or in part, of others." (Hampton, &c. v. Morris, &c., 2 Met., 336.)

This results although the debtor may not then know that he is insolvent. If he contemplates becoming so, and makes the transfer or payment with the design to prefer, then the transaction is within the denunciation of the statute.

So, also, it will be presumed that one designs the usual result of his act; and if the facts show that at the time of the transfer or payment to his creditor the debtor knew he was insolvent then the design to prefer will be presumed, and the transaction be within the statute. (Thompson, &c. v. Heffner's ex'ors, &c., 11 Bush, 353.) This is not an absolute, although, to give proper effect to the statute, it should be held to be a strong, presumption. It is urged that a debtor should be allowed to pay; that it must be shown that the act was done by the insolvent debtor with the

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design to prefer; that this intention can not be inferred from the insolvency and sale or transfer; and that as the law requires the concurrence of the two facts, that one of them should not be inferred by reason of the existence of the other.

We have already said that the presumption is not an absolute one. It will not, and ought not, to prevail if the circumstances of the transaction show that no preference was intended. The facts attending each case must be considered. To illustrate: Suppose A is liable both as principal and surety. He has ample to pay his own debts, but if forced to pay all for which he is bound, or all be considered, then he is in fact insolvent. Under these circumstances, but not in contemplation of insolvency, or with any idea of preferring a creditor, he makes a payment to one of them. Certainly the legislature did not intend that this should be cause for putting him into bankruptcy. If so, then it may be done although his assets may greatly exceed in value his own debts and those which it is reasonably certain he may have to pay; and men engaged in commerce and trade, who must necessarily, inter se, become sureties, would at all times be exposed to this hazard.

Again, we will suppose that A is bound, both as principal and surety, in a sum larger than his assets. He is nominally insolvent. He is, howevef, engaged in a prosperous, money-making business, and bids fair shortly to be worth more than his liabilities of every character. Under these circumstances, and not in contemplation of insolvency, or with any intention to prefer a creditor, he makes a payment to him. Surely such a transaction would not be ground for his financial ruin. Such a rigid construction of the statute would not produce the end for which it was designed; but, on the contrary, would cripple commerce, tie the hands of honest but embarrassed and struggling debtors, and bring ruin upon many who might otherwise avoid it. Neither the language nor spirit of the act requires a construction so prolific of bad results.

The interest of the debtor furnishes the ground for equitable interference. It is the essence of the statute. The design to prefer will be inferred from a payment by an insolvent debtor, but the circumstances accompanying it may show plainly that there was no motive or thought of giving an advantage or preference, and then the presumption is repelled.

In this instance, however, the debtor was hopelessly insolvent when the payment was made. This is not only proven, but admitted; and the circumstances attending the transaction not only do not rebut the presumption of an intent to prefer, arising from the fact of payment and insolvency, but, in our opinion, confirm it. The debtor testifies in substance that he then knew that he was insolvent; that Wm. S. Grimes was his cousin and had been especially kind to him; that he believed he would assist him in his troubles quicker than anyone else; and for these reasons he preferred to give him an advantage over his other creditors.

This shows a clear case of preference, and, aside from the presumption we have alluded to, brings the transaction within the statute and defeats the subsequent assignment, which, if valid, would give the infant no priority of payment.

Judgment affirmed.

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NEW NATIONAL TURNPIKE CO. v. DULANEY AND OTHERS.

(Filed January 7, 1887.)

Damages on injunction bond—Attorney's fees—Where an injunction is merely ancillary or in aid of the relief sought, or is relied on to secure the relief when obtained, or to prevent the commission of a wrongful or tortious act that would result in irreparable injury before the termination of the prime cause of action, a recovery may be had on the bond for the payment of reasonable counsel fees when the defendant has succeeded in dissolving the injunction; but where the injunction is the relief sought, and, in fact, gives the relief if sustained, no recovery for counsel fees can be had.

A petition was filed by appellees enjoining proceedings in the county court to condemn a right of way through their land for a turnpike road. A demurrer to the petition was filed and sustained, the injunction dissolved, and the petition dismissed. In this action upon the injunction bond to recover counsel fees alleged to have been paid for the purpose of having the injunction dissolved, Held—That no such recovery can be had. While it is admitted that the counsel were employed to have the injunction dissolved, yet the merits of the case had to be considered as much as if the case had progressed upon proof to a final termination.

Barnett, Noble & Barnett and C. B. Seymour for appellant.

P. B. Muir for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

The National Turnpike Co. and the Jefferson and Bullitt Turnpike Co. instituted proceedings in the Jefferson County Court to condemn a right of way for a turnpike road through land owned by the appellees.

A petition was filed by the appellees in the Louisville Law and Equity Court enjoining that proceeding, to which a demurrer was filed by the appellants that was sustained, the injunction dissolved and the petition dismissed. The appellees, in order to obtain the injunction, executed the following bond: "We undertake that the plaintiffs, W. H. Dulaney, Jno. F. Moore, Charles Renaker and Delaney E. Stark, shall pay to the defendants, the National Turnpike Road Co. and the Jefferson Turnpike Co., the flamages, not exceding twenty-five hundred dollars, which they may sustain by reason of the injunction in this action, if it is dnally decided that said injunction ought not to have been granted."

The present action was instituted on this bond, and the damages sustained by reason of the injunction sought to be recovered. It is claimed in the petition that the plaintiffs had paid counsel fees for the purpose of having the injunction dissolved to the amount of two hundred dollars, and the sole question presented by the appeal is, can counsel fees be claimed and recovered as damages under the stipulations of the injunction bond?

The court below adjudged, on a demurrer to the petition, that no such recovery could be had, and in that conclusion we must concur. The case of Burgen v. Sharer, from the Madison Circuit Court, 144 B. M., 97, is conclusive of the present case, as it determines directly the question involved.

The rule is that when the attachment or injunction is merely ancillary, or in aid of the relief sought, or is relied on to secure the relief, when obtained, or to prevent the commission of a

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wrongful or tortious act that would result in irreparable injury before the termination of the prime cause of action, then a recovery may be had on the bond for the payment of reasonable counsel fees, when the defendant has succeeded in discharging the attachment or dissolving the injunction; but, on the contrary, when the injunction is the relief sought, and in fact gives the relief, if sustained, no recovery for counsel fees can be had, and, as said in Burgen v. Sharer, the injunction preventing the parties from proceeding to open or condemn the way, the only injury was the deprivation of its use in consequence of the injunction. The only damage that can be recovered in this class of cases "is such as results from the operation of the injunction itself."

An attachment is generally, and perhaps always, in aid of the original cause of action, and issues to secure the relief, when obtained. It may be issued to secure the payment of the debt when reduced to judgment. The obligor may admit the debt, and yet deny the grounds for the attachment. In such a case, if the plaintiff fails to make out the grounds, the defendant, although a judgment for the debt is rendered, may sue on the attachment bond and recover attorney's fees paid, if reasonable, in order to have the attachment discharged.

So in case of an injunction where the widow asserts her right to dower and obtains an injunction to stay waste, the right to dower may be conceded or litigated, and if it turns out that the injunction was improperly granted and is dissolved, a recovery may be had for the attorney's fees arising from the employment to dissolve the injunction. Where an injunction which was obtained as ancillary to an original proceeding is dissolved the obligors in the injunction bond are liable for a reasonable attorney's fee. To this extent the doctrine has been carried by this court as to the measure of recovery on attachment and injunction bonds, but no further. If the debtor enforces the collection of an execution by reason of payment since the judgment, the injunction being the relief the plaintiff seeks and is entitled to, and not ancillary to some other proceeding, the obligors are liable for the debt, interest and costs, and the damages, not exceeding ten per cent., and no attorney's fee can be taxed except such as is allowed in ordinary actions by the statute against the defendant. The Code in fact fixes the damages to stay proceedings on a judgment to be assessed by the judge at the dissolution, and they are not to exceed ten per cent. on the amount enjoined. And if the delivery of the property has been delayed, the value of the use, hire or rent thereof shall be assessed. (Section 295, Civil Code.) Such are the damages, and none other, when the injunction is the relief asked for, and the Code has but followed the decisions rendered on the subject.

It is only where the writ of attachment or injunction has been resorted to in order to make a remedy already adopted the more effectual that extraordinary costs are allowed. Although connected with the original proceedings it is made independent of and disconnected from them so far as the question of costs and expenses is concerned, because the plaintiff compels the defendant not only to resist the original cause of action, but another and distinct cause of relief in aid of it. Not so where the injunction is in fact the only relief sought in the original proceeding, and this is the plain distinction recognized in the case of Burgen v. Sharer. In that case the defendant was about to proceed to open a road, as in this case, and an injunction obtained by the plain-

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tiff, restraining him from passing over the plaintiff's land. A bond like the one in this case was executed, and the question was made as to the liability of the obligor for attorney's fees. It is immaterial that the injunction was merely preliminary, that is, to operate until the matters alleged in the bill could be determined. It was the relief sought, and the final judgment, if for the plaintiff, would have been rendered perpetuating the injunction. The injunction is the remedial right sought to be obtained, and in such a case no counsel fees will be allowed. The facts alleged were not deemed sufficient to authorize the preliminary injunction, and the case was, therefore, disposed of on its merits. It is true that in the present action on the bond it is alleged that the employment made was to have the injunction dissolved, but in order to do this the merits of the case, that is, the facts upon which the injunction was obtained, had to be considered, as much so as if the case had progressed upon proof to a final termination. The admission by the demurrer, that the attorneys for the defense were employed for a particular purpose, was not an admission that the fees paid constituted, to that extent, the damages the appellants had sustained by reason of the injunction.

This was an injunction restraining the party from proceeding until the case in court could be heard and determined, or until the further order of the court. It is not distinguishable from Burgen v. Sharer, and the damage the plaintiffs can recover "is only such as resulted from the operation of the injunction itself."

Where the original action is for an injunction, that being the relief the plaintiff becomes entitled to if successful, the case is then like any other ordinary or equitable proceeding to the question of cost. No extraordinary cost can be allowed or received, but the defendnt may look to the bond of the plaintiff to recover the damage he has sustained by reason of being deprived of the use of his property, or the existence of some other right that the injunction for the time being has prevented him from exercising. We perceive no reason for adopting a different rule as to the measure of damges so long adopted and recognized by this court, and the judgment below is now affirmed.

LONG AND OTHERS v. CENTRAL KENTUCKY LUNATIC ASYLUM.

(Filed Jan. 7, 1888—Not to be reported.)

Asylums—Powers of special commissioners—By an act of the legislature an appropriation was made to the Central Kentucky Lunatic Asylum to build a new house for colored patients, the act providing for the appointment of three commissiners by the Governor—one from each Superior Court district—to "supervise said improvements," the money appropriated to be placed in their hands. These commissioners were directed to have plans and specifications made by a competent architect, and to let the work to the lowest bidder. Under the general law the buildings and grounds, as well as all the affairs of the asylum, were under the management of nine commissioners, required by law to reside in the county where the asylum is located. Held—That the selection of a site for the new building is entirely with the regular commissioners, and the three special commissioners have no voice in the selection, as no such power is expressly conferred, and none can be implied from the powers that are expressly conferred.

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Helm & Bruce for appellants.

Brown, Humphrey & Davie for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

By an act approved May 18th, 1886, the legislature appropriated to the Central Kentucky Lunatic Asylum the sum of forty-two thousand dollars, to be expended as follows: $12,000 to complete a building begun by F. M. Creel, and thirty thousand dollars to build a new house for colored patients. The act further directed "that the money thus appropriated should be placed in the hands of the commissioners to be appointed by the Governor, one of whom shall reside in each Superior Court district, and said commissioners shall supervise said improvements. Before commencing the work they will have plans and specifications thereof made by a competent architect, and will let the work on each building as a whole to the lowest bidder," etc. They were to pay for the work as the buildings progressed, not exceeding 80 per cent., and the remainder when the work was completed, etc.

One of the buildings had been partially completed, but no site had been selected for the new building intended for colored patients, and no express authority given the three commissioners to locate it. Under the general law regulating the conduct and management of these asylums nine commissioners are to be appointed by the governor for each one, whose term of office shall be six years.

The act provides that the asylum shall be under the control of its commissioners. They are to have the general management and control of all the land, buildings, funds, books, papers and other effects and property of their respective asylums, and shall cause them to be used and applied in the way best calculated in their judgment to promote the objects for which the institution was established. They are to cause all appropriations to be used as directed by law, and have the general control and supervision of the officers of the institution. Are to make reports from time to time to the auditor of public accounts, and are given almost unlimited power as to the management and conduct of the institution. It is a supervising board, required to live within the county where the asylum is located, whose duty it is to look to the interest and welfare of the institution and the patients within it.

When this special act was passed appointing the three commissioners to expend the money appropriated by the State for the purpose of erecting the new building for colored patients these nine commissioners had been duly appointed and acting as such under the general law. The three special commissioners, or a majority of them, went upon the asylum grounds with a view of fixing the site for the new building and to make arrangements for the completion of the building already begun. The nine commissioners were notified of the intention of the special commissioners, and each set of commissioners claimed the right to designate the spot for the new building. They differed as to the location, some of the regular commissioners uniting with the special commissioners as to the propriety of one location, and a majority of the regular commissioners selecting a different locality, the conference resulting in such a disagreement as originated this litigation.

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The special commissioners announcing their purpose to commence the work, the regular commissioners obtained an injunction that was enforced by the chancellor below, and hence this appeal.

Much testimony was taken for the purpose of sustaining the judgment of each commissioner as to the proper locality for the building. That testimony we have not considered, as the right to select the location must belong exclusively to the one side or the other. Why the legislature, in the exercise of its discretion, saw proper to withdraw from the regular board the right to control the expenditure of the money is not the subject of inquiry here. It was the exercise of a legislative function over which the chancellor has no control. It is evident that the right to make this expenditure is given to the special commissioners in express terms, but as to the location of the site for the building we find no such power given, and can imply the existence of no such right when looking to the powers conferred and duties imposed upon the nine commissioners under the general law. The legislature never contemplated that any irreconcilable difference of opinion could arise, as it was doubtless supposed that the nine commissioners, or a majority of them, would select the ground, and the special commissioners then proceed to adopt their plans, and construct the work as required by the act. The organization of the asylum was complete, and under the control of nine commissioners. They had the general management and control of all the land, buildings, etc., and were required to cause them to be used and applied in the manner best calculated to promote the interests of the institution. Their powers had not been curtailed except by the act creating the special commissioners. They lived near the asylum, were acquainted with its grounds—the natural advantages and disadvantages that would exist by the location of a building at one place or the other, and with such powers conferred as made them the trustees for the State and the institution, with a general supervisory power. The chancellor was no doubt reluctant to go further in restricting their powers than the language of the special act authorized. The fourth section of the act shows an intention to place the money in the hands of the three commissioners that it might be properly expended, with the power to supervise the improvements, and to do this it was necessary that an architect should be selected to fix the plan and specifications. The supervision of the work, with the right to expend the money and adopt the plan proposed by the architect, did not invest them with the right to select the site. If similar powers had been given the architect and the names of the commissioners excluded from the special enactment, it could not be said that under such authority he could have selected the site without consulting those who were, in fact and under the law, controlling and using the premises as trustees for the State. The legislature was wanting a judicious expenditure of the money, and, therefore, selected those who lived far distant from the asylum, one in each Superior Court district, to see to the disbursement and supervise the improvement as it progressed.

We can well see some reason for selecting others than the regular commissioners to make this expenditure, but none could well exist, and certainly nothing appears from the act, for taking the power from the commissioners to locate the site and give it to strangers or those not identified with the institution. Therefore the chancellor should not, by implication merely, take this power from the one and give it to the other. That the three commissioners, or such of them as acted, were prompted in their action by what they conceived to be the best interests of the

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asylum there can be no doubt, and they may have refused to expend the money in the erection of a building at a locality where it might, in their opinion, prove injurious to the State or those to be kept within it, still an honest difference of opinion was the result of the consultation on the subject, and the right to locate being with the nine commissioners the judgment below must be affirmed.

NICHOLS, ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 10, 1888—Not to be reported.)

Railroads—Duty to trespassers—A deaf mute was walking on the track of appellee's road, near a depot, with his back to an approaching train. The usual signals were given as the train approached the depot, and the engineer, as he approached the man, called to him to leave the track, and blew the whistle for down brakes, but the car was then so near as to render it impossible to check its progress so as to save the life of the man. Held—That the company is not liable. The deceased, being on the track where there was no crossing, was where he had no right to be, and as the ground was level on each side of the track, so that he might have stepped off without the least trouble, the engineer had the right to presume that he would abandon the track for his own security. Moreover, it was the highest degree of neglect on the part of the deaf mute to go upon the railroad track where trains were constantly passing, and use it as a footpath.

Geo. S. Fulton for appellant.

Wm. Johnson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant's intestate was run over and killed by a freight train of the appellee, and it is claimed that it was caused by the willful negligence of the employes on the train. The intestate was a deaf mute and was walking on appellee's road, about four hundred yards from Samuel's depot, with his back to the approaching train. The regular signal of blowing the whistle and ringing the bell was made as the train approached the depot, and one having the sense of hearing could and must have known that the train was approaching. It was moving at the rate of twelve or fourteen miles an hour, and another person, being on the road between the depot and where the unfortunate man was killed, stepped off the track as the train approached, but the deceased paid no attention to it whatever. The engineer, as he neared the man, called to him to leave the track and blew the whistle for down brakes, but the car was then so near as to render it impossible to check its progress so as to save the life of the deceased.

That the engineer doubtless saw him, or could have seen him in time to stop the train, is maniest, but the deceased was on the track of the road where there was no crossing and where he had no right to be, with the ground level on each side of the track, so as he might have stepped off without the least trouble, and under such circumstances the engineer had the right to presume that he would abandon the track of the road for his own security. Any man with his senses about him would have left the track. In fact there was the highest degree of neglect on the part of the deaf mute in going upon

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the railroad track, where trains were constantly passing, and using it as a footpath for his own convenience.

His death was the result of his own folly, and the court below acted properly in giving the peremptory instruction.

Judgment affirmed.

YEARLY v. MORRIS' ADM'R.

(Filed Jan. 10, 1888—Not to be reported.)

Vendor and vendee—Deficit—A deficit of twenty acres in a tract of land supposed to contain 282 acres, sold in gross, is not sufficient to authorize the chancellor to give the vendee compensation therefor.

A. P. Settle for appellant.

Wm. Lindsay and Isaac J. Forbus for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Chief Justice Pryor.

This was an action by the vendor to enforce a lien for purchase money. The vendee claimed compensation for a deficit of twenty acres, which he sought to have allowed as a credit on the plaintiff's claim. The chancellor having refused him the credit he has appealed.

The judgment below will not be disturbed. The original conveyance shows a sale in gross of the boundary described, but that boundary being defective in some of its calls a second deed was made in which the words more or less, contained in the first deed, were omitted, but yet it is evident that all the land remaining of the original tract was sold for two thousand dollars. That it was supposed to contain 282 acres is established, but there being neither mistake or fraud alleged, and only a deficit of twenty acres, the chancellor, unless the sale was by the acre, should, as he did, have denied the relief.

Judgment below affirmed.

PORTER, JR., &c. v. FORD, &c.

(Filed Jan. 10, 1888—Not to be reported.)

Wills—Lien on real estate for payment of legacies—The personal estate of a testator must be first exhausted before the real estate can be applied to the payment of either debts or legacies, unless the intention of the testator to have the real estate first applied for that purpose is clearly shown.

A testator devised $1,000 to each of the appellants, and a house and lot to F., who was appointed executrix and empowered to act as such without giving bond. Although more than enough personal property went into the hands of the executrix to pay all debts and legacies the special legacies to appellants were never paid. In this action by creditors of F., the executrix, an attachment was issued and levied upon the house and lot devised to her. Appellants were made parties and filed a cross petition asserting a lien upon the attached property for the payment of their legacies. Held—That appel-

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lants, after the personal estate was exhausted, occupied merely the attitude of creditors of F., and possessed in virtue of the will no lien upon the house and lot devised to her. And even if the conduct of the parties sufficiently evidence collusion between the plaintiffs and F. to give preference to plaintiffs to the exclusion of other creditors, the court was not authorized to adjudge that the attached property be applied pro rata to all the creditors as provided in article 2, chapter 44, General Statutes, as no such relief is prayed for by appellants in their cross petition.

O'Hara & Bryan for appellants.

M. J. Dudley for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

It satisfactorily appears that Lucy E. Ford was, at the commencement of this action, and had for several years previously been, indebted as their guardian to appellees, her children, a very large amount, derived from the estate of their father and her husband, which she had not accounted for or paid over.

Appellees in their petition state that although she was in fact indebted in a much larger sum they are content with a judgment against her for $10,000, and we think that sum at least is due them, after making all deductions from the amount that went into her hands as guardian on account of her dower interest, expenditures made by her for their benefit, and every other probable credit to which she may be entitled. For we can not conceive, nor is it suggested, how she could have legally and properly disposed of or paid out so much of the large amount of her husband's estate with which the evidence shows that she is partly chargeable, as to reduce the claim of her children and wards below the sum for which they ask judgment. The claim of the plaintiffs being clearly a just one, and the attachment obtained by them at the commencement of the action having been levied upon the house and lot of the defendant, Lucy E. Ford, before any provisional remedy was obtained or sought for by appellants, who were subsequently made parties upon their own motion, the question arises whether there exists in favor of the latter any superior lien or charge upon the attached property, or any right to share in the distribution of the proceeds of it.

By the will of Lucy L. Porter five hundred dollars was given to the Baptist Church and one thousand dollars each to appellants, the son and two grandchildren of the testator. But all the rest of her estate was devised to her daughter, Lucy E. Ford, including the house and lot in controversy, and she was also appointed exectuor of the will and empowered to act as such without giving bond.

It appears that a large amount of the personal property went into the hands of the executrix, much more than enough to pay all debts against the estate and the special legacies. But she did not pay any part of the legacies, except that having a claim against one of the legatees. Thomas M. Porter, for more than the amount he is entitled to under the will, he must be regarded as having been fully satisfied. For although she voluntarily and without consideration surrendered the note held by her, there being still a balance unpaid of more than one thousand dollars, yet as the note was originally given for money borrowed of her as their guardian, and which belonged to them, that act of hers should not deprive them of the right to set off the amount thus

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due from him against the claim set up in this action to their prejudice.

It appears that, having failed to pay over the legacies in due time, or to give security as executrix, in compliance with an order of the county court Lucy E. Ford was, May 12, 1885, removed as executrix; and May 16, 1885, a rule was issued by the county court and executed, to pay over the assets in her hands to her successor, the administrator de bonis non. But instead of doing so she left the State of Kentucky, and two days thereafter this action was commenced against her by appellees, and the attachment was issued and levied upon the house and lot. It further appears that May 25 she executed and sent from the State of Virginia, where she then was, written authority to the clerk of the circuit court to enter her appearance in the action, and a short time thereafter the same attorney who instituted the action filed her answer confessing her indebtedness to the plaintiffs as alleged in the petition, and thus authorized the court to render personal judgment against her.

Conceding that the conduct of the parties sufficiently evidence collusion between the plaintiffs and defendant, Lucy E. Ford, to give preference to them to the exclusion of the legatees under the will of Lucy L. Porter, or others of her creditors, yet in the present condition of the pleadings the lower court was not authorized to adjudge that the attached property be applied pro rata to all her creditors, as provided in article 2, chapter 44, General Statutes, for no such relief is prayed for by appellants in their cross petition.

The simple inquiry then, as the case stands, is whether there exists, under the will of Lucy Porter, any prior lien or charge upon the house and lot specially devised to Lucy E. Ford, for the payment of the legacies to appellants.

It is a well settled rule that the personal estate must be first exhausted before the real estate can be applied to the payment of either debts or legacies, even against the heirs. And it is only when the intention of the testator to have the real estate first applied for that purpose is clearly shown that a court of equity will do so.

There is nothing in the will of Lucy L. Porter to indicate an intention by her to have the house and lot specially devised to Lucy E. Ford charged with the payment of the legacies to appellants. On the contrary it is manifest she intended they should be paid out of the personalty, of which there was greatly more than enough for the purpose.

The personal property that went into the hands of Lucy E. Ford as executrix being the source to which appellants had the right to look, and their remedy being against her for failure to pay over the legacies, they occupied, after the personal estate was exhausted, merely the attitude of her creditors, and possessed in virtue of the will no lien upon the house and lot devised to her.

As, therefore, the attachment lien of appellees existed from the commencement of the action, and appellants did not have or acquire any lien on the house and lot superior thereto, we think the lower court properly decided the property was subject first to pay the claim of appellees, and the judgment is affirmed.

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O'BANNON'S ADM'R v. L. & N. R. R. CO.

(Filed Jan. 12, 1888—Not to be reported.)

Railroads—Master and servant—One entering an employment assumes all the risks ordinarily incident to it.

The increased dangers of railroading arising from rain, snow or ice are a part of the ordinary risk incident to the business.

A railroad company is not liable for injury to a brakeman resulting from the accumulation of ice or sleet on the top of a freight car.

Galloway & Sims for appellant.

Mitchell & DuBose, H. W. Bruce and Wm. Lindsay for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Holt.

A. J. O'Bannon, while in the employ of the appellee, the Louisville & Nashville Railroad Company, fell from the freight train which he was helping to operate and was killed.

His administrator seeks, under section 3 of chapter 57 of the General Statutes, to recover damages upon the ground that the killing was the result of willful neglect upon the part of the appellee. As the action was dismissed upon demurrer to the petition its statements must be taken as true.

The accident happened at night. The deceased was at the time operating a brake upon a coal car, and sleet and ice had formed upon the edge of it, where he was compelled to stand in handling the brake. In consequence of this he slipped and lost his life.

According to the averments of the petition the willful neglect consisted in the failure of the appellee to either "supply salt or sand upon this ice which had accumulated and was upon the top of the coal car," or remove it.

No question as to defective machinery is presented.

It appears from the petition that the night was "cold and sleeting;" and we must, therefore, presume that the ice had formed during that night, or at least upon that trip.

Conceding that at that season of the year (December), and in the locality where the accident happened, that it was the duty of the appellee to provide its trains with a proper supply of salt or sand to be used in times of snow or ice, yet this action presents no complaint upon this score; and we do not, therefore, decide that any such duty rested upon the company.

The failure complained of is that the ice was not removed or sand or salt put upon it.

Certainly in the absence of averment we will not presume that, in this latitude, it was the duty of the company to provide other servants than the brakemen themselves, to accompany the train in anticipation of unusual weather, and remove the ice or sleet from their pathway or strew it with salt or sand.

One entering an employment assumes all the risks ordinarily incident to it.

The increased dangers of railroading arising from rain, snow and ice or the weather are a part of the ordinary risk incident to the business. To hold railroad companies liable to their employes on account of dangers arising from the elements would lead to the running of trains in good weather only, thus seriously interfering with the travel and business of the country.

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We are inclined to think that it was the duty of the deceased to provide for his own safety by removing the ice or putting salt or sand upon the spot where he had to stand to operate his brake; but whether this be so or not the danger was one ordinarily incident to the business; snow or sleet was likely to fall at any time during its prosecution, thus adding more or less to the risk. The train might start upon its trip when the day was pleasant, and before reaching its destination, and during the following night, ice and snow come, thus increasing the ever existing danger to those operating it. Thus it seems to have been in this instance; and the deceased, when he entered upon the employment, knew all this, and must be held to have assumed the risk as one ordinarily incident to it.

This being so it may be admitted that those superior to the deceased in the management of the train knew of the danger, and yet the appellee can not be held guilty of willful neglect.

Judgment affirmed.

TREACY, &c. v. BARCLAY, &c.

(Filed Jan. 12, 1888—Not to be reported.)

1. Burden of proof—In this action to recover possession of a stallion and damages for the detention the plaintiffs having manifested their right to maintain this action unless, as pleaded by the defendant, they have waived such right before the institution of this action, they were not required to negative the defense of waiver, which is in the nature of a plea in avoidance, but the burden was upon the defendant to establish it by proof. The court did not err, therefore, in placing the burden of proof upon the defendant.

2. Excessive verdict—The assessment of $300 as damages for the detention of the stallion, which was valued by the jury at $4,000, was not excessive.

D. G. Falconer and Beauchamp & Allen for appellants.

J. D. Hunt for appellees.

Appeal from Fayette Common Pleas Court.

Opinion of the court by Judge Lewis.

It is not only proved, but substantially admitted in the pleadings, that appellants failed to comply with their part of the contract by which they agreed to remit to appellees, not later than the first day of October, 1887, the actual one-half of "service fees" for the stallion "Banker," whether collected or not, and to make and render "a statement of the particulars of that season's total earning by said horse." And as it is, in express terms, provided that in case of a failure of either party to perform the contract in whole or in part, in any way, the agreement might be declared void at once, without notice by the party aggrieved, appellees had the right, at any time after the date mentioned, to demand the delivery of their stallion to them in the city of New York, as is in such a state of case provided in the contract. And as appellees did, in writing, November 4, 1887, notify appellants that in consequence of such breach the contract was at an end and demanded a return of their horse. They had the right, upon the refusal or failure of appellants to comply in a reasonable time with such demand, to maintain an action for the possession and damages for the detention, unless, as stated

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in the answer of appellants, such right was, before the institution of this action, waived.

Whether there was such waiver was submited to the jury, who, under proper instructions by the court, decided on that issue of fact against appellants.

The only question then is whether the lower court, as counsel contend, erred in placing the burden of proof on the appellants.

There is no controversy about the ownersip of the stallion, nor room for any as to the breach of the contract by appellants, and the consequent prima facie right of appellees to the possession, and having thus manifested their right to recover they, as plaintiffs, were not required to negative the defense of waiver, which is in the nature of a plea in avoidance, but it was incumbent on appellants, defendants to the action, to establish it by proof, and as they signally failed to do so the verdict of the jury was properly for the plaintiffs.

The right to recover in such a case implies a wrongful detention, and damages therefor. And when the purpose for which the horse was used, and his value, fixed by the jury at $4,000, are considered we do not think the assessment of damages at $300 is excessive.

Judgment affirmed.

SEVERANCE v. KELLY.

(Filed January 12, 1887.)

County clerks—Collection of license fees—Under the revenue law of 1886, the county clerk and not the county judge is the proper person to collect the license fees for retailing spirituous liquors, and to receive the commission thereon.

Rountree & Lisle for appellant.

S. A. Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

This is a controversy between the appellee, as county judge, and the appellant, as county court clerk, each contending that he is the proper person under the Revenue Law of 1886 to collect the license fees for retailing spirituous liquors and receive the commisions thereon.

Section 1, article 5 of chapter 92 of the General Statutes provides: "All licenses mentioned in this article, except licenses to sell by retail spirituous, vinous or malt liquors, shall be granted by the county clerk; and licenses to sell by retail spirituous, vinous or malt liquors shall be granted by the county court."

* * *

The next section fixes the amount of the license tax.

It is urged on behalf of the county judge that the law restricts the power of the county clerk by forbidding the grant by him of a license to retail liquor; and that as the work must be done by the county judge that he should receive the license fee and get the commission. The question must be determined by arriving at the legislative intention, to be gathered from the other provisions of the law. In considering it, however, it is proper to keep in mind that prior to the enactment of the present law the county clerk granted certain licenses, but the power was vested

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in the county court in its discretion to grant license to retail liquor, and the clerk received the tax. The present law does not say that the county judge shall grant the license, but the county court. It does it after hearing and upon a judicial finding. It should not be presumed that the legislature has so framed the law as to hold out an inducement which might, in some instances, influence the co urt's action. In fact it seems to have guarded against this, because section 11, article 17 of chapter 28 of the General Statutes provides that the presiding judge of the county court shall be paid for his services in holding his courts out of the county levy, the allowance to be made by the court of claims.

Turning now to the other provisions of the Revenue Law we find it provided in section 13, article 5 of chapter 92 of the General Statutes:

"The clerk shall, by the last of December, in each year, report to the Auditor an abstract of the licenses granted by him and by the county court, stating the amount of tax paid to him, and also the amount of other public moneys received by him for taxes or otherwise. The amount so paid and received shall be accounted for as other revenue."

Section 15 says:

"Clerks shall be allowed, upon a settlement with the Auditor, three per cent. commission on all taxes or revenue collected by them."

Section 5, article 8:

"Each circuit and county clerk shall make out an account of all taxes and other public money received by him up to the first day of each circuit court, and said report shall show in detail of whom said moneys were received, for what, and when received, and shall be verified by him and entered of record; and he shall pay over to the trustee of the jury fund so much thereof as the court may by order direct as being necessary for the payment of the jurors, and the original account certified, with the order of court, shall be transmitted with the balance of the fund to the Auditor. The clerk shall be allowed five per cent. commission on said sums reported by him, which may be deducted before paying over the money aforesaid." * * *

Section 11:

"Clerks of county courts shall also report (to the circuit court at the fall term) the names of all persons to whom they or the county court has issued licenses under any law of this State, showing the date, for what granted, amount paid therefor, and to whom paid, which report shall be examined and approved by the county judge, recorded by the clerk of the circuit or criminal court, and certified to the Auditor."

Section 12:

"It shall be the duty of the clerks of the circuit and county courts, and of the trustees of the jury fund of this Commonwealth, to keep a well bound book in their offices, in which they shall enter, at the time it is receivable, or when received, all taxes or other moneys received by them for the Commonwealth, showing of whom received, on what account, amount and date; which book shall at all times be open to public inspection."

Considering all of these provisions and the entire law it seems to us that the legislature intended that the license fee for retailing liquors should be paid to the county clerk. The statute fixes his commission for receiving and paying out the fund from license taxes realized. In speaking of the pay for so doing the county judge is not named. It requires the county clerk to re-

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port to the Auditor "an abstract of the licenses granted by him and by the county court, stating the amount of tax paid to him." If the county judge has the right to receive the license fees for selling liquor then there is no provision in the statute requiring him to account to the Auditor or any one for them.

The county clerk is required to report to a superior court the licenses granted and the amount received therefor; and this report must be examined and approved by the county judge and certified to the Auditor. He must also keep an account of them in a book to be kept in his office, to be open at all times to public inspection.

There is no provision in the law requiring the county judge to make any report as to any such fees. No one examines or approves any report by him, and he is not required to keep any account of any such fees. Surely this would not be so if he were authorized to receive them, because they often amount to a large sum.

The law has carefully guarded the matter as to the clerk. His official bond is certified to the Auditor, and if he fails to account for them he is responsible by a summary proceeding.

There is no provision of the law requiring the bond of the county judge to be so certified; and we see no reason for the selection of one person to collect certain license fees and another to collect others. The tax is paid upon the issual of the license, and this in all cases is done by the clerk. One of the sections above cited, in speaking of the report required of the clerk to the fall term of the court, says "that he shall report to whom paid." This means he shall state whether the money received by him has been paid to the Auditor or to the trustee of the jury fund under an order of court.

In view not only of the express provisions of the law, but of the safeguards provided by it as to the county clerk in connecion with the collection of license fees, and the absence of any as to the county judge, it is plain that the clerk is the proper person to collect them when paid for the privilege of retailing liquor; and the judgment is, therefore, reversed, with directions to overrule the demurrer to the petition and for further proceedings consistent with this opinion.

GAINES v. JONES, &c.

(Filed January 12, 1888.)

Vendor and vendee—In an action upon a note executed for the purchase price of land the defendant pleaded that the deed executed by the vendor did not include four acres of land which was actually sold to him, and represented by the vendors at the time of the sale to be a part of the tract. The plaintiff admitted that the four acres was left out of the deed by mistake, and also that it was omitted by mistake from the deed from his immediate vendor to him, and shows that it is described by a marked boundary, and had been held and claimed by him and the vendee as a part of the tract described in the deed more than fifteen years when the action was commenced. Held—That the plaintiff has shown his ability to make a good title, but it was error to render judgment upon the note without requiring the vendor, or his executor and sole devisee, he being dead, to make a new deed or so reform the original one as to pass the title to the four acres as was agreed when the contract was made.

W. L. Brown for appellant.

Randall & Ramsey for appellees.

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Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

Appellee Jones instituted this action for judgment on a promissory note for $39, executed by appellant Gaines, to John Tankesly, deceased, in part consideration of a tract of land, and assigned to Jones by J. R. Tankesly, executor and sole devisee of the vendor.

In defense of the action appellant, in his answer made a cross petition against J. R. Tankesly, states that the deed executed by John Tankesly did not include about four acres of land which was actually sold to him and represented by the vendor at the time of the sale to be a part of the tract, and that he did not discover that part was excluded until this action was commenced, when he caused a survey to be made according to the calls of the deed, although, believing it was included, he had erected a dwelling house and other buildings upon it.

John R. Tankesly, in his answer, admits the four-acre parcel was represented to appellant as part of the tract, and was sold by his father to him, and, by mistake, not conveyed by the deed. He also admits that it was not included in the deed to his father from his immediate vendor, and the only title he had at the time of the sale to appellant was a possessory title. But he states and satisfactorily proves that it was actually purchased and paid for by his father and was intended to be included in the deed as part of the tract sold by his vendor, who had title thereto, but, as in the present case, it seems to have been left out by mistake.

The purchase by John Tankesly was in 1857, and he then took possession and has had it ever since. And as the four acres is described by a marked boundary, had been held and claimed as part of the tract described in the deed by appellant and his vendor more than fifteen years when the action was commenced, we think an ability to make a good title has been shown by J. R. Tankesly. But the court rendered personal judgment for the amount of the note sued on, and also for about $6 in favor of J. R. Tankesly, amount of a note filed by him, and directed a sale of that part of the land which is described in the deed to satisfy the two debts and costs of the action.

No provision requiring J. R. Tankesly to make a good title to the four acres is contained in the judgment, nor is there any reference whatever to it, although forming the main subject of litigation. But appellant is left by the judgment without title to the four acres, and without any remedy, except by a new action, to compel a compliance with the contract to convey it to him, which, it is admitted, was made.

It seems to us as the four acres was represented to be and was actually sold as part of the tract by John Tankesly, deecased, and the deed was accepted by appellant, believing that parcel was included by it, the lower court should, before rendering any judgment against appellant, have required J. R. Tankesly to tender a new deed or so reform the original one as to pass the title of the four acres, as was agreed and intended by the parties, when the contract was made, for neither Jones nor J. R. Tankesly was entitled to judgment until the mistake was corrected and the deed made to conform to the contract between, and intention of, the parties to it.

The judgment is, therefore, reversed and cause remanded, with directions to permit J. R. Tankesly to execute and render a deed

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passing title to the four acres and for further proceedings consistent with this opinion.

WRIGHT, &c. v. UNDERWOOD, &c.

(Filed January 14, 1888—Not to be reported.)

1. Judicial sales—Promises by commissioner as to title—While, as a general rule, a purchaser at a judicial sale can not resist the collection of the purchase money on account of any statement made by the commissioner as to the title at the time of the sale, yet where the commissioner, as plaintiff in the action, has procured the decree and was otherwise interested in the sale than as commissioner merely, he will not be allowed to collect the purchase money in the face of unperformed promises made by him at the sale which induced the purchaser to buy and which, if complied with, would vest the title in the purchaser.

2. Same—Presumptions—In an action to enjoin the collection of the purchase money for land sold under decree it is averred in the petition and admitted by the answer that the decree of sale was rendered in the suit of "Robert Underwood, Adm'r v. plaintiff and A. S. Brown and others, defendants." The sale was made by Robert Underwood as special commissioner, and the character of his statements at the sale were such as to authorize the inference that he was interested in the sale otherwise than as commissioner merely. Held—That the court will presume that the Robert Underwood, who, as administrator, was a party to the decree, is the same person who acted as commissioner, and that he not only obtained the judgment, but was interested in the sale otherwise than as commissioner.

Lewis McQuown and Logan Porter for appellants.

Wright & McElroy for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Holt.

The appellant, W. A. Wright, purchased at a commissioner's sale made by the appellee, Robert Underwood, as special commissioner, a tract of land at $5 per acre. At the time of the sale a claimant of seventy-six acres of it forbade the sale to that extent. Notwithstanding this the appellant made the purchase, paid the first payment at that time, executed his sale bonds for the other two payments, due in one and two years respectively, and the sale was reported to court and confirmed.

The appellant, having paid all of the purchase money save a sum equal to the price of the seventy-six acres, has enjoined the execution for this balance. His petition avers and he, in substance, testifies that when the sale was made the commissioner conceded that the seventy-six acres was adversely claimed and held, but induced him to make the purchase by then stating that he would put the purchaser in possession and would not enforce the payment of the purchase price as to the seventy-six acres until he did so. In this he is substantially sustained by three other witnesses.

Opposed to them is the evidence of the commissioner only, and, to a certain extent only, as he admits that he announced at the sale that he would warrant and defend the title; and if any of the land was lost the purchaser would not have to pay for it, and would not lose his money if he did not get it.

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The testimony, considered in its entirety, leaves little room to doubt but what the purchaser understood, and had the right to understand, from the statements then made by the commissioner, that he would not have to pay for the seventy-six acres until he was put in possession of it under a good title.

It was sold as a part of the estate of James Brown, deceased, and we are satisfied that in fact it did not belong to it, but to the claimant. Beyond question it was held adversely at the time of the sale, and it is, therefore, impossible for the appellant to recover it as in any effort to do so he will be met with a plea of champerty. Unless, therefore, he is now entitled to relief he is remediless.

Nothing else appearing, a purchaser of land at a commissioner's sale can not resist the payment of the purchase money by reason of any misrepresentation by the commissioner as to title or possession or on account of any promise in this respect by him which may be unperformed.

If he has no other connection with the sale or interest in it save as commissioner, then the purchaser, after its conformation, can not prevent the collection of the purchase money on account of any statement made by him as to title at the time of the sale.

Here, however, the commissioner, as administrator, was the plaintiff in the decree. He procured it. This, we think, may fairly be assumed as a fact from what appears in the record, although the case is not very fully prepared.

It is averred in the petition in this action and admitted by the answer that the judgment of sale was rendered in the suit of "Robert Underwood, Adm'r, &c., plaintiff, and A. S. Brown and others, defendants."

The comimssioner was a special one; and one would infer from the character of the statements made by him at the sale that he was otherwise interested in it than as commissioner merely. Upon this state of case we must presume that the "Robert Underwood" who, as administrator, was a party to the decree, is the same person who acted as commissioner; and that he not only obtained the judgment, but was interested in the sale otherwise than as commissioner merely. This being so, and the purchaser having relied upon the statements to which we have alluded, he should not be compelled to pay the purchase money and not get the land. The heirs of James Brown are nonresidents. The party who was the plaintiff and obtained the decree of sale and then induced the appellee to purchase upon the faith that he would get the land is now seeking to enforce the collection of the purchase money, although it is quite certain that the land did not belong to the Brown estate, and entirely certain that the purchaser can not recover it, owing to the adverse holding. To permit this, under such circumstances, would be an offense to equity and a mockery of justice. Although a sale of property may be ordered by a court, and the property be under its control or offered for sale by its commissioner, yet if he has obtained the decree and be interested in the sale he will not be allowed to collect the purchase money in the face of unperformed promises made by him at the sale and which induced the purchaser to buy, and which, if complied with, would vest the title to the property in the latter.

Judgment reversed, with directions to perpetuate the injunction and for further proceedings in conformity to this opinion.

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GIFFORD v. MULLINS.

(Filed January 14, 1888—Not to be reported.)

1. An absolute deed will be held to operate as a mortgage where it is evident that such was the intention of the parties.
2. The finding of the master as to rent, improvements, etc., will not be disturbed upon appeal unless clearly wrong.
3. Pleading—Re lef—The grantor in an absolute deed, which was intended as a mortgage, instituted an action praying for a reconveyance of the land, alleging that the rent of the land, of which the defendant had the use, and the timber used by him, amounted to more than the mortgage debt. The defendant denied that the deed operated as a mortgage, and asked judgment against plaintiff for the reasonable rent of the land during the time he occupied it after the execution of the deed, and for "general relief." The court adjudged a lien on the land for the balance found due the defendant, the judgment reciting that "plaintiffs have waived the deficiency in the prayer in the answer and cross petition." Held—That this recital in the judgment must be taken as true, and that this waiver authorized the judgment enforcing the lien; but if not—
4. It is competent and proper for a court of equity, having ascertained and determined that one of the parties to a pending action is indebted to another, and that a lien exists upon the property or fund, the subject of litigation and then under the control of the chancellor, to subject it, under a prayer for general relief, to the payment of such indebtedness, and thus end the litigation.

John H. Fryer for appellant.

Chas. H. Lee for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Lewis.

June 4, 1887, appellant Gifford conveyed to appellee Mullins the land in controversy for the stated consideration of $279.60, which was in fact the amount the former then owned the latter. And on the same day, though after the deed was made, Mullins executed a bond, in which it is recited he then sold the same land to Gifford for the consideration of $287.10, payable January 1, 1878, with interest at the rate of 8 per cent. per annum from that date, upon the condition that if the consideration was paid on or before the day named Mullins would convey the land, but if not so paid Gifford was to surrender the bond to be canceled, the sole object being, as stated, to give Gifford until that date to pay for the land; but in the event of his failure to do so he was to surrender all claim thereto and interest therein.

Gifford having failed to pay the consideration, the possession of the land was, in March, 1880, surrendered to Mullins, but the bond was retained by him until September 12, 1884, when he commenced this action.

In his petition it is stated that the consideration mentioned in the bond is the same, interest being added, as that mentioned in the deed, and was in fact the amount of his indebtedness to Mullins; and that the deed was intended by the parties, and did operate as a mortgage, to secure the payment of said debt.

He further stated that the rent of the land, of which Mullins had the enjoyment, and the value of timber taken from it and appropriated by him, amounted to more than the debt, for the payment of which the mortgage was given.

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The relief prayed for by the plaintiff was the enforcement of the contract as intended by the parties, a reconveyance of the land, and judgment for the excess in value of rents and timber appropriated by Mullins over the debt mentioned.

At the April term, 1885, the lower court adjudged the deed and bond constituted no more than a mortgage of the land to secure the payment to Mullins of the debt which Gifford owed him, and referred the case to the master commissioner, with directions to take proof and to report as to the value of rents and timber taken, on the one hand, and the value of improvements put upon the land by Mullins while he was in possession.

At a subsequent term a final judgment was rendered in favor of Mullins for $147, the assumed balance of the debt, and value of improvements after deducting the credits, to which Gifford was found entitled; and to satisfy the judgment the land, or enough of it for the purpose, was directed to be sold.

From that judgment Gifford and Frey, to whom he had transferred his interest in the land, have appealed.

As no cross appeal is prosecuted by the plaintiff it is not necessary to consider whether the lower court erred in adjudging the deed to be in its operation simply a mortgage. Though the circumstances under which the two instruments were executed, the peculiar provisions of the bond and conduct of the parties make it evident they intended the deed to operate as a mortgage, and in such case, as has been decided by this court, it should be so treated.

There is conflict in the testimony in regard to the value of the rents, the timber and the improvements, as is generally the case where witnesses are promiscuously called on to give their opinions as to values without having certain criteria to guide them.

When the master commissioner, who is presumed to have the requisite capacity and to be impartial, has made his report on such subjects, and it has been duly considered and passed on by the chancellor, after hearing such suggestions on the subject as counsel may make, this court should not disturb such finding of fact unless clearly wrong, especially when, as is the case in this instance, the estimates of some of the witnesses are manifestly extravagant and unreliable. The only modification of the master's report made by the chancellor was in charging Mullins with interest on the rents, whereby the balance in his favor was reduced to the sum for which judgment was rendered, and of that appellant can not complain.

It is contended the chancellor erred in adjudging a lien on the land existed for the balance found due to Mullins, and in directing a sale to pay it, because that relief was not specifically prayed for by him.

It is true he denied the deed operated as a mortgage, and asked judgment against Gifford for the reasonable rent of the land during the two years he occupied it from the date of the deed to March, 1880, and the result of the judgment he asked for would have been to relieve Gifford from the payment of the purchase money and himself from rents. He was, therefore, not in a position to ask judgment, except in the alternative for the debt, or a sale of the land.

But the relief asked by the plaintiffs could not be granted except upon the assumption that he was still indebted for the land, whatever balance might be found, after deducting such credits as he was entitled to, and that a lien thereon existed for such balance.

It is expressly stated in the judgment, and must be taken as

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true, that "the plaintiffs have waived the deficiency in the prayer in the answer and cross petition;" and thereupon the chancellor proceeded to direct the sale of the land to pay to Mullins the ascertained balance.

If appellee had, after the judgment on the master's report was rendered, asked leave to amend his answer and counterclaim by adding a prayer for judgment for the balance due him, and for the enforcement of his lien, which unquestionably existed, the chancellor would have permitted it done. But the waiver of the plaintiffs, it is fair to suppose, prevented him doing so, and they can not now be heard objecting on account of that defect in the pleading. Besides, as held in the case of Riley v. Smith, decided at the last term of this court (9 Ky. Law Rep. 615), it is competent and proper for a court of equity, having ascertained and determined that one of the parties to a pending action is indebted to another, and that a lien exists upon the property or fund, the subject of litigation and then under control of the chancellor, to subject it, under a prayer for general relief, to the payment of such indebtedness, and thus end the litigation.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

FORBES & BRO. v. COOPER & CO.

(Filed January 18, 1888.)

1. Set-off—An unliquidated demand, even though it arises out of a contract, can not be used as a set-off. This was the rule uniformly applied in all cases arising under the old Code, and section 96 of the new Code was not intended to change that rule.

2. Same—While the equity jurisdiction to set-off demands against each other existed prior to the statute and is not dependent on it, the chancellor will not, merely because of the existence of such equity as the insolvency or nonresidency of the plaintiff, take jurisdiction of the defendant's claim against the plaintiff for unliquidated damages, and proceed to try both cases on their merits, and render judgment for the party who has the larger claim.

Dulaney & Mitchell for appellants.

Galloway & Simms for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Bowden.

1. It was uniformly held, under the statute of 1796, that an unliquidated demand could not be used as a set-off. (M. & B., 1448, where the old cases are cited.) It was so held under the English statute, and under similar statutes in different States of the Union.

2. It was held in Shropshire v. Conrad, 2 Met., 143, that a demand for unliquidated damages, though it arose out of a contract, was not a proper subject of set-off under section 128 of the old Code; and that rule was uniformly applied in all cases arising under that Code.

3. We do not think that section 96 of the new Code was intended

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to change that rule. If such had been the purpose heed would have been given to the obvious fact, pointed out in Shropshire v. Conrad, that the definition of a counterclaim needed to be changed, for if any cause of action arising out of a contract, though for unliquidated damages, could be pleaded as a set-off, it would not be precluded by the fact that it arises out of the contract stated in the petition, and the result would be that every case in which the defendant's cause of action arose out of the contract sued on would be both a counterclaim and a set-off. If the supposed change had been intended the counterclaim should have included only such causes of action in favor of the defendant as arose out of the transaction, other than a contract stated in the petition, or is connected with the subject of the action. The two sections would have provided that when the action is on a contract, judgment or award, the defendant may set-off any demand which arises out of a contract, whether liquidated or not, or out of a judgment or award; but if the transaction sued on is other than a contract, judgment or award, the defendant may counterclaim only such cause of action as arises out of that transaction, or is connected with it. This would be symmetrical, but it would often involve the practical difficulty of trying distinct cases at the same time—a difficulty that may exist, to some extent, when the defendant's cause of action arises out of the transaction stated in the petition; but generally the two contentions, relating to the same matter, are less vexatiously confusing.

While the language of the new Code is formally that of definition, we do not think it was intended to so define a set-off as to permit unliquidated demands to be pleaded, even when founded on a contract. The right to plead a set-off under the statute does not depend on the collateral fact that the plaintiff is insolvent or a nonresident; if it exists by reason of the statute, it may be asserted by the defendant, though the plaintiff is resident and solvent, and the ends of justice do not seem to require a plaintiff to submit his cause of action to the confusing influence of matters in no way relating to it, but relevant to an independent cause alleged by his adversary. It does not seem a sufficient reason for permitting this perplexity in all cases merely because it may happen that, in some cases, the plaintiff is insolvent or nonresident.

4. It is certain that the equity jurisdiction to set-off demands against each other existed prior to the statute, and is not dependent on it: and while there is much obscurity in regard to the extent to which it will be exerted, it seems clear that when there is no particular equity, such as that which arises out of the fact that the plaintiff is insolvent or a nonresident, unliquidated damages will not be set-off in equity. If such an equity exists, and it is sought to set-off a legal demand for damages against a demand asserted in equity, the chancellor may delay execution of his decree until the defendant has had his demand ascertained; if it is a legal demand against which the set-off is sought to be applied the judgment at law may be temporarily enjoined so as to give the defendant opportunity to get his judgment so it may be set-off. We have not, however, found any case in which the chancellor has, merely because of the existence of such equity as insolvency or nonresidency, taken jurisdiction of the claim for unliquidated damages and proceeded to try both cases on their merits, and to render judgment, as in case of mutual demand, for the party who has the larger claim.

Section 378 of the Code recognized this rule. If, for example, Forbes & Bro. had sued Cooper & Co. on the claim which they

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sought to plead as a set-off, they could have had the judgment obtained by Cooper & Co., enjoined under section 378, whether the ground for the injunction was insolvency or nonresidence, till they could have their judgment ready to be set-off against it. But in any case that could arise it would be necessary that Forbes & Bro. should bring Cooper & Co. before the court in order to obtain a personal judgment, or to bring their property before it so as to subject it. When insolvency is the equitable ground it may still be impossible to summons the adverse party, though a resident in the State, while it may be possible to summon him, though he is a nonresident But whatever may be the practical disadvantage or difficulty, and however desirable it may seem to permit a defendant, upon such equitable grounds being shown, to present his case as a set-off, whereby the difficulty as to obtention of jurisdiction would be obviated, we can not go beyond established rules even to secure justice. It is not our province to consider by what permitted method the defendant, sued by an insolvent or a nonresident, may use, defensively, an unliquidated claim for his protection when he can not obtain a personal service on him. Whether he may, when he does not contest the demand asserted against him, proceed by attachment and have himself served as a garnishee, and thus indirectly bring the nonresident into court, seems not to be quite settled. That is allowed in Pennsylvania, Louisiana, Vermont and Tennessee. (Drake on Attachments, section 543.) He could then answer his adversary and rely on the attachment, and thus prevent a judgment requiring him to pay until the validity and extent of his own claim, for the payment of which he would have a lien, should be determined.

Section 14 of the Code does not refer to a case like this, when a defendant asserts a purely legal demand, and where there is no equitable issue to be transferred. Here the only equity the defendant can invoke is one which does not pertain to his cause of action, but arises out of the extraneous fact of insolvency or nonresidence; and this equity, as we have seen, does not give the chancellor jurisdiction to hear and determine, as a set-off, the defendant's claim for damages, and, therefore, can not entitle the defendant to have the transfer made.

Section 387 does not conflict with section 17, nor even modify it. When a judgment is set-off against another judgment it is not annulled or modified; the judgment creditor gets the full benefit of it; it is satisfied, not by money forced out of the defendant, but by the extinction of a judgment against the plaintiff. The act of setting off is only a mode of satisfying it.

The judgment is affirmed.

Presiding Judge Ward dissenting.

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SUPERIOR COURT ABSTRACTS.

MUTUAL BENEFIT LIFE INSURANCE CO. v. NICOLL.

Filed December 17, 1887. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Where an insurance agent takes personal property from the insured as his own, and agrees to pay for it by having a policy issued and delivered, the company is not bound by the contract.

A special agent, authorized to take and forward applications for life insurance and to receive and receipt for the first premium, agreed to have a policy of $10,000 issued to appellee, and accepted the first premium, a horse at the price of $200, agreeing to pay appellee $10, the premium being only $190. The agent took the horse "for his own use." Nothing was said about how the company was to be paid. In this action by appellee against the company to recover damages for its failure to deliver the policy, Held—That the company is not liable, and that a peremptory instruction to find for defendant should have been given.

Dulaney & Mitchell for appellant; Thomas H. Hines and John M. Wilkins for appellee.

FARMERS BANK OF KENTUCKY v. PENTECOST.

Filed January 6, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Appeals—Schedule—In order to enable the appellant to prosecute his appeal upon a partial transcript he must file his schedule within ninety days after the granting of the appeal. And this rule applies as well to cases involving the settlement of estates as to ordinary cases.

H. F. Turner for appellant; John Young Brown and E. W. Hines for appellee.

FLOYD v. PENICK.

Filed January 6, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Where the transcript is not filed twenty days before the second term after the granting of the appeal, and the appellee does not enter his appearance, the court will, of its own motion, dismiss the appeal.

Harrison & Belden for appellant; Burton & Burton for appellee.

WILDER v. HUDSON.

Filed January 11, 1888. Appeal from Harlan Circuit Court. Opinion of the court by Presiding Judge Bowden, dismissing.

A schedule filed before the appeal was granted is of no avail, and does not authorize the prosecution of the appeal upon a partial transcript.

Wm. Lindsay for appellant; John W. Rodman and Geo. C. Drane for appellee.

SMITH, &c. v. HERNDON, &c.

Filed January 11, 1888. Appeal from Scott Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Excutors—Payment of debts by devisees—S. and P., as executors, received money enough to pay all debts of their testator, but lost it in private speculation. When called on to settle they had to raise the money in some way. As between themselves the executors seem to have regarded each as liable for one-half, accordingly P. proposed to S. that each should raise half the

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money required, and thus discharge the executorial liability. P. sold land and raised his part, while the children of S., who were devisees, mortgaged their land to R., who furnished the other part. The children of S. having the mortgage debt to pay, claim that this money was used in paying the testator's debts in the interest of all the devisees, and seek to make the other devisees liable for their proportion. Held—That the money paid by the children of S., was merely an advancement by them to their father, to enable him to pay as executor what he was liable for in that capacity, and they can not hold the other devisees liable for any part of the amount.

A. Duvall and J. F. Askew for appellants; Owens & Finnell and W. Rodman for appellees.

WIMBERLY v. METCALFE.

Filed January 11, 1888. Appeal from Graves Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing, Judge Barbour dissenting.

1. In an action of slander, where the alleged slanderous words charge the plaintiff with the doing of an act in a foreign State, the petition, when special damage is not averred, must allege that the act charged to have been done in a foreign State was an offense under the law of that State, involving moral turpitude and indictable, unless it is an offense at common law, but whether in that case it is necessary the court does not consider.

In this case the words alleged to be slanderous were these: "He has two wives—one here, and one in Missouri or Arkansas." Special damage is not alleged, nor is it alleged that bigamy is an offense against the law of either Missouri or Arkansas. Held—That although the words alleged import that the plaintiff had become the husband of one of the women by a valid marriage, and that he had ostensibly become the husband of the other by a marriage that was bigamous, and would be criminal if bigamy was a crime in the States named, the petition did not state a cause of action.

2. Polygamy, though subject to canonical censure, was not an offense at common law.

D. B. Stanfield, W. W. Robertson and J. E. Robbins for appellant; W. W. Tice and W. M. Smith for appellee.

SMITH v. COMMONWEALTH.

Filed January 11, 1888. Appeal from Calloway Circuit Court. Opinion of the court by Judge Barbour, reversing.

Peace bond—Whether or not it is essential under the Code to the validity of a peace bond that it should in all cases be executed by both the person who is required to keep the peace and the surety, it is essential that the bond should conform to the order of court reciting its execution, and where the order of court recites that the bond was executed by both, a bond executed by the surety alone is invalid as the clerk has no authority to take a bond different from that which the court has ordered to be taken.

G. A. C. Holt for appellant; P. W. Hardin for appellee.

MATTHEWS v. LONG & KENNEDY.

Filed January 11, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Practice—In this ordinary action, in which the law and facts were submitted to the court, there is in the transcript a paper which contains what purports to be the court's statement of the conclusions of fact stated separately from the conclusions of law, but it is not identified by the bill of exceptions, or by any order of court, although the bill of exceptions recites that the court stated in writing the conclusions of fact found separately from the conclusions of law. Held—That this paper can not be regarded as a part of the record, and as the pleadings authorize the judgment it must be affirmed.

R. S. Bevier for appellant; Owen & Ellis for appellees.

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TANDY'S ASS'EE v. HATCHER & CO.

Filed January 11, 1888. Appeal from Taylor Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Appeals—Jurisdiction—As the only question in this case is as to the correctness of the ruling of the lower court in adjudging costs against the appellant, this court has no jurisdiction of the appeal.

Thompson & McChord for appellant; R. S. Montague for appellees.

MERRITT v. MERRITT'S EX'OR.

Filed January 18, 1888. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Gifts—Causa mortis—To constitute a valid gift of personal property the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be completed by actual, constructive or symbolical delivery. The delivery must be actual, if the subject of the gift is in the immediate possession of the donor and subject to be delivered, or constructive or symbolical by the delivery of something to represent, and intended to represent, the thing given.

2. Same—In an action upon a promissory note the defense was that the plaintiff's testator had, in his last sickness, made a gift of the note to defendant. The testimony tended to show that the testator said to defendant, referring to a trunk in the room, which, it is claimed by defendant, contained the note, "I give the trunk to you and all its contents, except the deeds to my Texas property." There is no evidence conducing to show that the note was in the trunk, or believed by the testator to be in the trunk, other than that furnished by the statement of the testator to the defendant: "You will find more in the trunk than you expect," and by the further fact that there was nothing of value in the trunk unless it contained the note sued on, and by the fact that the defendant had the note in his possession after the testator's death. Held—That the evidence fails to show any clear and well-defined purpose upon the part of the testator to give the note in controversy to defendant, and that it fails to show that the note was in the trunk or that there was a delivery of any symbol representing the contents of the trunk.

Dulaney & Mitchell and E. W. Hines for appellant; Wright & McElroy for appellee.

McFARLAND v. ALBRITTON.

Filed January 18, 1888. Appeal from Graves Circuit Court. Opinion of the court by Judge Barbour, reversing

Principal and surety—Agreement between sureties construed—A and B, being sureties for a note for $5,000, for a firm which had failed and made an assignment, entered into a written agreement, whereby B, in consideration of A's payment to him of $1,500 in cash, bound himself to assume the entire liability of A upon said note, A transferring to B all the claim he might have against the assets of the insolvent firm or their assignee by reason of the payment of said note by him and B, the latter binding himself to hold A harmless from further liability on the note. The day the writing was made $3,000 was paid on the note and B executed his individual note for $2,000 for the balance, and afterwards took the note and made a settlement with the principals, and, as they claim, released them from further liability. After all this A instituted this action against the individual members of the insolvent firm to recover the $1,500 which he alleges he, as surety, paid for them. The appellee alone made a defense which was based upon the agreement between A and B and the settlement of the debt by the principals with B. Held—

1. That A paid the $1,500 to B to be paid on the $5,000 note, and that it was so paid, and that A has the right to look to the members of the firm personally for indemnity for the amount he has paid, less the amount B has received thereupon from the firm assets.

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2. The settlement made by B with the principals can not affect A's right to recover in this action, although B had possession of the note. The mere possession of the note by one surety is not evidence that he has paid it, and any settlement the principal makes with one surety without the knowledge of the others is made at his peril, and subject to the rights of the others.

3. If A told defendant, after the note matured, that he had paid B $1,500 to assume the payment of the note and let him out, and that B was to have all he could get out of it and that he, A, had no further interest in it, and, if knowing defendant was settling with his creditors, and that all the creditors were required to sign the agreement, and that defendant was settling with B as the sole owner and claimant of this debt, he, A, never claimed to be a creditor, he is estopped from asserting his claim in this action, and a demurrer to so much of the answer as set up these facts was properly overruled.

D. G. Park and W. W. Tice for appellant; Wm. Lindsay for appellee.

HOWARD v. CRISP.

Filed January 18, 1888. Appeal from Elliott Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Amendment of pleadings—While the right of a party to amend his pleading so as to perfect the original, or set up an additional, cause of action or ground of defense is addressed to the discretion of the court, yet amendments substantial and material to the cause of action or defense should be allowed unless there be some facts or circumstances indicating a purpose to delay or prevent a trial, or unless the proceedings have reached such a stage that the issue would be materially changed. An amended answer pleading the statute of limitation was offered before the jury was sworn, but several terms after the original answer was filed. The offer to file was accompanied by an affidavit sufficient in its terms to rebut any presumption arising from the delay, if any such, that the failure to file sooner was caused by a purpose to delay a trial. Held—That the offer to file was in time, and the amendment should have been allowed, as it presented a sufficient defense.

2. Limitation—If, as matter of law arising on the facts stated in the petition, it appears when the cause of action accrued the defendant, in relying on the statute of limitation, need not state when the right accrued. This he need do only when he relies on facts other than those stated to show that the right accrued at another time.

3. Same—C., being indebted upon a replevin bond past due, executed to H. a note for the amount of the bond in consideration of the agreement of H. to pay the bond. C. paid the note to H., and H., having failed to pay the bond, C. was also compelled to pay that. In this action C., alleging these facts, seeks to recover of H. the amount paid in discharging the bond, and H pleads limitation. Held—That the plaintiff's cause of action accrued upon the lapse of a reasonable time after the defendant's promise to pay the bond.

J. R. Botts for appellant; J. E. Cooper for appellee.

GASTON'S ADM'R v. ROBARDS, &c.

Filed January 18, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Advancements—A father can not by word or act, unless testamentary, make that an advancement which is not in law one. Nor can he give to a child money or property as a portion in life without the child being liable for the value of the thing, at the time of the gift, as an advancement unless he disposes of all his property.

2. Same—If the father loans money to his child and takes his note therefor, nothing else appearing, it is not an advancement, but a debt. But there is nothing which prevents the father from giving to his child a note due to him by the child. A father held a note executed to him by his married daughter, and another executed to him by her husband. In a book of

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advancements kept by him these notes were charged to the daughter, and upon each note there was this endorsement: "Interest stopped on this note. August 16, 1881," that being the date of the entry in the book. The notes were retained by the father and came to the hands of his administrators. Held—That the facts show that the notes were given as an advancement.

3. Same—A father may charge his married daughter, as an advancement, with a note executed to him by her husband unless the husband should be insolvent, and whether or not in that event the charge could be made is not determined.

Rountree & Lisle for appellant; Harrison & Belden for appellees.

ECKERLE, &c. v. HILERICH'S EX'OR.

Filed January 18, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Bowden, affirming.

Construction of devise—Section 18 of chapter 113 of the General Statutes, which provides that "if a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, such issue take the estate devised and bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will," does not apply when its application would destroy "the general plan of bequest," or when a different disposition of the legacy is required by the will.

A testator had five living children and one grandchild, the sole representative of a deceased daughter, "Mary Ann." By the second article of his will the testator provided that the following-named children, naming Mary Ann, as one of them, should each receive $700; and Clara, daughter of Mary Ann, deceased, $350 before a certain son should receive anything, the testator having advanced him that amount. By the third article the testator provided that, after the foregoing had been done, the residue of the estate should be divided among all of his children in shares alike, except that the grandchild should receive one-half as much as the children. By the fourth article it was provided that if any child should die leaving issue, such issue should take the parent's share, "except as above provided for Clara." Held—That the testator's granddaughter, Clara, takes under the second article of the will only the $350 devised to her, and not the $700 devised to her mother, it being apparent that the name of her mother was used by inadvertence, and that the testator intended that Clara should have only a half share.

N. F Martine for appellants; Cary & Spindle for appellee.

KENTUCKY CENTRAL R. R. CO. v. PREWITT.

Filed January 18, 1888. Appeal from Clark Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Killing of stock—If from any cause those in charge of a railroad train can not see stock on the track until so near them that they can not, by the use of proper care, prevent a collision, the company should not be held liable for the killing of the stock. As there was testimony in this case tending to show that smoke obstructed the view, special interrogatives asked by the defendant as to the distance the cattle were from the engine when first seen, and as to what, if anything, prevented those in charge of the train from seeing the cattle sooner, should have been submitted to the jury, this action having been tried before the repeal of so much of the Code as requires the court, upon motion, to order a special verdict.

2. Same—It was error to instruct the jury to find for plaintiff unless, after the company's servants saw the cattle upon the roadway, they used such means as were in their power to avoid the injury, as such an instruction authorized the jury to find for the plaintiff, regardless of the paramount duty the employes owed to their train and the property on it.

Breckinridge & Shelby for appellant.

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BENNETT v. BARNES.

Filed January 18, 1888. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Reversed judgment—Restitution—Appellant sued appellee, seeking to enforce a lien upon land for purchase money on an alleged oral sale, or to have a rescission. Judgment enforcing the alleged lien was rendered by default. Upon appeal that judgment was reversed, but not having been superseded the land had been sold under the judgment and conveyed to appellant, to whom possession had been delivered. Upon the return of the case appellee answered, denying that appellant had, or ever had had, any title to the land or any possession of it, or that he had ever made any contract with appellant respecting it, and asked judgment for the possession of his land or for its value. No evidence being offered to prove any of the disputed matters, the court dismissed appellant's petition and rendered judgment for appellee for the value of the land. Held—That as no objection was made to the assertion by appellee of his claim to be indemnified in this action, it is too late now for appellant to complain, even if complaint could properly be made, which is not determined.

E. C. Hubbard for appellant; Fogle & Glenn for appellee.

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KENTUCKY COURT OF APPEALS.

CENTRAL PASSENGER R. R. CO. v. KUHN.

LOUISVILLE & NASHVILLE R. R. CO. v. SAME.

(Filed January 19, 1888.)

1 Railroads—Flagmen—It was negligence of the most flagrant character in a railroad company not to have some one to give notice of the approach of trains at a point near a large city where its road crossed a public thoroughfare, and where street cars crossed its track many times during the day and unitl a late hour at night. A flagman during the day merely was not sufficient; there should have been a flagman there at 9 o'clock at night.

2. Concurrent negligence—Presumption of negligence—Where a passenger on a train or a street car is injured by reason of a defect in the road, cars or machinery, or by a want of care or diligence in those employed, or by any other thing which the company can or ought to control, a presumption of negligence upon the part of the company arises, and in an action against the company the burden is upon it to rebut this presumption. A passenger upon a horse car was injured by reason of a collision of the car with a steam engine at a railroad crossing. In this action against both the horse-car company and the steam car company, charging concurrent negligence, Held —That the burden was upon the horse-car company to show proper care, and upon the plaintiff to show negligence upon the part of the steam car company.

3. Duty of driver of street car—The court properly refused to instruct the jury "that it was not the duty of the driver of the street car to stop his car and go ahead on foot to the crossing to see if a train was approaching, unless he had reasonable ground to believe a train was approaching." The view of the railroad being obstructed and there being no conductor or other person on the car to exercise this vigilance, the probability of danger imposed this duty on the driver.

4. Evidence—City ordinance—The horse car company can not complain of the exclusion from the jury of an ordinance of the city requiring steam companies to have a flagman at the crossing. Even if the company had notice of the ordinance, which does not appear, or was required to take notice, its negligence does not excuse the negligence of the horse-car company.

5. Prejudicial error—The defendants were not prejudiced by the action of the court in permitting the plaintiff to testify that his family consisted of "a wife and three children," as the instructions guided the jury plainly as

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to the compensation or damages the plaintiff was entitled to recover, and it is apparent that they confined themselves to the instructions in assessing damages, and were not influenced by the testimony complained of.

6. Measure of damages--This action was instituted to recover for the gross neglect of the two defendants, and no special damage was alleged other than the fact of the injury, the pain and suffering of the plaintiff, his expenses, loss of time and permanent injury. The jury were instructed that if the verdict was for plaintiff they should assess such damages, within the amount claimed, as would reasonably compensate him for his loss of time, necessary expenditures, and for permanent injury or disability, if any, and for the injury sustained by him in his bodily and mental suffering, if any there was, resulting directly from said injuries. The court also propounded this special interrogatory: "What sum in damages will reasonably compensate the plaintiff for the injuries sustained by him?" To which the jury responded: "$5,000." Held—That the jury were properly instructed as to the measure of damages.

7. Joint trespassers—Assessment of damages—The act of 1839 which provides that "in actions of trespass it shall be lawful for the jury to assess several or joint damages against the several defendants; and when the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, and a joint judgment for costs" is still in force, as it has not been repealed, expressly or by implication, by either the revised or general statutes, or by the Code of Practice. And this statute affords a remedy against all joint trespassers, with the right on the part of the jury to punish each wrong-doer to the extent of his participation in the wrongful act, and, if one is the more guilty than the other, to punish him the more severely.

In this action, the jury, by their special findings, fixed the damages at $5,000, and required the one defendant (the steam railroad company) to pay of that amount $2,000, and the other (the street car company) to pay $3,000. Held -That the jury had the right to thus apportion the damages, but, even if they had not, the defendants were not prejudiced, as otherwise there would have been a joint judgment against both for $5,000, the whole of which might have been recovered of one with no right of contribution against the other.

Brown, Humphrey & Davie for Central Passenger R. R. Co.

Barnett, Noble & Barnett and Wm. Lindsay for Louisville & Nashville R. R. Co.

O'Neal, Jackson & Phelps and Kohn & Barker for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

The appellee, Chris. Kuhn, instituted the present action in the Jefferson Court of Common Pleas against the Central Passenger Railroad Company and the Louisville & Nashville Railroad Company, in which it is alleged that, when a passenger on the cars of the Passenger Railroad Co., he was injured by being thrown out of the car by reason of a collision between the cars of that company and those of the Louisville & Nashville Railroad Company, caused by the joint negligence of the employes of each defendant. The accident occurrred in the eastern part of the city at the corner of Baxter avenue, at a point where the city railway cars crossed the track of the L. & N. Railroad. There was a verdict assessing the damages at $5,000, and then a several finding by which the city railway company was required to pay $3,000 of the damages and the L. & N. Railroad Co. $2,000. Both of the railroad companies have appealed.

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The plaintiff was injured about 9 o'clock at night in July, 1884, the car in which he was riding being struck by the engine of the L. & N. Railroad Co. in the attempt of the passenger car to cross its track.

The question of negligence was properly submitted to the jury by special interrogatories, and by the instructions given, the jury finding that the injury was caused by the concurrent negligence of the two companies. It is apparent from the testimony that each company was guilty of the grossest neglect, and liable to the appellee in damages for the injury sustained by him.

It appears from the evidence that where the one track crossed the other was a public thoroughfare, used constantly by those passing in and out of the city, with street cars crossing the track of the steam railroad company many times during the day and until a late hour at night; that the Louisville & Nashville Railroad Company kept a flagman at the crossing during the day to warn those passing of the approach of its trains, but at night no flagman was required to remain, and those passing this dangerous crossing, whether in street cars or other modes of conveyance, left to provide for their own safety, and to risk the danger of being run over by constantly passing trains with no other protection than their own knowledge as to the time the trains would pass or their vigilance in noticing the train's approach. No bars or gates had ever been erected, and the trains running by steam day and night over the crossing, with a dense population on each side of the track, left to risk all the danger that was constantly menacing them at this particular point and at a time when a vigilant flagman was most needed. Buildings were also located at or near the track so as to obstruct the view of those crossing when looking in the direction this train approached on the night of the accident.

Such a movement of the railroad trains, in the midst of a dense population constantly passing over its track, without any one to give notice of the train's approach, was negligence of the most flagrant character.

As to the Central Passenger Company it is manifest that its driver was unfitted for his employment; that he took no pains to satisfy himself of the approach of the train, when others less interested than himself and not on his car saw its approach in time for him to have saved himself if he had exercised even the slightest care. Besides, when he discovered the train's approach he attempted to cross the track in front of it, when, by the exercise of the slightest care, he might have avoided all danger. It is, therefore, plain that the injury complained of resulted from the negligence of both companies.

It is proper to notice first some of the objections made by counsel for the street car company during the progress of the trial, and now complained of as error to its prejudice. It is argued that the court below erred in adjudging that the burden of proof was on the street car company (the collision being admitted) to show that the injury was not caused by its neglect, and at the same time holding that no such rule could apply to the L. & N. Railroad Company, the other defendant. This record shows that the Central Passenger Company was willing to assume the burden, and asked that it be allowed to first introduce its evidence, and the motion was overruled. The plaintiff was then required to make out his case of negligence against both defendants, but when the evidence was all in the court permitted counsel for the passenger company to conclude the argument, and it,

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therefore, seems to us that if either party was prejudiced by this action of the court it was the plaintiff and not the defendant. The rule adopted in Smith v. Louisville & Portland Railroad Company, 2 Duvall, 556, places the burden of this case in the company, and while that case may fail to distinguish properly the class of accidents to the passenger in which the burden is on the carrier from those where the burden is on the plaintiff, still, in this case, one of the grounds of complaint, or the negligence complained of, is the want of care on the part of the driver and his want of fitness for the position given him.

Mr. Cooley on Tor s, referring to a Pennsylvania case (Laing v. Colder, 8 Penn. St., 479; Sullivan v. Philadelphia, 30 Penn. St., 234), says: "Prima facie where a passenger being carried on a train is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. This is the rule where the injury is caused by a defect in the road, cars or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can or ought to control, as a part of its duty to carry the passengers safely, but this rule of evidence is not conclusive." (Cooley on Torts, page 663.)

The injury in this case was the want of diligence in the driver, and the law will presume neglect from the mere fact of the injury, and the burden is on the defendant, who may show that the injury originated from causes the driver could not prevent. The passenger commits himself to the custody and control of the carrier, and if the car breaks, or the cars, while controlled by the driver, should strike an obstruction, as a wall or an embankment, the presumption of negligence arises and must be overcome by the carrier on the complaint of the passenger injured by the accident. The accident may have been caused by the other defendant, but if so it devolved on the company in charge of the passenger to show it. And, further, says Mr. Cooley, "suppose a railway train, thrown from a track from some cause not apparent and the passengers all injured, would it be reasonable to put an injured person to the necessity of discovering and pointing out the cause and taking the fault to the company before he could recover, or may he who has entrusted his person and his life to the control of the company, etc., rely on the injury itself as entitling him to redress and leave to the defense the task of presenting exculpatory evidence?" A felon may have placed obstructions on the track or caused the accident in a manner that no vigilance could guard against, and, if so, it may be easily shown by the company. This rule, placing the burden on the company, is in accord with the doctrine that a common carrier of passengers must exercise the highest degree of care and diligence to prevent injury—such care as a reasonable and cautious man would use under the circumstances is the diligence required. This rule, says Hilliard, applies to the vehicle, the horses, the harness, the skill, caution and sobriety of the driver. (2 Hilliard on Torts, page 587.)

This court in the case of the L. & N. R. R. Co. v. Ritter, decided at the March term, 1887 (9 Ky. Law Rep., 22), recognized the same doctrine, both as to the presumption of negligence and the care required of the carrier. This case is attempted to be distinguished from that of the Railroad v. Ritter's A'dm'r, and that class of cases, and cases where the accident, the result of the neglect, might have been caused by the act of a stranger. We see no reason for the distinction. The negligence complained of is that of the company's driver, and that another contributed to the result can make no difference. If the steam railroad company had not been sued it would have been a case directly

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against the other defendant for the negligence of its driver. Where the direct cause of the injury results from the act of another over whom the carrier has no control the burden is on the plaintiff, as where the injury is caused by an obstruction placed on the track of the road by a trespasser and the alleged negligence is the failure of the company to remove the obstruction within a reasonable time, thereby causing the injury. We decline to follow the case of Curtis v. Rochester, 18 N. Y., 534.

Another objection is in regard to the fifth instruction given by the court to the jury, to the effect that when the view of the railroad is obstructed, that, on approaching the crossing, in order to avoid injury, the exercise of greater caution is required by those approaching and those in charge of the train than when the view is clear and unobstructed.

The defense asked the court to modify this instruction or to define the degree of care required in such a case by telling the jury "that it was not the duty of the driver of the street car company to stop his train and go ahead on foot to the crossing to see if a train was approaching, unless he had reasonable grounds to believe a train was approaching." This was refused, and properly, because the court could not, as a matter of law, adjudge that such caution could be dispensed with, and as there was no conductor or other person on the car to exercise this vigilance the probability of danger imposed this duty on the driver. While a conductor, in addition to the driver, may not be required on a street car, still, at such a crossing, a force sufficient should be employed to avoid danger to the passengers.

It was evidently neglect on the part of the steam railway company, under the circumstances, in failing to provide for the safety of those crossing by removing the obstruction, or in having gates or bars or a flagman to prevent those crossing from being injured by its trains, but the failure to do this did not relieve the street railway company from the negligence of its employes, and, therefore, instruction No. 1 was properly refused, and for the additional reason that instructions were given as to the degree of diligence required of the steam railroad company. This is not an action by the one company against the other, nor is the negligence of the street car company's driver the negligence of the passenger. The passenger is charging neglect against both. There is certainly a higher degree of care required of a carrier for the security and safety of its passengers than for the security of those not on its train, and, therefore, the distinction between the instructions given for the plaintiff as against the defendant, in whose care the plaintiff was, and as against the steam car company for its concurrent negligence. The doctrine with reference to injuries to those crossing the track of a railway where the right to cross exists is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country, so what is reasonable care and prudence must depend on the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing or gates or bars, so as to prevent injury, but that reasonable care would not be required in a crossing in the country where but few passers passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient. This is the general rule laid down by all the works on negligence. (Thompson on Negligence, page 417; L., C. & L. Railroad Co. v. Goetz's Adm'r, 79 Ky., 442.)

The court excluded from the jury the ordinance of the city of

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Louisville, requiring the steam railroad company to have a flagman at this crossing. It did not appear that the company had notice of the ordinance, and if required to take notice we can not well see how the negligence of the steam railroad company could excuse the neglect of the codefendant, causing this injury. That they were both guilty of neglect is clearly shown, and there is no pretense that the street car company supposed that this ordinance had been complied with.

We proceed now to consider the objections made by both defendants to the judgment below. During the progress of the trial the appellee, while being examined as a witness, was asked the question: "What family have you?" The response was a wife and three children. Objections were interposed to the question by the defendants and overruled. This action was instituted for the gross neglect of the two defendants, and no special damage was alleged other than the fact of the injury, the pain and suffering of the plaintiff, his expenses, loss of time and permanent injury.

The case was tried in the court below as one for compensation only, and whether, under the proof and averments of the petition, his condition with reference to the support of his family should have been embodied in an instruction as one of the elements of damage is not necessary to be determined. The case was not tried on that theory, and no such instruction given. The court told the jury that if the verdict was for the plaintiff they should assess such damages, within the amount claimed, as will reasonably compensate him for his loss of time, necessary expenditures, and for permanent disability or injury if such be the result, and for the injury sustained by him in his bodily and mental suffering, if any there was, resulting directly from said injuries. This instruction guarded the jury plainly as to the compensation or damages the plaintiff was entitled to recover. They were not misled and doubtless not influenced by the mere response of the witness to the question that he had a wife and three children.

The cases referred to as rendering such testimony incompetent are where the evidence was excluded, the plaintiff insisting that it was an element of damage, or where the court had permitted the jury to consider it as an element of damages in cases where no special damage to that effect was alleged or punitive damages asked. Besides the general instruction as to the measure of damages, this special interrogatory was propounded to the jury by the court: "What sum in damages will reasonably compensate the plaintiff for the injuries sustained by him?" The response by the jury was: "We say $5,000." So we think it is apparent that the jury confined their consideration as to the measure of damages to the general instruction given, and the special interrogatory propounded by the court. It is argued, however, that the character of the testimony, with reference to the injury inflicted and the damages awarded, shows that the jury, in fixing the damages, was not confined to the instructions given.

The principal surgeon who dressed the wound says that it was on the head, a fracture on the outer plate of the skull. He regarded it as dangerous, and still regards it as such, likley to result in epilepsy or softening of the brain. That the plaintiff was unconscious for several days. After the danger of inflammation disappeared he left the case in charge of the family physician. He was in attendance on the patient for eight or ten days. The family physician testified that he attended the plaintiff five or six weeks. He was in a comatose condition three or four days; that he suffered a great deal and required constant attention during his entire illness; that blood discharged from one of his ears; has been called to see him several times since to treat him for

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severe headache, vomiting and inflammation of the left ear; that his complaints were attributed to the injury received and its duration would likely last through life; that plaintiff was a very healthy man before he received the injury. He attended him three weeks prior to the trial. He was vomiting and blood oozing from his ear. The general result in cases of this kind is weakness of the mind or epilepsy. Dr. Larrabee was then recalled and stated that the symptoms stated by the family physician rendered the probability of epilepsy stronger. The statements, made by skilled surgeons and physicians, uncontradicted by any proof in the record, was the testimony upon which this verdict was based, and, if true, and there is no reason for doubting them, the verdict of the jury is fully sustained by the evidence, and, looking to the general and special instructions on the question of damages, we are satisfied the response merely to the question propounded "that he had a wife and three children" did not enhance the damage or prejudice the substantial rights of the parties.

The next question arises as to the special findings by which the jury required the one defendant to pay, of the damages sustained, $2,000, and the other $3,000. The jury had said that the plaintiff was entitled to recover $5,000, and if, as is maintained by counsel for both defendants, they had no right to apportion this sum between the wrongdoers, then the reversal, if had, would only require the court below to enter a joint judgment for the $5,000, the whole of which might be recovered of one with no right of contribution against the other. It is urged, however, by the Central Passenger Company, that the judgment requires it to pay $1,000 more than the L. & N. Railroad Company, and the court having no right to enter such a judgment it should be reversed, without determining its effect upon the substantial rights of the parties in the event the damages could not be severed, and such was the common law rule on the subject. We will proceed to determine the question made as to the act of 1839. That act provides: "That, in actions of trespass, it shall be lawful for the jury to assess several or joint damages against the several defendants, and where the jury find several damages the judgment shall be in favor of the plaintiff against each defendant for the several damages and a joint judgment for costs." This act, which has been held to apply to all kinds of trespassers and that modifies the rule of the common law and is more a question of practice than of right, has not been repealed expressly or by implication by either the Revised or General Statutes, or by the Code of Practice. There is no provision of the Code of Practice with regard to the remedy in conflict or inconsistent with the provisions of the act of 1839, nor any provision of the General Statutes in conflict with or inconsistent with its provisions or title that treats of this subject. This statute affords a remedy against all joint trespassers, with the right on the part of the jury to punish the wrongdoer to the extent of his participation in the wrongful act, and if one is the more guilty than the others, to punish him the more severely. It is an equitable statute and in this case it is exemplified by punishing the one more severely whose duty it was to stop until the train passed, and who could have avoided the danger by the exercise of the slightest care. We are the less reluctant to recognize the validity of the act of 1839, as it in no manner affects the rights of these parties, as a reversal because of the damages being severed would only result in directing a joint judgment against the two defendants for the real amount of damages assessed. (Ferguson

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v. Terry, 1 B. M., 96; Henry v. Sennett, 3 B. M., 311; Cox v. Cooke, 1 J. J. M., 360; Rochester v. Anderson, 1 Bibb, 439.)

Judgment affirmed.

HOFFERT v. MILLER.

(Filed January 19, 1888.)

1. The deed of an infant conveying real estate, when any valuable consideration passes to him, is not absolutely void, but voidable merely, and he has an election, after his disability is ended, to affirm or avoid it. It is not necessary that he should execute a new deed or re-acknowledge the original one in order to confirm it, but something more than bare recognition or silent acquiscence is necessary to a binding confirmation, unless prolonged for the period of statutory limitation.

2. Limitation—A grantor can not, after ten years from his arrival at full age, maintain an action to avoid and set aside a deed executed by him while an infant. No period of limitation being specially provided for such an action, section 9 of article 3, chapter 71, General Statutes, applies since that section provides that any action not otherwise provided for "can only be commenced within ten years next after the cause of action accrued." And where the estate conveyed was a remainder, the running of the statute against the action to set aside the deed is not postponed until the death of the life tenant, but begins immediately upon the arrival of the grantor at full age.

Simmons & Schmidt and Collins & Fenley for appellant.

William Goebel for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

July 11, 1868, Mary Miller, entitled, under the will of her husband, John Miller, to a life estate, and his sons, Winchans, Ambrose and Charles L. Miller, entitled to the fee in remainder by a joint deed, conveyed their respective interests in a lot of land, for the recited consideration of $300, to William Hoffert and John Pletcher, who then entered into possession.

This action was instituted August 19, 1884, by Ambrose Miller and Charles L. Miller against Hoffer, Pletcher and the wife and children of the latter, to whom a conveyance of an interest in the lot was made subsequent to 1868, to set aside and cancel the first-mentioned deed, and also the one made to Catherine Pletcher and her children, and to recover two-thirds of the lot, Mary Miller, the widow of John Miller, having died in 1877.

Two grounds are relied on in the petition for the judgment prayed for:

First, that the deed was procured by the fraudulent representations of the vendees and ignorance of the plaintiffs of the condition and value of the estate inherited from their father.

Second, that the plaintiffs were, at the date of the deed executed by them, infants.

As both the plaintiffs were of full age more than ten years before the commencement of this action, recovery for the alleged fraud is barred by the statute of limitation in such case provided.

The evidence clearly shows that Ambrose Miller was more than twenty-one years of age when the deed of 1868 was executed

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and the petition was, as to him, properly dismissed. But appellee, Charles L. Miller, as is both shown and admitted, then lacked about twenty days of being twenty-one years of age, and judgment was rendered in his favor for one-third of the lot.

The deed of an infant conveying real estate, where any valuable consideration passes to him, is, as well settled by this court, not absolutely void, but voidable merely. (Phillips v. Green, 3 A. K. Mar., 7; Same v. Same, 5 Mon., 345; Breckinridge v. Ormsby, 1 J. J. Mar., 236.) And he has an election, after his disability is ended, to affirm or avoid it. To confirm, it is not indispensable that he should reacknowledge the first or execute a new deed, but he may do so after full age by an act in pais. But conveyances of an infant are not so easily ratified as his purchases, and something more than bare recognition or silent acquiescence is necessary to a binding confirmation, unless prolonged for the statutory limitation. There must be some positive act or words of the minor from which his assent to the deed executed during his minority may be inferred. (Tyler on Infancy and Coverture, 84; 2 Kent's Com., 238; Wheaton v. East, 5 Yerger, 41.)

Says Story: "Without undertaking to apply this doctrine to its fullest extent," that is, that the act, after full age, should be of as great solemnity as the original instrument, "and admitting that acts in pais may amount to a confirmation of a deed, still we are of the opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. A fortiori, mere acquiescence, uncoupled with any acts demonstrative of an attempt to confirm it, would be insufficient for the purpose." (Ibid, 85; Tucker v. Moreland, 10 Peters, 75; Jackson v. Carpenter, 11 Johnson, 542.)

But though voidable such a deed passes the title, and some act on the part of the infant, after full age, is necessary to be done to avoid and divest the estate. (Philips v. Green, 5 Mon., 345.)

The evidence in this case shows no more than a mere acquiescence on the part of the appellee. The consideration of $100, being one-third of the purchase price, was received by him when the deed was executed, but his retention of it was not such an act as amounted to a confirmation of the deed. The first act which can be regarded as an election by him was the institution of this action, which was more than fifteen years after he arrived to full age. But as the life tenant did not die until 1877, when his right to maintain an action for recovery of the property first accrued, it is manifest that if that was the only relief prayed for, or alone necessary to restore him to the enjoyment of the property, the action was commenced within the time allowed by the statute. But to recover the property he must set aside the deed which passed the estate to his vendees, and the single inquiry is whether he commenced the action in proper time for that purpose.

Within what time such an action must be commenced, and whether there is in fact any express statutory limitation on the subject, are questions not hitherto passed upon by this court.

The authorities generally agree that the election to avoid such deed must be made by the infant within a reasonable time after he arrives at full age. But what is a reasonable time can not be determined by any certain or fixed test, and must, therefore, be left for the discretionary determination of the court, which is not, in accordance with the modern and wiser policy of our laws, to fix in every case a definite limit to litigation, and a period at which owners of property may repose in security.

In Meriweather's Adm'r v. Herran, 8 B. Mon., 162, is this lan-

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guage: "The right of avoidance is still the same, founded in the infancy of the party, taking date from the moment of executing the contract, or at any rate from his arrival at full age, and subject to be defeated or lost by any act of confirmation or waiver, or by such continued acquiescence as may afford an implication of either, or by the failure to assert the right for such a length of time as in analogy to the statute of limitations and in view of its purpose of giving repose to society should operate according to the principles and practice of a court of equity to prevent its future assertion."

It seems to us the necessity of resorting to analogy, and much less of depending upon the discretion of the court as to whether the election has been made within a reasonable time, does not now exist, but that section 9, article 3, chapter 71, General Statutes, was intended and should be applied to a case of this kind. It is as follows: "An action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued."

In our opinion, therefore, while a party may, before the expiration of that period, by act, bind himself to a confirmation, he can not, after ten years from his arrival at full age, maintain an action to avoid and set aside a deed made while an infant. And as this action was not commenced within that statutory limit, the court erred in rendering judgment for the plaintiff, and it is reversed, with directions to dismiss the petition.

ALEXANDER, &c. v. HUMBER.

(Filed January 19, 1888.)

1. Joint trespassers—Assessment of damages—The act of February 14, 1839, allowing a joint or several assessment of damages in an action of trespass, is still in force, never having been repealed.

2. Affidavits of jurors to explain verdict—If the affidavits of jurors are ever to be received to show that the verdict intended to be returned was, in fact, not returned, by reason of a mistake as to the effect of the language used, they should be received with the greatest caution, and the verdict not changed unless the mistake is clearly made out. In this action against joint trespassers to recover damages, the verdict of the jury was: "We, the jury, find for plaintiff, $1,000, jointly." A few hours after the verdict was returned, and after the matter had probably been discussed with the friends of the parties, the jury came before the judge, and, upon inquiry, almost every one of them said they intended to find $500 against each defendant, and the verdict returned was not their verdict. Subsequently their affidavits to this effect were filed in support of a motion for a new trial, which was overruled. Held—That even if the affidavits could properly be considered upon a motion for a new trial, this court does not feel authorized upon the record, as presented, to disturb the conclusion reached by the trial judge.

3. Reversible error—No error committed during a trial is available upon appeal unless it has been relied upon as a ground for a new trial.

4. Negligence—Evidence of intoxication—In an action to recover damages for personal injuries caused by the defendant's negligent driving, evidence that the defendants were intoxicated was competent as bearing upon the question of negligence.

5. Measure of damages—In such an action the plaintiff is entitled to be compensated, not only for the loss of time and actual necessary expenses

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growing out of the wrong, but for the physical and mental suffering, and any permanent injury that is reasonably certain to accrue from it, and which is the plain consequence of it.

6. Negligence—Instructions—The court properly refused an instruction from which the jury might have inferred that if at the moment of the accident it was beyond the power of the appellants to prevent the injury, that then they were not liable, although such a state of case had been brought about by their own neglect.

W. Montfort, Montgomery, Lindsay & Botts and O'Hara & Bryan for appellants.

E. E. Settle and Thos. R. Gordon for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Holt.

The appellee, Francis Humber, sued the appellants, J. W. Alexander and T. L. Martin, for "wrongfully, wantonly, willfully and negligently" driving a buggy against and over her, when she was walking along a public road.

The verdict was: "We, the jury, find for plaintiff $1,000 jointly."

Among other grounds presented for a new trial is one to the effect that this was returned by mistake, and that the jury intended to sever the damages, and fix them at $500 against each of the appellants.

It appears that the verdict was handed in by the jury without question or objection by any one. Several hours thereafter the trial judge stated in open court that he had been informed by one of the jury that it was not their verdict. Thereupon, and although they had been discharged as to this case several hours, he called them before him and examined them, nearly every one saying that they intended to find $500 against each defendant, and that it was not their verdict.

Subsequently their affidavits to the effect above indicated were filed in support of the motion for a new trial, but it was refused.

The act of February 14, 1839, allowed a joint or several assessment of damages in an action of trespass. (3 Loughborough 572.)

This was in derogation of the general rule of the common law. It was adopted because the conduct of one trespasser is often more wanton and aggravating than that of another.

The Code of Practice contains no such provision. It says nothing upon the subject. The case of Buckles, &c. v. Lambert, 4 Met., 330, decided since its adoption, recognized the statute as then in force, and to this view we adhere. The jury, therefore, had the power to sever the damages, and the question is now presented whether the lower court should, upon the affidavits, have set aside the verdict.

The affidavits of jurors can not be received to impeach their verdict for misbehavior in themselves or their fellow jurors. (Allard v. Smith, 2 Met., 297.)

It is said, however, that this is not the purpose here, but to show that the real verdict was not returned by a mistake in the language used in writing it.

After a verdict has been returned in open court it would open a wide door to trickery, corruption and fraud to grant a new trial upon the ex parte affidavits of individual jurors as to what the jury intended to do. Public policy requires a court to act with great caution in such a case. It was not proposed in this instance to show by them that there was no verdict, but that the one returned by them, and then read in their hearing without

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objection by them, was not true. After its rendition they probably mingled with the friends of the respective parties. The matter may have been discussed, and under such circumstances a court should be slow to set aside the verdict upon affidavits procured from the jurors by the losing party, and prepared probably by his attorney.

If such affidavits are ever to be received it should be with the greatest caution, and only in cases of mistake clearly made out, and free from all misconduct upon the part of the jurors. In this case they intended that the appellee should have $1,000, and they doubtless supposed there would be contribution between the appellants so as to make each pay half of the judgment. Certainly they did not intend to use the word "severally" where they said "jointly," as then the verdict would have been for $1,000 against each of the appellants.

The facts were before the trial judge. He knew the parties, and conceding that the affidavits of the jurors were in this instance within the exception to the general rule, and, therefore, could properly be considered upon the motion for a new trial, yet we do not feel authorized upon the record as presented to disturb the conclusion reached by him.

Any errors, if there were any, in giving instructions and in permitting the appellee's attorney to avow before the jury what rejected witnesses would prove, or the character of rejected testimony, can not be considered by this court, as they were not embraced in the grounds for a new trial.

No error committed during a trial is available upon an appeal, unless it has been relied upon in the grounds for a new trial. (Commonwealth, for use, &c. v. Williams, &c., 14 Bush, 297.)

The repeal of the statute requiring an assignment of errors did not affect this rule, and it will control, although objection may have been made and exception taken at the proper time. (McLain v. Dibble & Co., 13 Bush, 297.)

The ground upon which a new trial was asked by reason of the admission of alleged incompetent testimony is, by its terms, limited to evidence relating to permanent injury to the appellee.

This must be regarded as a waiver of objection to any other testimony. The admission of evidence tending to show that the appellants were more or less intoxicated at the time the injury was inflicted, is not, therefore, open to question.

If it were, however, it was unquestionably competent. The issue was whether the appellants were guilty of neglect.

Intoxication ordinarily deprives one of the same power to exercise caution as when sober. It will hardly be claimed that if one were injured by neglect in the movement of a locomotive, that it would not be competent to show that the engineer in charge of it at the time was intoxicated.

A new trial was asked, however, upon the ground that the lower court improperly admitted testimony tending to show a permanent injury to the appellee, and also erred in refusing instructions asked by the appellants, and these questions only remain to be considered.

The wrong complained of was not a continuing act, or of such a character that successive actions could be maintained for the results flowing from it. It was one act. The injured party had the right, therefore, to offer testimony as to, and to recover for, all injuries that were reasonably certain to result from the wrong. If limited to proving her pain, suffering and injury to

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the time of bringing her action, and not allowed to show its continuance up to, and existence at, the time of trial, then it would follow that she would have but a partial remedy. Still more so would this be true if she were not allowed to show that permanent injury had resulted or was reasonably certain to result from the wrongful act.

In such a case one is entitled to be compensated, not only for loss of time and actual necessary expenses growing out of the wrong, but for the physical and mental suffering and any permanent injury that is reasonably certain to accrue from it, and which is the plain consequence of it.

The wrong being from a single act, the nature and extent of it in all its consequences may be considered. The injured party need not delay suit until all the consequences have been developed. He may recover for past and future suffering and past and future deprivation of health, if they be the direct result of the injury. (Sedgwick on Damages, pages 92n, 120, 654n.)

Complaint is made that the instructions given to the jury were likely to confuse and mislead them; that they failed to properly define the different degrees of neglect; that they in effect authorized the finding of punitive damages for ordinary neglect, and in substance said that no contributory neglect whatever would prevent a recovery in this case.

If they are in fact open to such objections, yet for the reason already given we can not consider them. Five of the nine instructions asked by the appellants were refused. The first and third of these had already in substance been given.

While we can not look to those given for the purpose of determining whether there must be a reversal, because the grounds for a new trial do not authorize it, yet we can do so to see whether those rejected had already been given.

The second instruction refused was calculated to mislead the jury. They might have understood from it that no recovery could be had for any result of the wrongful act, however certain to follow, which had not then become a fact.

The fourth instruction limited the right to recover compensatory damages to any that had accrued up to the bringing of the suit, and did not permit any recovery whatever for any mental suffering, and was in these respects objectionable.

The fifth one was likely to mislead the jury. From it they might have inferred that if at the moment of the accident it was beyond the power of the appellants to prevent the injury, that then they were not liable, although such a state of case had been brought about by their own neglect.

Perceiving no error authorizing a reversal of the judgment below, it is affirmed.

PHILPOT v. COMMONWEALTH.

(Filed January 19, 1888.)

A sledge hammer is a deadly weapon within the meaning of section 2 of article 4, chapter 29 of the General Statutes, which provides for the punishment of any person "who shall willfully and maliciously cut, strike or stab another with a knife, sword or other deadly weapon, with intent to kill."

C. W. Lester and R. S. Crawford for appellant.

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P. W. Hardin for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was convicted in the Whitley Circuit Court of the crime of willfully and maliciously striking and wounding Lee Ballard with a large hammer, to wit: Sledge hammer, with intent to kill said Ballard.

The jury found the appellant guilty of the charge and fixed his punishment at confinement in the penitentiary for the term of three years.

The lower court having overruled his motion for a new trial he has appealed to this court.

The appellant's contention is, that the instrument described in the indictment is not a deadly weapon within the meaning of section 2, article 4, chapter 29 of the General Statutes. That section provides: "If any person * * * shall willfully and maliciously cut, strike or stab another with a knife, sword or other deadly weapon with intent to kill, etc., he shall be confined in the penitenitary," etc.

It is insisted by the appellant that the "deadly weapons" mentioned in the section supra are such deadly weapons as may be used for the purpose of cutting, thrusting or stabbing.

The language used in this section is "cut, strike or stab."

This language has reference, first, to any instrument which is capable of being used for the purpose of cutting, thrusting or stabbing a person, and which may be dangerous to his life if used by the assailant for that purpose; or, second, any instrument capable of being used for the purpose of striking a person, and which may be dangerous to his life if used by the assailant for that purpose. There is no doubt that a sledge hammer falls within the second class.

The judgment is affirmed.

[This case has been pending upon a petition for rehearing, hence the delay in the publication of the opinion.]

WHEAT v. BANK OF LOUISVILLE.

(Filed September 8, 1887—Not to be reported.)

1. The president of a bank has no authority by virtue of his office to agree to the release or composition of a debt due to the bank; and, while the bank may be estopped from denying his authority to make such agreements, if he has been in the habit of doing so by the consent or with the knowledge of the directors of the bank, or if they, by act or conduct, have held him out to the public as authorized to do so. No such facts appear in this case.

2. Pleading—An averment that the bank was "represented" by its president at a creditors' meeting at which an agreement was made for the composition of a debt due the bank, without averring that he was authorized to so represent it, is not equivalent to an averment that the president had authority to agree to the composition: and a mere denial that such an agreement was made, without anything further, was sufficient to put in issue the president's authority to make it.

Chas. H. Gibson for appellant.

Hamilton Pope and Wm. Lindsay for appellee.

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Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

Wheat & Durff, doing business as merchants, made an assignment for the benefit of their creditors. The trustee instituted this action to settle the trust. The appellee, the Bank of Louisville, having been made a defendant, asserted a considerable indebtedness against the firm, and made its answer a cross-petition against its members.

The appellant, John L. Wheat, alone filed an answer to it. He does not deny the indebtedness but avers that shortly after the failure the creditors, at a creditors' meeting, agreed with Wheat & Durff and each other to accept fifty per centum of their claims in full discharge thereof, and that the bank so agreed, being represented at the meeting by its president.

The answer further avers that as the indebtedness of the firm to the bank was evidenced by paper which it had endorsed to it, and upon which other parties were primarily liable, that subsequent to the making of the composition agreement it was further agreed between Wheat & Durff and the Bank that the latter should collect the indebtedness so far as possible from those first liable therefor, and when no more could be collected that then Wheat & Durff should pay to the bank fifty per centum of the amount uncollected, and in consideration thereof be discharged from all further liabiility.

The bank by a reply denies that it ever made either agreement, and it is now insisted that inasmuch as it does not aver that its president had no authority to act for it at the creditors' meetings, that this must be taken as pro confesso, and his action considered as its action. The answer, however, does not aver that the appellee's president had authority to agree to the composition, but merely says that the bank was represented at the two creditors' meetings by its president without averring that he was authorized to so represent it, and that the bank agreed to the settlement. Upon this state of pleading the authority of its president to bind it by any such agreement must be regarded as in issue.

The evidence is somewhat conflicting as to whether all of the creditors present at the creditors' meeting or the president of the bank did then agree to the composition. The decided burden of the testimony, however, supports this view, and we think it may be safely so assumed.

The appellant testifies that the second agreement above named was made with the appellee's president alone. So that when the appellant now urges that the bank's recovery should be confined to a sum equal to fifty per centum of its debt, the question arises whether it is bound by the action of its president as above indicated. If it be answered in the negative, then it will be unnecessary to consider the other questions that have been ably presented in argument. The charter of the bank gives him no such power. It provides that the administration of its affairs shall be under the control of a board of directors.

It is conceded in argument upon the part of the appellant that he had no express authority to so bind the bank, and that he never advised its board of any such attempted action by him. Neither is it contended that he, virtute officii merely, could compromise or release its debt. If he had such power it must be traced to the assent of the board of directors, either express or implied. In truth the position of president of a bank is one of dignity rather than power. There is an indefinite general respon-

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sibility attached to the place. He is expected to watch more closely the daily transactions of the bank than the other directors, and while they or usage may confer upon him special powers and extend his authority, yet that inherent in the position is very slight. Indeed it seems, by judicial decision, to be confined to taking charge of the litigation of the bank. Mr. Morse says:

"The same species of limitation in the power of the president forbids him to surrender or release claims of the bank against any person, from whatsoever source arising, or to stay the collection of an execution against the estate of a judgment bebtor. For either of these acts is the exercise of a discretionary authority over the affairs and property of the bank, which is the peculiar and exclusive province of the directors." (Morse on Banks and Banking, page 133.)

This is the general rule, and undoubtedly he has no power, by virtue of his office, to bind the bank in an unusual manner or in any undertaking outside of its customary routine of business. No authority goes beyond this line.

It was held in Smith v. Lawson, &c., 18 W. Va., 212, that the president of a bank could not transfer or assign a note belonging to it. In Olney v. Chadsey, 7 R. I., 224, that he could not surrender the securities held by his bank to secure a debt. In Hodges' Ex'or v. National Bank, 22 Grattan, 51, that he had no right to release a debt owing to his bank, and in the case of the Bank of the United States v. Dunn, 6 Peters' U. S. Rep., 651, that his agreement that the endorser upon a note should be liable was not binding upon the bank

It is contended, however, that the president of the appellee acted under such circumstances as to raise the presumption that he was empowered by it to so act, and that third parties being, therefore, equitably entitled to rely upon his representations, the law will presume the authority and hold the bank bound by his action, if not ultra vires, although in point of fact he had no such authority or was even acting in violation of the instructions of its board of directors.

The bank must, however, in some way be a party to such circumstances or chargeable with notice or knowledge of them in order to so hold, and this record fails to exhibit such a state of case.

It is true that the appellee's debt was a large one, and its directors were, therefore, likely to watch closely whatever steps were taken looking to its payment or the settlement of the trust estate. They held several meetings between the time of the failure of Wheat & Durff and the first creditors' meeting when the composition was proposed, and also between such first meeting and the second one, when it was accepted. They probably knew their president attended these meetings, but these circumstances did not, in our opinion, authorize third parties to presume that they had given the president unlimited authority in the matter or the power to agree to a composition of the debt. In fact the evidence shows that while no vote had been taken in the board of directors, yet each member had, at its meetings, expressed himself as opposed to accepting anything less than the full amount of it.

The president of a corporation may, without express authority, perform all acts which are properly incident to the trust reposed in him, or which necessity or custom may impose upon the office.

The release or composition of a debt due to a bank, however, is a matter peculiarly within the province of its directory.

If there be any matter which, more than any other, falls within the scope of their duty, it is this one, because it not only affects the prosperity of the institution, but may involve its very existence.

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Necessity does not require the president to exercise his judgment alone as to it. Indeed, the proper management of a bank dictates that he should not do so, and it is not, therefore, a matter incident to the performance of his duty.

There is no evidence whatever in this record that it has been customary for the president of the appellee to control such matters, or agree to the release or composition of the debts of the bank without express authority from its directory, and we fail to see upon what ground third parties had an equitable right to believe that he had such power.

If he had been in the habit of doing so by the consent, or with the knowledge of the directors of the bank, or if they, by act or conduct, had held him out to the public as authorized to do so, then a proper policy, as well as common justice to third parties dealing with him in good faith, would estop the appellee from now denying his authority.

It not having done so, and having in no way authorized, recognized or ratified his action, it is not bound by it, and the judgment below for the entire debt, must, therefore, be, and is affirmed.

WHITLOCK v. COMMONWEALTH.

(Filed January 21, 1888—Not to be reported.)

Reversible error—There can be no reversal in a criminal case for an error of the lower court in overruling a motion for a new trial.

Crenshaw & Kelly for appellant.

P. W. Hardin for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Holt.

The false swearing for which the appellant, Reuben Whitlock, has been convicted, consisted in his testifying before the grand jury that at a certain time and place he was not engaged in playing cards with certain parties.

There is no conflict in the evidence as to what he so testified, but the testimony as to whether he was so playing is conflicting, and this being so the conclusion of the jury should not, upon an appeal, be disturbed.

But a single exception appears in the entire record. This was taken to the action of the lower court in overruling the motion for a new trial.

It may by the 271st section of the Criminal Code be granted by the trial court, if, in its opinion, the accused, from any cause has not had a fair and impartial trial. This broad discretion is given to it because the judge has seen all the actors in the trial and has witnessed the entire proceeding.

Tihs is not so, however, of the court to which an appeal may be taken, and with a view, therefore, of leaving the decision of certain questions to the trial judge as the final arbiter by reason of his better opportunity to judge of them, the 281st section of the Criminal Code provides that his decisions upon the challenges to the panel, and for cause, upon motions to set aside an

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indictment and for a new trial, shall not be subject to exception, and this court has so often decided that it will not consider the question whether the action of the lower court upon a motion for a new trial was correct or not, that it is needless to cite authority.

Judgment affirmed.

STEPHENS v. COMMONWEALTH.

(Filed January 21, 1888—Not to be reported.)

1. Continuance—The absence of one of two or more counsel employed by the defendant in a criminal prosecution is not a sufficient reason for continuing the trial to the next term, especially when it does not clearly appear that a fair trial can not be had without his presence.

2. Same—To authorize a continuance on account of the absence of witnesses, the defendant in a criminal prosecution must not only show their testimony to be material, but that he has used proper diligence in the endeavor to procure their attendance.

P. W. Hardin for appellee.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Lewis.

The indictment against appellant was returned at the September term, 1886, of the court, but upon his application the case was continued, as was again done at the next term.

At the September term, 1887, when he was tried, an affidavit was filed and motion made upon the grounds one of his counsel and certain witnesses were not in attendance. It does not appear he had no other counsel besides the one whose absence he made a cause for continuance. On the contrary, at the preceding term, he applied for and obtained a continuance because another and different person employed by him as counsel from the beginning was then ill. He says in his affidavit, the one whose absence he makes the cause for continuance, was employed by him since the last term. Conceding that his contract with that attorney was of such a character as to bind him to be present at the trial, still it does not appear his services were indispensable to a full and proper defense of appellant, nor that if they were his place was not nor could be supplied.

The absence of one of two or more counsel employed by the defendant in a criminal prosecution can not be a sufficient reason for continuing the trial to the next term, especially when it does not clearly appear a fair trial can not be had without his presence. Such practice would frequently result in an indefinite postponement of criminal trials.

No reason is shown why the absent witnesses mentioned in the affidavit were not summoned before the preceding term, so as to enable the court to secure their attendance at the trial term by recognizance or attachment for contempt.

To authorize a continuance on account of absence of witnesses, the defendant to a criminal prosecution must not only show their testimony to be material, but that he has used proper diligence in the endeavor to procure their attendance.

No brief for appellant is filed in the case, nor are any other grounds relied on for a new trial than to have first considered, except the alleged error of the lower court in permitting the at-

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torney for the Commonwealth to cross-examine the defendant in regard to his contract with his absent attorney, but as, independent of what was thus developed, the affidavit did not show sufficient reason for a continuance, appellant was not prejudiced by that error if it was one.

We have examined the record carefully, and perceiving no error of law occurring at the trial prejudicial to the rights of appellant, the judgment is affirmed.

VARNEY v. JUSTICE.

(Filed January 24, 1887.)

1. Elections—Construction of statutes and Constitution—A statute is to be regarded as directory merely if the directions given to accomplish a particular end may be violated, and yet the given end be in fact accomplished, and the merits of the case unaffected, and this rule is applied where the statute gives directions as to the manner of holding elections; but the same rule can not be applied to the Constitution of the State.

2. Same—The words of the Constitution are never to be regarded as directory merely. If directions are given as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed and in no other manner, as no unessential matters were intended to be embraced in the Constitution.

Section 16 of article 8 of the Constitution provides: "All elections by the people shall be held between 6 o clock in the morning and 7 o'clock in the evening." At an election for jailer, the officers of the election being unable to record the votes of all who offered to vote within those hours, kept the polls open from 7 o'clock in the evening until 9 or 10 o'clock that night, during which time they recorded the names of twenty-five voters, all of whom voted for appellant, who was declared elected to the office of jailer. At 7 o'clock in the evening, appellee had received a majority of the votes cast. He, therefore, contested appellant's right to the office upon the ground that the twenty-five votes cast after 7 o'clock were illegal. Held—That the constitutional provision quoted is mandatory, and that appellee is entitled to the office.

3. Same—Where another than the person returned as elected is found to have received the highest number of legal votes given, he is entitled to the office.

Connally & Cline for apellant.

A. J. Auxier, J. M. York and J. L. Ferguson for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

At the August election, 1886, the appellant and appellee were opposing candidates for the office of jailer of Pike county, Ky.

It is agreed that the officers of the election for precinct No. 6 in said county were legally appointed and duly qualified to hold and conduct the election in said precinct; that they met at 6 o'clock in the morning of the day designated by the Constitution of the State for the purpose of holding said election, and immediately entered upon the discharge of their duties; that they held the election without intermission from 6 o'clock in the morning until 7 o'clock in the evening; that at the hour of 7 o'clock a considerable number of the legal voters of the precinct who had been at the polls nearly all day wishing to vote had not voted because the officers of the election could not record their

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votes between the hours above named; that the officers of the election, in order to accommodate these voters, kept the polls open from 7 o'clock in the evening until 9 or 10 o'clock that night, during which time they received and recorded the names of twenty-five voters of the precinct, all of whom voted for the appellant.

These twenty-five votes were counted for the appellant, by the aid of which he was declared elected to the office of jailer, but for the aid of these votes the appellee was elected to the office of jailer.

In a word, at the hour of 7 o'clock in the evening the appellee had received a majority of the legal votes cast in the county for the office of jailer.

The appellee contested the appellant's right to the office upon the ground that these twenty-five votes cast for the appellant after 7 o'clock in the evening were illegal votes and should not have been received or counted, because they were cast without the hours prescribed by the Constitution of the State.

The circuit court sustained the appellee's contention and awarded the certificate of election to him.

From that judgment the appellant has appealed to this court.

This court has held time and again, and recently in the case of Anderson v. Winfrey from Christian county (9 Ky. Law Rep., 181), that where the election has been held within the hours fixed by the Constitution of the State, and at the place designated by law, mere irregularities in appointing the officers of the election or mere irregularities in the proceedings of the officers of the election will not vitiate the poll, nor will such irregularities be permitted to disfranchise for the time being a legal voter voting at such an electon, unless such irregularities affect the real merits of the case.

This court has announced the foregoing doctrine upon the ground that the appointment of the officers of the election and the manner of their conducting it are regulated by statute, and in order that the legal voter may be protected and not be disfranchised for the t me being by mere irregularities in the appointment of the election officers, or mere irregularities in the proceedings of the election officers, the statute authorizing their appointment and prescribing the manner in which they shall conduct the election must be construed to be directory merely and not mandatory, unless such irregularities really affect the merits of the case, in which case the statute must be construed to be mandatory.

But the question presented in this case is altogether different.

Here we are called upon to deal with a constitutional question, for section 16 of article 8 of the present Constitution of this State provides:

"All elections by the people shall be held between 6 o'clock in the morning and 7 o'clock in the evening."

By the term directory it is meant that the statute gives directions which ought to be followed, but the power given is not so limited by the directions that it can not be exercised without following the directions given. In other words, if the directions given by the statute to accomplish a given end are violated, but the given end is, in fact, accomplished without affecting the real merits of the case, then the statute is to be regarded as directory merely.

Should this rule of construction be applied to the Constitution of the State? We think not.

The Constitution of the Satte was adopted by the people of the State as the fundamental law of the State. This fundamental law was designed by the people adopting it to be restrictive upon

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the powers of the several departments of government created by it. It was intended by the people that all departments of the State government should shape their conduct by this fundamental law. Its every section was doubtless regarded by the people adopting it as of vital importance and worthy to become a part and parcel of a constitutional form of government, by which the governors as well as the governed were to be governed. Its every mandate was intended to be paramount authority to all persons holding official trusts in whatever department of government, and to the sovereign people themselves. No mere unessential matters were intended to be engrafted in it, but each section and each article were solemnly weighed and considered and found to be essential to the form of constitutional government adopted. Wherever the language used is prohibitory it was intended to be a positive and unequivocal negation. Wherever the language contains a grant of power it was intended as a mandate. Wherever the language gives a direction as to the manner of exercising a power it was intended that the power should be exercised in the manner directed, and in no other manner. It is an instrument of words granting powers, restraining powers, and reserving rights. These words are fundamental words, meaning the thing itself. They breathe no spirit except the spirit to be found in them. To say that these words are directory merely is to license a violation of the instrument every day and every hour. To preserve the instrument inviolate we must regard its words, except when expressly permissive, as mandatory, as breathing the spirit of command.

The section under consideration uses the word "shall." It is mandatory, and excludes the right to hold the election earlier than 6 o'clock in the morning and later than 7 o'clock in the evening. If the language was construed as directory merely the election might not only be continued until 9 or 10 o'clock at night, but all next day and the day after, and on and on, unless the courts, in the exercise of a discretion, should limit it, and thus make a constitutional provision in disregard of the one made by the people for the government of elections.

For these reasons it is clear that the votes cast after 7 o'clock in the evening for the appellant were illegal, and that the circuit court did right in excluding them.

Section 8, article 7, chapter 33 of the General Statutes provides: "Where another than the person returned shall be found to have received the highest number of legal votes given, such other shall be adjudged to be the person elected and entitled to the office."

Deducting the twenty-five illegal votes from the number of votes that the appellant received in the county, the appellee received the majority of the legal votes cast, and according to the section of the statute supra he was elected and entitled to the office.

The judgment of the lower court is affirmed.

THACKER v. BOOTH, DULANEY & CO.

(Filed January 24, 1888—Not to be reported.)

1. In an action upon an assigned note, one of the defenses was, that there was no consideration for the assignment, and that the plaintiffs were, in fact, not the owners of the note. The assignor was made a party to the action and answered, admitting that the note belonged to the plaintiffs.

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Held—That the plaintiffs can maintain the action, as it is not material to the defendants whether or not there was any consideration for the assignment.

2. Vendor and vendee—Possessory title—In an action by a vendor to enforce a contract for the sale of land, the defense that the vendor can not make a good title is not sustained, as the possession of the vendor and those through whom he claims, for more than forty years, has invested him with a good title.

3. Vendor's lien—Alteration of note—Equity will not allow one to hold the land of another and not pay for it; therefore, where a vendor has not conveyed, he has an equitable lien for the purchase money until it is paid, without any express agreement to that effect.

The insertion, in a note for purchase money, of the words, "lien to hold until paid in full," was not a material alteration, and did not affect the payor's liability.

4. A mere intention to use or occupy as homestead in the future, land which has never been so used, will not avail to exempt it from the owners' debts.

In an action to enforce a mortgage in which the wife of the mortgagor did not unite, the allegation by the defendant that at the time the mortgage was executed he was preparing to build a house upon the land to be used as a home for himself and family, does not entitle him to a homestead.

5. A homestead is not exempt as against a debt created before the improvements were made, although the note evidencing the debt was not executed until after the erection of the improvements.

Josiah Harris for appellant.

T. J. Watkins for appellees.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Holt.

The appellees, Booth, Dulaney & Co., brought this action against the appellant, Thacker, seeking the sale of a town lot to pay two claims held by them, one being a purchase money note, executed to one Glenn by the appellant for the lot, and which the appellees claimed had been assigned to them, and the other being for the price of material purchased by the appellant of the appellees to build a dwelling house thereon for himself and family, and to secure the payment of which he had, some time subsequent to the purchase of the lumber, executed a mortgage to the appellees upon the lot, his wife not uniting in it.

Several defenses were presented. Those relating to the purchase money note were: First, that there was no consideration for the assignment of it to the appellees, and that they in fact were not the owners of it; second, that Glenn had no title to the lot, and that the deed tendered by him and the title papers of those through whom he claimed did not cover it; third, that it was not binding upon the appellant, because, after its execution and delivery by him and without his knowledge, it had been altered by inserting in the body of it the words: "Said Glenn's lien to hold until paid in full."

The enforcement of the mortgage given to secure the other claim was resisted only upon the ground the wife had not united in it, and that the lot was exempt as a homestead.

The vendor, Glenn, was not only a party to the suit, but he answered, admitting that the note belonged to the appellees. This estopped him from thereafter asserting any right to it, and the appellant was fully protected as against him in paying it to the appellees. It could make no difference to the appellant whether the appellees had paid Glenn anything or not for it.

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The appellant knew he owed it, and Glenn admitted, upon the record, that it was the property of the appellees.

It is shown that the lot, as a part of a large tract of land, had been in the actual possession of those through whom Glenn derived title for more than forty years.

Title papers are in evidence showing a title of record for nearly twenty years before the institution of this suit.

A commissioner, under a decretal sale, conveyed it to one Anderson in 1866. He conveyed it by a general warranty deed to one Martin in 1874, and Martin to Glenn by a like deed in 1882. There is not even a suggestion that any one, save those through whom the title has been derived as indicated, has ever, at any time, or is now setting up any claim to the lot or any of it, or has ever been in possession of it.

The possession of Glenn and those through whom he claims has evidently invested him with a good title.

It was useless to insert the words "said Glenn's lien to hold until paid in full" in the note. He did not convey to Thacker, and, therefore, the law created an equitable lien upon the land for the purchase money until it was paid, without any express agreement to that affect.

A lien existed in the nature of a trust, because equity will not allow one to hold the land of another and not pay for it. To do so would be in violation of good conscience and every rule of right.

Our General Statutes have made an exception to this rule for the bona fide creditors and purchasers where the vendor has conveyed and failed to reserve a lien in the statutory mode.

The legal title was left in Glenn, and the law would not compel him to transfer it to his vendee without payment for the land. (Lusk v. Hopper, &c., 3 Bush, 179; Bradley v. Curtis, &c., 79 Ky., 327.)

Admitting, however, that this alleged change or addition to the note was material, yet, whether it was in fact made or not, was put in issue. The burden of showing it was on the appellant. He testifies affirmatively, while Glenn negatives his statement with equal emphasis. This defense, if sufficient, must, therefore, be regarded as not sustained by the testimony.

The pleadings of the appellant fail to aver that when the note for the lumber and the mortgage to secure it were given, he was with his family occupying the lot as a homestead. They merely set up an intention to do so.

The answer says:

"He bought the lot for a home, intending at the time to build a residence thereon for occupancy of himself and family, and at the date of said mortgage had made and was making preparations to build for himself and family a home, and he had no other home or place of residence at the time and owned no other home; that he was married at the time of said pretended execution of said mortgage, and had a family living with him in this Commonwealth."

This is all the appellant pleaded upon this subject.

A mere intention to use or occupy land in futuro as a homestead, and which has never been so used, will not avail to exempt it as such to the debtor. (Fant v. Talbott, 81 Ky., 23; Hansford v. Holdam, 14 Bush, 210.)

It is true that the appellant, when introduced as a witness, says that he was occupying the lot as a home with his family when the note and mortgage were executed. There is, however, no pleading by him to make this evidence available.

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If, however, we are mistaken in this, yet it is absolutely certain that when the debts for which they were given was first created he was not doing so. The lot was then vacant. The sole consideration of the debt was material furnished by the appellees to build a house and home upon it. The note and mortgage subsequently given were merely evidences of the previously existing liability. It was created before the improvements were made.

As against this debt, by the express provision of the homestead law, the appellee was not entitled to a homestead. (Chapter 38, article 13, section 16 of General Statutes.)

It was not necessary, therefore, that the wife should unite in the mortgage.

Judgment affirmed.

ADER, &c. v. CITY OF NEWPORT.

(Filed January 26, 1888—Not to be reported.)

1. Constitutional law—Selection of city officers—The legislature has no power to provide for the selection of officers for towns and cities in any other mode than by "election," by which is meant a selection by qualified voters at the polls. And where it is manifest that officers were intended to be, and are, in fact, officers of a city merely, the fact that the district in which they are to exercise their functions extends in name beyond the corporate limits of the city, does not give the legislature the power to provide for their selection by appointment.

2. Same—Selection of "district" officers—In order to bring an officer within the meaning of the provision of the Constitution which authorizes the legislature to provide for the selection of district officers by appointment, it is not necessary that the district in which the officer is to act should correspond in its boundary exactly with a justice's district or an election precinct. The legislature may create other districts of boundaries different from those of election precincts and justices' districts.

3. Same—Police and fire district—A town or city and contiguous territory may be formed into a "police and fire district," whereby, in consideration of paying a fair share of taxes to support the police and fire departments, the owners of property within the district obtain needed protection and benefit from them; and while the taxes upon the persons within the corporate limits of the city and those without need not be precisely at the same rate, the benefits not being of the same degree, it is necessary to the validity of an act creating such a district that, by its own terms, it should be operative in every part of the district, and that its benefits to no portion of it should depend on a contingency.

An act entitled "An act to create the Newport Fire and Police District in Campbell County, and to provide for the government thereof," provided that the territory therein described, which extends beyond the corporate limits of the city, shall constitute the Newport police and fire district, and that the judge of the county court shall appoint three commissioners, who shall have full control of the police and fire departments of the city, the board of councilmen of the city to designate the number of men to be employed in each of said departments and provide for paying them and the commissioners. It is further provided that the portion of the territory without the limits of the city may "arrange" with the commissioners for police and fire protection for its benefit upon the petition of the owners of the majority of the assessed value of property within said territory, the county judge to levy a tax to carry out "such arrangement." Held—That the act is in conflict with section 6 of article 6 of the State Constitution, and is, therefore, invalid.

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4. Same—Title of act—There is no part of the act which has not a direct connection with the subject expressed in the title, and it is, therefore, not in conflict with section 37 of article 2 of the Constitution.

O'Hara & Bryan and Wm. Lindsay for appellants.

C. J. Helm for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Lewis.

The city of Newport instituted this action for an injunction, which was granted, enjoining the defendants, Ader, Cottingham and McCracken, from interfering with the property belonging to the officers and men employed in the police and fire departments of the plaintiff, and from appointing officers or men for either of said departments, and judgment having been rendered overruling the motion to dissolve the injunction upon the face of the petition and affidavit of the plaintiff, and perpetuating it, the defendants prosecute this appeal.

The appellants claim the right to control and manage, as commissioners, the police and fire departments of said city in virtue of an act of the General Assembly, entitled "An act to create the Newport fire and police district in Campbell county, and to provide for the government thereof," approved February 27, 1886, and an amendment made thereto April 23, 1886.

And whether they can legally exercise such power depends upon the validity of the act.

By section 1 it is provided that the territory therein described, which extends beyond the corporate limits of the city, shall constitute the Newport police and fire district.

Section 2 as amended provides "that the judge of the Campbell County Court shall appoint three commissioners, residents and property holders of the district, to be known as the 'commissioners of the Newport police and fire district,' who, having given bond and taken the oath of office, shall have full control of the police and fire departments as they now exist in the city of Newport, and all buildings, apparatus, books and other property belonging thereto, and they are fully empowered to make such rules and regulations as they my deem prudent and wise for the government thereof."

Section 3 provides that the board of councilmen of said city may designate the number of men to be employed in each of said departments, and provide for paying them and the commissioners, and that the appointment and removal of policemen and firemen shall be under the exclusive control of said commissioners.

Section 4 is as follows: "That portion of the territory within said district not included in the corporate limits of the city of Newport, may arrange with said board of commissioners for special police and fire protection for its benefit upon the petition of the owners of the majority of the assessed value of the taxable property within said territory. To carry out such arrangement the county judge of Campbell county shall, on the request of the commissioner, levy such an ad valorem tax upon the taxable property of the territory as the commissioners shall require, not exceeding twenty-five cents on each $100 worth of taxable property. Said tax shall be certified to and collected by the sheriff of Campbell county, and paid out upon the orders of said commissioners. The sheriff shall be accountable for the collection and disbursement of all such taxes upon his county levy bond;

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but so long as no arrangement is made between said commissioners and said suburban district, no responsibility shall attach to said city for any failure of police or fire protection therein."

By section 7 so much of the charter of the city of Newport as in conflict with the act is repealed.

It does not seem to us the act is in conflict with section 37, article 3 of the Constitution, for there is no part of it which has not a direct connection with the subject expressed in the title.

The parts of the Constitution relating to the main inquiry in the case are sections 6 and 10, article 6.

Section 6 is as follows: "Officers for towns and cities shall be elected for such terms and in such manner and with such qualifications as may be prescribed by law."

Section 10: "The General Assembly may provide for the election, for a term not exceeding four years, of such other county or district ministerial and executive officers as shall from time to time be necessary and proper."

Whatever may have been the reason for the discrimination made, the language of the Constitution makes it unquestionable that while power is given by section 10 to the General Assembly to provide for either the appointment or election of county and district ministerial and executive officers, other than those in preceding sections mentioned, officers for towns and cities can not, without violating section 6 be chosen in any other mode than by election. And by the term election thus used is, as held in Speed v. Crawford, 3 Met., 207, meant a selection of officers by qualified voters at the polls. It has, in the same case, been also decided that police commissioners, such as authorized by the act under consideration, are officers in the meaning of that section.

It is, therefore, manifest that if the said board of commissioners are intended to be, and in fact are, officers of the city of Newport merely, and their authority and duties confined within its corporate limits, they can not be constitutionally chosen in any other mode than by an election of the qualified voters thereof.

In the case of Police Commissioners v. City of Louisville, 3 Bush, 507, it was held that the legislature had the power to create a police district co-extensive with the county of Jefferson, including the city of Louisville, and to provide, under section 10, for the selection, either by appointment or election, of a board of police commissioners, to act within and for such district.

If an entire county may be created a police district, we do not see why a town or city and contiguous territory may not be formed into one for the same and the additional purpose of maintaining a fire department.

But it is argued that such a district is not a division of territory known to the Constitution or contemplated by section 10.

By section 5, article 2, the General Assembly is required to lay off each county into convenient election precincts, and by section 34, article 4, it is provided each county shall be laid off into districts, in each of which two justices of the peace and a constable are to be elected.

But there is nothing in the language of section 10, which in express terms or by implication prohibits the creation by the General Assembly of other districts or boundaries different from those of election precincts and justices' districts, which themselves are not intended to be in every case identical.

On the contrary, as it was certainly contemplated that the "other district officers" mentioned in that section would possess

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functions and have to perform duties of more or less importance, but different from those of either justices of the peace or constables, it would be absurd to conclude they were intended in every case to act within or to the extent of the precise limits of a justice's district or election precinct.

Territorial divisions of counties for various purposes, sometimes of greater and sometimes of less than a justice's district, have been created by the General Assembly since the adoption of the Constitution, the validity of which have been expressly recognized by this court.

To say that every district created by statute, without regard to the object or necessity requiring it, should correspond exactly in its boundary with a justice's district, it seems to us would be without reason.

While, as often held by this court, lands used for agricultural purposes exclusively, though adjacent to a town or city, can not, against the consent of the owners, be included in and subjected to all the burdens of municipal government, it would be neither unjust nor oppressive to include such owners within a fire and police district, whereby, in consideration of paying a fair share of taxes to support the department, they obtain needed protection and benefit from them.

But it seems to us the act in question does not have the effect to create a district within which there is secured to those residing beyond the corporate limits of the city of Newport the benefit and protection of the police and fire departments. On the contrary, while the district in name is extended beyond, the practical operation of the statute and the benefits of it are confined within, the corporate limits of the city of Newport.

By section 4 of the act it is provided: "That portion of the territory within said district, not included in the corporate limits of the city of Newport, may arrange with said board of commissioners for special police and fire protection for its benefit upon the petition of the owners of the majority of the assessed value of the taxable property within such territory."

It thus appears that whether those residing without the city limits shall or shall not have any benefit or protection from the fire and police departments, depends not upon their will, but upon their ability to "arrange" with the commissioners, who may or may not consent to make the arrangement.

They have not, in virtue of the act, any interest in the apparatus or property connected with the departments as they now exist in the city of Newport, but provision must be made therefor by the commissioners. Nor are the same firemen or policemen required to act in common throughout the district.

There is an entire lack of identity of interest between those within and those beyond the city limits. There is in fact to be two distinct and independent systems for conducting, supporting and using the fire and police departments, even if that part of the district without the city limits gets any benefit at all.

While the taxes upon the two classes of persons need not be precisely of the same rate, as the benefits are not of the same degree, we think it necessary to the validity of such an act that by its own terms it should be operative in every part of the district, and that its benefits to no portion of it should depend on a contingency.

For the reasons indicated the judgment is affirmed.

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STEWART v. TROUTMAN'S ADM'R.

(Filed January 26, 1888—Not to be reported.)

Construction of judgment as to interest—In an action by a vendor to recover the value of two interest-bearing county bonds which the vendee agreed to give him as part consideration for the land and to enforce a lien upon the land therefor, the plaintiff alleged the value of the bonds to be $1,000 each. The defendant admitted that the two bonds were worth, at the institution of the action, $1,500—and that they had collected the coupons amounting to $70 on the 1st of January, 1859. The court adjudged that the plaintiff recover of the defendant $1,500, "no interest to be collected thereon," and also interest on $2,000 from April 1, 1859, and $70, amount of coupons collected, with interest thereon. Held—That the plaintiff was entitled to interest on $2,000 to the date of the judgment, as the defendant had been collecting interest on that amount, and from the date of the judgment he was entitled to interest on $1,500, the value of the bonds. The words, "no interest to be collected thereon" referred to past interest and not to future interest.

James S. Pirtle, A. E. Willson and Hargis & Eastin for appellant.

J. P. Hobson and W. O. Harris for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

Troutman sold to Samuels, Mullholland, Jacob and Florence a tract of land in Hardin county, for which they agreed to give him three Hardin county bonds for $1,000 each and a small sum in addition, to be paid in merchandise. One of the bonds and the merchandise were received by the vendor, but the two remaining bonds were not delivered or paid.

Troutman instituted an action against his vendees, alleging the nonpayment of the bonds and their value to be $1,000 each, and sought to enforce a lien on the land. A judgment was rendered in the case and its proper interpretation is the question involved in the present controversy. It was admitted by the answer of the defendants that the two bonds were worth, at the institution of the action, $1,500; that they had collected the coupons for interest on the bonds, amounting to $70, on the 1st of January, 1859. The bonds were bearing interest.

These facts being conceded, the court adjudged "that Troutman recover of the defendants the sum of $1,500, no interest to be collected thereon. Also interest on $2,000 from the 1st day of April, 1859, at the rate of 6 per cent, per year. Also $70, amount of coupons collected, with interest from the 1st of January, 1859, being uncollected. The remainder of the sum claimed by plaintiff and the question as to the liability of the land mentioned in the pleadings, is reserved for further adjudication." That the judgment is awkwardly drawn, and in the absence of averments in the petition that are admitted by the defendants, its language would be so ambiguous as to render its meaning doubtful. In the light, however, of the pleadings there is but little doubt as to the meaning of the court below. The doubt arises from that part of the judgment as to the interest on the sum of $2,000, the face value of the bonds. The judgment was rendered on the 12th of December, 1865. The bonds were worth, as the plaintiff alleged, $2,000, when the contract was made. The defendants

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say, $1,500. The plaintiff was then entitled to a judgment for $1,500, with interest on the confession made by the defendant, still the court may have refused to allow any interest, and his judgment being erroneous could only be reviewed by this court. It is urged that the court did adjudge in plain language a recovery for the $1,500, no interest to be collected thereon, and, therefore, that part of the judgment needs no explanation and is susceptible of but one meaning. It is plain, however, that the court rendering the judgment intended to allow the plaintiff interest. The defendants had collected $70 of the interest. They were interest-bearing bonds, and as defendants had agreed to deliver theirs, and were contesting their nature, and yet collecting the interest, they were required to pay interest on the $2,000 instead of the $1,500, and when this interest on the $2,000 ceased to exist as a claim by the plaintiff is the real question involved. Was the plaintiff entitled to collect it until the judgment was rendered and no longer, or was he entitled to collect it until the $1,500 was paid, or did interest stop on the whole demand when the judgment of December, 1865, was entered? What was the judgment? The judgment was for the value of the bonds, no interest to be collected thereon, and for interest on $2,000 up to the date of the judgment. No interest was given on the value from the time the bond should have been delivered, but in lieu thereof interest was given on the $2,000, making the judgment for the principal, $1,500, and for the interest, $804. So $2,304 was the judgment on the 12th of December, 1865.

The court in effect said to the defendant, "the plaintiff is entitled to more interest than that already accrued on $1,500 of the face value of the two bonds." He should have the interest these bonds are bearing and that is being collected by the defendants on the $2,000, their entire face value from April, 1859, to this judgment, and such is its proper meaning. The words in the judgment, no interest to be collected thereon, had no reference to future interest, but that to which the plaintiff was already entitled. The calculation made while this case was pending in the Superior Court and made part of its judgment is the correct one.

The balance due the plaintiff after deducting the credits as of the 27th of January, 1873, is $2,185.74, and $12.15 cost. For this plaintiff should have a judgment.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

KINNEY, &c. v. KINNEY'S EX'OR, &c.

(Filed January 28, 1888.)

1. A devise to a church, "to be applied to foreign missions," is within the scope of our statute permitting devises to charitable uses, and is valid.

The provision of the statute that no church shall be capable of holding the title to exceeding fifty acres of land, does not apply to a devise which merely gives the property to the church in trust, to be applied by it to a charitable purpose, the restriction in the statute being intended to prevent a church from taking or holding for its own use more than fifty acres of land.

2. Such a devise is not void for indefiniteness or vagueness, as the language used by the testator indicates definitely the purpose to which he desired his bounty to be applied.

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Gilbert & Reed and R. P. Quarles for appellants.

W. W. Robertson for appellees.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Holt.

Benjamin Kinney died testate in 1886, being then the owner of one hundred acres of land.

His will provides:

"I do will and bequeath to the Methodist Episcopal Church, South, to be applied to foreign missions, all of my property, real and personal, after the payment of my just debts * * * for their use and benefit exclusively." He was never married, and his collateral kindred are his heirs at law. They now claim that the devise lapsed and became inoperative as to the land, and that they are, therefore, entitled to it. This claim is based upon the fact that our statute relating to charitable uses forbids a church from taking or holding the title to over fifty acres of land, and its construction is, therefore, involved. The statute, 43 Elizabeth, chapter 4 (1 M. and B., page 308), and which is emphatically known as the one relating to charitable uses, recognized and permitted the holding of estate without limit by and for certain charities therein named, among which were churches. It was pro tanto a repeal of the mortmain acts, and because of its general character this court held that under the rule adopting as a part of our law all English statutes of a general nature enacted prior to 4th James I, became a part of our law. It was held to be in force in this State in 1834 in the case of Gass & Banta v. Wilhite, &c., 2 Dana, 170, and so remained until the adoption of the Revised Statutes in 1852, as will appear by a reference to the cases of Moore's Heirs v. Moore's Devisees, 4 Dana, 354, and Attorney General v. Wallace's Devisees, 7 B. M., 611, both of which were decided prior to the last named date.

By virtue of it such devises in charity as were embraced by it were held valid in this State without regard to their extent.

Actuated, doubtless, by a belief that public policy required a limit to this boundless right of acquisition by religious societies, the Revised Statutes, page 177, repealed this law, and by section 1 of chapter 14 provided that all devises for the benefit of certain charities therein named, among which are churches, should be valid, save as "hereinafter restricted," and as a sort of mortmain act, section 3 of the same chapter provides:

"No church or society of Christians shall be capable of taking or holding the title, legal or equitable, to exceeding fifty acres of ground, but may acquire and hold that quantity for the purpose of erecting thereon houses of public worship, public instruction, a parsonage, a graveyard, and a horse pound."

The present General Statutes contain in substance the same provisions. (General Statutes, chapter 13.)

It is evident that the purpose of the statute was to prevent the accumulation in the hands of the churches of large landed estates.

It was dictated by the same idea as to public policy which prompted the English mortmain act of 9th George II.

Such a result would not only tend to cripple the progress and industry of the country without furthering the cause of Christianity, but would furnish a means and be likley to create a disposition upon the part of the church to meddle and interfere in matters of State.

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Looking, then, to the purpose of the statutory restriction, it is evident that the devise now in question is not embraced by it either in spirit or letter. It merely gives the property to the church in trust, to be applied by it to a charitable purpose. The restriction in the statute above cited was intended to prevent a church from taking or holding for its own use more than fifty acres of land.

This devise for charity is within the scope of our statute permitting such uses.

Section 1 of chapter 18 of the General Statutes, which authorizes them, subject to the restriction already named, says:

"All grants, conveyances, devises * * * of any lands * * * for the relief or benefit of the aged or impotent and poor people, * *- * churches, * * * or for any other charitable or humane purpose, shall be valid."

The objection that the devise is so vague that the intention of the testator can not be executed is not well taken. The trustee is named in the will, and the language used by the testator indicates definitely the purpose to which he desired his bounty to be applied.

So far have the English courts gone in favoring charities that where it is evident a testator intends one by devise, but leaves the object to the selection of a trustee, who dies without making it, they will lay hold of it and administer it under a scheme. (Mills v. Farmer, 1 Merivale, 55.)

Or, if the specified objects cease to exist, they will remodel the charity and it will not be allowed to fail, if it be apparent that charity was intended, although the particular mode pointed out may be impossible of execution. (2 Story's Equity, sections 1170 and 1181.)

It is true that the doctrine of cy pres, as broadly administered by the English courts, has been rejected in this State, but if it were equally in force here there would be no need of resort to it in this instance, because the donor has definitely fixed the purpose to which his charity is to be applied, and while this court has seen fit not to aid charities to the extent of making or changing a will, and has refused to go so far as to apply the testator's bounty to an object never contemplated by him and to which he probably would not have contributed, yet, because they are blessings in which all are more or less interested, they are looked upon with peculiar favor by our courts.

They will not be allowed to fail for want of a trustee, and if their object, as intended by the donor, be ascertainable and consistent with law and public policy, they will be upheld.

Judgment affirmed.

HOLBROOK v. HEAD.

(Filed January 28, 1888—Not to be reported.)

1. The person named in a will as executor is entitle to qualify, provided the sureties offered by him are sufficient, unless by reason of his mental condition or some legal disability he is incapacitated to act as executor.

2. Appeals to circuit court—While appeals from orders of the county court permitting or refusing to permit a person to qualify as executor are tried de novo in the circuit court, that court should be careful not to disturb the action of the county court if the evidence shows a proper exercise of judicial discretion by that tribunal.

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E. E. Settle for appellant.

A. Duvall for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Pryor.

The will of Jeseph F. Williams was admitted to probate in the Owen County Court, and the appellee, J. A. Head, was nominated as executor.

The record shows that at the time of probate Head, with his sureties, offered to qualify and execute the bond required by law. His right to qualify was denied, and the appellant appointed administrator with the will annexed. The record in the county court, as well as that in the circuit court, is silent as to the reasons refusing the right of the executor to qualify. An appeal was prosecuted by the appellee to the circuit court from the order by which the right to qualify was denied, and the circuit court, by its mandate, reversed the order of the county court, with directions to that court to permit the appellee to qualify as the executor.

There is no bill of evidence found in this record from either court, and nothing in the record of the county court showing that any evidence was offered or any reason assigned for disregarding the wishes of the testator. The case on the appeal would be tried de novo even if there was a bill of evidence, still the circuit court would be careful not to disturb the action of the county court if the evidence showed a proper exercise of judicial discretion by that tribunal. The court will presume, as this record stands, that no evidence was heard in either court, and, therefore, the judgment of the circuit court must be affirmed.

The testator confided the custody and control of his property to the one nominated as his executor by his last will, and the person named as such is entitled to qualify, unless by reason of his mental condition or some legal disability he is prevented from acting as executor.

It is the testator that appoints his executor, and the question as to his peculiar fitness for such a position or his want of ability to manage the estate, because of his failure in his own financial affairs, can not be addressed to the discretion of the county judge when asked to permit him to qualify. If the court has jurisdiction of the subject matter, and his sureties offered are solvent so as to secure the estate going into the hands of the fiduciary, the court should permit him to qualify.

There is nothing to prevent the county judge from inquiring into the condition of his sureties offered, either on the original application to qualify or under the mandate from the circuit court, and if the sureties are not such when offered as will render the estate secure, to reject the application. (Berry v. Hamilton, 12 B. Monroe, 191.)

This judgment must, therefore, be affirmed.

JONES' HEIRS, &C. v. SPRADLING, &c.

(Filed January 28, 1888—Not to be reported.)

1. Bills of exceptions—Identification of depositions—Where depositions read upon the trial of an ordinary action are identified by the bill of exceptions and referred to by the judge in the bill as copied in a transcript of the record used upon a former appeal, nothing more is required to make them a part of the record, the old record being placed with the new.

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2. In this action of ejectment the only question between the parties being the location of the boundary line between their lands, and a possession and claim of title being shown by the plaintiffs to have been in them and their vendors for a great many years—long enough to have vested in them a perfect title—they were entitled to recover, there being no conflicting testimony. It was, therefore, error to order a nonsuit.

Wm. J. Hendrick for appellants.

J. H. Power and E. W. Hines for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Pryor.

This case was heretofore in this court and was transferred to the equity side of the docket by the court below, the parties being allowed to take proof by depositions, but the case to be tried, as the first judgment recited, as a common law action. The judgment was reversed, and the case is now here for the second time. It is objected that the bill of evidence is not complete, as the depositions read to the jury on the last trial are not embodied in the bill of evidence, but referred to in the bill as already in this court and constituting a part of the record on the former trial. If already copied and in this court as a part of the original record, there was no necessity for inserting another copy in the last bill of evidence. The depositions read are identified by the bill, and are copied in full in the old record. It is so certified by the judge who signed the bill, and not by the clerk. This is all that should be or is required. It is not necessary to again copy that part of the record already here.

As said in the former opinion, the question between the parties was the location of the boundary line between their lands, but as no proof was introduced by the defendant and a nonsuit ordered, the question presented is: Should the case have gone to the jury? A possession and claim of title was shown by the plaintiffs to have been in them and their vendors for a great many years—long enough to have vested in them a perfect title—and with no conflicting testimony, the plaintiff was entitled to recover. The case should have gone to the jury.

Judgment is reversed and cause remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

WHITE'S TRUSTEE v. WHITE, &c.

(Filed January 28, 1888.)

1. Contingent remainders—A conveyance to A for life and at her death to B should she survive A, and upon the death of both A and B, "to vest in fee simple" in the children of B "then living and the representatives of such as may be dead," creates a contingent remainder in the children of B.

2. Same—Under our statute a contingent remainder in land passes by deed, and may be sold under decree of court.

J. A. Sullivan for appellant.

C. F. & A. R. Burnam for appellees.

Appeal from Madison Common Pleas Court.

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Opinion of the court by Judge Bennett.

R. J. White, Jr., made a deed of assignment to the appellant for the equal benefit of his creditors.

The only property claimed by R. J. White, outside of that exempt from sale under execution, was one-fifth remainder interest in a tract of land containing two hundred acres.

The appellant, as assignee of R. J. White, instituted suit in the Madison Court of Common Pleas for the purpose of having said one-fifth remainder interest sold.

The chancellor, upon the hearing, dismissed the appellant's petition upon the ground that the interest of R. J. White in said land was that of a contingent remainder, and, therefore, as the life tenant was still alive could not be sold.

The habendum of the deed under which R. J. White claims is as follows:

"To the grantee, Elizabeth Taylor, for and during her natural life, with all the rents and profits thereof to be held and enjoyed by her, and at her death to the grantee, Lucy Ann White, should she survive Elizabeth, for and during her life, free from all control or liability of every kind of her husband, except the right to a home with the family during his life, which is secured to said J. R. White, Jr., and at the death of both of said grantees, Elizabeth Taylor and Lucy Ann White, to vest in fee simple in the children of Lucy Ann White then living, and the representatives of such as may be dead, in equal parts."

R. J. White, Jr., is one of five living children of Lucy Ann White.

The words "to vest in fee simple in the children of Lucy Ann White then living," refer to such of her children as may be living at the time of her death. This is made manifest by the succeeding clause, wihch provides that the representatives of such of the children as may be dead shall take in equal parts.

Accordingly, the children take no interest in the land until after the death of their mother, Lucy Ann White.

The distinction between a vested and contingent remainder is that in the former the interest must vest immediately, but the right to the enjoyment of the property is made to depend on some future event. In the latter the interest does not vest immediately, but is made to depend upon some uncertain future event.

Here no interest in the land vests in the children of Lucy Ann White except such as may be living at the time of her death. It is clear, therefore, that R. J. White's interest in said land is that of a contingent remainder.

It is contended that by the common law a contingent remainder could not be sold by a decree of court, for the reason that the decree could operate on the title only, and as no title passed to the contingent remainderman until the happening of the contingency there could be no sale in the interim by a decree of court.

But section 6, article 1, chapter 63 of the General Statutes provides: "Any interest in, or claim to, real estate may be disposed of by deed or will in writing."

This provision clearly embraces a contingent remainder interest in land, and as R. J. White conveyed the same by deed for the equal benefit of his creditors, the chancellor should have ordered the sale of said interest.

The judgment is revered, and cause is remanded for further proceedings consistent with this opinion.

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FORMAN v. COMMONWEALTH.

(Filed January 28, 1888.)

1. Reversible errors—The decision of the lower court upon a challenge to the panel of the jury is not subject to revision upon appeal.
2. Summoning jury—Where the court has failed to appoint commissioners to select jurymen, as required by the statute, it may order the sheriff to summon a jury of a proper number for the succeeding term.
3. Same—Where the court, for cause, appoints a person other than a sheriff to summon a jury, the person thus designated has the power to appoint an assistant when the court may, in its discretion, deem it necessary; and even if the defendant in a criminal prosecution has the right to object to the person designated by the court or to his assistant, the unsupported affidavit of the defendant should not be regarded by this court as sufficient evidence that the lower court erred in overruling such an objection.
4. Instructions—While the jury should never be instructed that they "are the sole judges of the evidence and credibility of the witnesses," such an instruction given in this case was not prejudicial to the defendant, as it could not reasonably have been regarded by the jury as an invidious reference to the defendant's witnesses.

Wood & Day and W. P. Thorne for appellant.

H. L. Stone and P. W. Hardin for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

This is the second appeal from the judgment convicting the defendant of manslaughter, and as the facts which were substantially recited in the opinion of this court in March, 1886, do not materially differ from those shown by the record before us, a detailed statement of them is unnecessary, especially as the legal questions now presented may be determined without.

The first ground relied on for reversal is the action of the lower court in overruling the challenge to the panel of the jury, and in connection therewith is an objection to the manner in which, and the officer by whom, after the list of standing jurors was exhausted, persons were summoned to complete the jury.

It appears that the court failed, at the previous term, to appoint the commissioners to select jurymen as required by article 4, chapter 62, General Statutes, but instead, on the last day of that term, as provided by section 11 may be done, made an order for the sheriff to summon a petit jury of the proper number for the succeeding term, which he did.

So even if the ruling of the court upon the challenge by the defendant was subject to revision by this court, we see no error or irregularity in it. But it is provided by section 281, Criminal Code, that "the decision of the court upon challenges to the panel, and, for cause, upon the motion to set aside an indictment, and upon motions for a new trial, shall not be subject to exception." And as heretofore held by this court errors not subject to exception in the lower court can not be considered or made grounds for reversal in the Court of Appeals, it follows, and has been expressly decided, that the decision upon a challenge to the panel is not subject to revision, but is final. (Terrell v. Commonwealth, 13 Bush, 248; Kennedy v. Commonwealth, 14 Bush, 340.)

After the regular panel of the jury was exhausted, only two jurors being selected, the defendant filed an affidavit that the sheriff would not fairly and impartially summons jurymen, and

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thereupon the court appointed, by consent of the parties, Howell to summons the required jury, and he, with the consent of the court, appointed Mason as his assistant. But to the appointment of the latter defendant objected upon the ground, supported by his affidavit, that he, Mason, was biased against him, and would not summon impartial men to act as jurors.

The court, however, overruled the objection, and both Howell and Mason took the oath required in such case, and summoned the jury by whom the defendant was tried.

Section 198, Criminal Code, provides: "The court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors, the officer or person designated being first duly sworn in open court to discharge the duty faithfully and impartially."

As the officer or person thus designated becomes invested with the same authority, and has the same duty to perform in respect to summoning jurors as pertain to the sheriff and his deputies, he, in our opinion, has implied power to appoint an assistant when the court may, in its discretion, deem it necessary. And we do not understand counsel for appellant to object upon the ground Howell had no power to appoint an assistant, the court authorizing it, but simply because the person appointed would not impartially and fairly discharge the duty imposed on him.

The Criminal Code does not expressly give to the defendant in a criminal prosecution the right to object to the person designated to summon a petit jury in place of the sheriff, the selection of such person by the court being deemed a guaranty of his honesty and fitness, and certainly the unsupported affidavit of the defendant should not be regarded by this court as sufficient evidence of error in that respect on the part of the lower court; for if, by the mere objection of the defendant, the appointment or designation of a person deemed by the court fit may be set aside, the summoning of the jury could be indefinitely postponed.

In this case Mason filed an affidavit denying he was biased or prejudiced against the defendant, and there is no evidence whatever that the jury actually summoned was not qualified and impartial, or anything in the record showing the defendant was prejudiced by the action of either Mason or Howell.

One of the questions of fact in this case was whether Cravens, the deceased, had a pistol at the time appellant, acting as deputy marshal, attempted to search and arrest him, and when he was killed, and upon that question, which has a material bearing upon the case, the evidence is conflicting.

The defendant offered to prove on the trial by W. H. Forman that he, the witness, got from one Dillard Tapp the number of a pistol claimed by him, Tapp, which corresponded with the number of the one delivered by the defendant to the officer to whom he surrendered after shooting decease, and which he testified he took from his person.

That evidence is so obviously hearsay and incompetent that there can be no question of the correctness of the action of the lower court is sustaining the objection made to it.

The remaining ground relied on for reversal is the following instruction:

"The jury are the sole judges of the evidence and credibility of the witnesses, and may take into consideration all the facts and circumstances permitted to go to them in evidence, and give such weight to the testimony of each witness as they deem the same entitled to."

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That instruction embodies the law, but ought never to be given, because it is to be presumed every person, who has intelligence enough to act as a juryman, understands, without instruction, that they are the sole judges of the credibility of the witnesses and the weight to be given to the evidence.

It does not, however, follow that giving such an instruction is necessarily an error to the prejudice of the substantial rights of the defendant, and as said in the case of Barnett v. Commonwealth, 8 Ky. Law Rep., 448, cited by counsel, this court had never, previous to that case, with one exception, reversed a judgment for that error alone.

The objection to such an instruction is, that in some cases it might be construed by the jury as an intimation, or expression of an opinion of the court, that certain witnesses in behalf of the accused are not entilted to credence. And whenever the circumstances are such as to authorize this court to believe that such has been the effect upon the minds of the jury in any given case, we ought to reverse the judgment.

But the instruction in this case can not, we think, be regarded as an invidious reference to the witnesses on behalf of the accused, and could not have been reasonably so regarded by the jury, for the witnesses introduced were numerous, the testimony was very conflicting and contradictory, and the jury could not, it seems to us, have considered the instruction directed by the court more against those testifying for the defendant than the others, and if not the rights of the accused were not prejudiced thereby.

The action of the court in overruling the motion for a new trial is not, under the Criminal Code, subject to revision by this court, and can not be considered.

We perceive no error of law occurring at the trial of this case prejudicial to the substantial rights of the appellant, and the judgment is affirmed.

CHEATHAM, &c. v. WHITMAN.

(Filed January 31, 1888.)

1. Service of summons on infants—If any presumption would arise as against an infant in a case where the officer merely returns the summons as "executed" that it was done properly, such a presumption is certainly rebutted when the return shows in addition how the process was executed, and that it was not executed as required by law.

2. Same—Under the old Code a summons against an infant under fourteen years of age was required to be served both upon the infant and upon his father or guardian, if any.

3. Same—When a summons against infants is required to be served upon their father, and the father is also a defendant to the action, a service upon the father as defendant, of a single copy of the summons in which the infants are named with him as defendants, is sufficient, without delivering to him a second copy as their father.

4. A judgment which is erroneous merely can not be questioned collaterally.

H. F. Turner and R. H. Cunningham for appellants.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

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Opinion of the court by Judge Holt.

The right of the appellants to recover the land in contest turns upon the question whether the judgment against them in the Faulkner suit was void. If erroneous merely it can not be questioned collaterally.

If the court had not acquired jurisdiction then it was void.

Briefly stated, the facts are as follows: In 1861 W. W. Cheatham in consideration of love and affection, conveyed the land to his wife, Mary F. Cheatham, for the benefit of his children. He was then indebted to Faulkner, who, in 1867, assailed the conveyance by suit as voluntary. The grantor, the grantee and their three children were named as defendants in the petition, as well as two creditors, one of whom was named Pitts. Two of the children are now appellants in this action, and the other two appellants are the heirs of the third child, who is deceased.

It appeared from the petition that all three of the childen were then infants. A summons issued upon it in which they, as well as W. W. Cheatham and his wife and the defendant creditors, were all named and ordered to be summoned as defendants. The record of that suit does not show whether the infants were then over or under fourteen years of age. The petition in this action avers, however, that they were then under that age, and as it went off on demurrer, this statement must be regarded as an admitted fact upon this appeal.

This return was made and properly signed upon the summons: "Executed on all other defendants except Carroll Pitts by delivering them true copies of the within."

A guardian ad litem was subsequently appointed for the infant defendants, and an answer in the usual form filed by him. A decree of sale was entered in December, 1867. It does not appear when it was executed, but Faulkner became the purchaser at the sale, and in 1869 conveyed it to the appellee's father, who thereafter devised it to the appellee. So far as disclosed by the record, not only the latter but also his father acquired the land bona fide, and without any notice even of any claim by the appellants.

Mrs. Cheatham having died in 1868 the appellants, in 1886, or nearly twenty years after the sale, brought this suit to recover it, upon the ground that the Cheatham children were not before the court in the Faulkner suit, and that for want of jurisdiction the decree was void.

Section 55 of the Civil Code of 1851 (then in force), provided: "The defense of an infant must be by his regular guardian, or by a guardian appointed to defend for him." * * * Section 56, after requiring that the guardian ad litem should be appointed by the court or the judge thereof (an amendment of February 9, 1858, authorized it to be done by the clerk in vacation), says: "The appointment can not be made until after service of the summons in the action, as directed in this Code."

This direction was found in section 81:

"Where the defendant is an infant, under the age of fourteen years, the service must be upon him and upon his father or guardian, or, if neither of these can be found, then upon his mother, or any other white person having the care or control of the infant, or with whom he lives. Where the infant is over fourteen years of age, service on him shall be sufficient."

Section 52 of the present Code does not require any service upon the infant, if he be under fourteen. In such a case it must

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be served upon the father. If none, then on the guardian. If none, then on the mother, and if he has no mother living then upon the person in charge of him.

But the old Code in such a case required service both upon the infant and his father or guardian, if either of the latter could be found.

As the record of the Faulkner suit does not show the age of the infants, but for the averment as to it in the petition in this action, we would, upon the authority of Webber, &c. v Webber, &c., 1 Met., 18, presume that the officer executing the process did his duty, and that the service was sufficient.

The demurrer to the petition admits, however, that they were not then fourteen years old, and the return shows that the summons was executed by delivering to them a copy.

If any presumption would arise as against an infant in a case where the officer merely returns the summons as "executed" that it was done properly, yet it certainly rebutted when the returns shows, in addition, how it was done, and that it was not executed as required by law. (Case, Davidge, &c. v. Colston, 1 Met., 145; Beverly, &c. v. Perkins, 1 Duvall, 251.)

Here the officers return shows that the service was merely by delivering a copy to each of the defendants.

Infants are peculiarly under the care of the chancellor as his wards. For this reason, prior to the adoption of our Code, it was held that an actual notification to an infant of the pendency of a suit was not necessary to the jurisdiction of the court. A decree without such service was, therefore, not void as to the infant, if a guardian ad litem was appointed and defended for him. It was, in such a case, merely erroneous. The security of the infant was regarded as under the ægs of the court. (Bank of U. S. v. Cochran, 9 Dana, 397; Benningfield v. Reed, &c., 8 B. M., 102.)

The law making power, however, with the view doubtless of affording greater security to the rights of the infant, provided, in the Code of 1851, that the infant should be summoned, and if under fourteen, that service should also be had upon either his father or guardian, if any.

Undoubtedly the object of this provision was to bring notice to one who would naturally feel enough interest in the infant to see that his rights were protected. The purpose of a summons is to give notice.

In the case now in hand the father of the infants, it is true, was a party to the suit, and the return on the summons does not show that it was served on him as the father of the infant defendants. It was executed on him as a party to the suit. But considering the reason for the rule furnished by the Code, why was this not sufficient as to the infants? They, together with the father, were named in the copy of the summons that was delivered to him as defendants. He was thereby notified that they had been sued. There was no need of delivering a second copy of the sumomns to him as their father. The reason for the law had been fulfilled, and its object accomplished as fully as if he had not been a party to the action, and a summons had been delivered to him as the father of the infants. (Louisville Industrial Exposition v. Johnson, &c., 8 Ky. Law Rep., 328.)

It follows that the court had jurisdiction in the Faulkner suit, and the judgment, therefore, was not void, hence the one in this action is affirmed.

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KENTUCKY SUPERIOR COURT.

BEMIS, &c. v. SPALDING, &c.

(Filed February 1, 1888.)

1. In an action to recover damages upon an injunction bond given in an action in which a perpetual injunction was the only final relief sought, the plaintiff can not recover an attorney's fee, even though for services rendered solely in procuring a dissolution of the temporary injunction.
2. Where a judgment perpetuating an injunction is reversed, in an action on the bond the plaintiff can not recover damages arising after the injunction was made perpetual.

J. A. Fulton for appellants.

C. T. Atkinson for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Bowden.

This is an action to recover damages on an injunction bond, which was given in an action seeking a perpetual injunction as the final relief demanded.

1st. The defendants in that action made no effort to have the temporary injunction dissolved, except such as was included in the resistance to the final relief asked. No attorney fee could be recovered in such case, even under the rule recognized by this court in Reading v. Davis, 6 Ky. Law Rep., 661, and New Nat. T. Co. v. Dulaney, 8 Ky. Law Rep., 530. The latter case was taken by appeal to the court of Appeals, which decided that when a perpetual injunction is the only final relief sought, no fee can be recovered for services rendered solely in procuring a dissolution of the temporary injunction. (9 Ky. Law Rep., 697.)

2d. Had there been no temporary injunction, the appellees would have suffered the same deprivation under the perpetual injunction until the order granting it was reversed and set aside. It was the final judgment of the circuit court, perpetually enjoining, which did the damage suffered while that judgment was in force, and as it would have been the same without a temporary injunction as with it, the latter can not be regarded as in any way having caused the loss suffered under the former. The bond secured against damages done while the injunction was temporary. In an action on the bond the principal is liable for no more than the sureties are. He and they are alike bound by its terms, and it is decided that sureties are not liable for damages arising after the temporary injunction is superseded by a perpetual injunction, afterwards reversed. (Weber v. Wilcox, 45 Cal., 301.)

The instructions permitted the recovery of an attorney fee and damages arising after the injunction was made perpetual.

The judgment is reversed and the cause remanded for a new trial.

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SUPERIOR COURT ABSTRACTS.

CHISM v. EVANS.

Filed January 25, 1888. Appeal from Monroe Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

A judgment rendered by a judge in his own case and in his own favor is absolutely void and not erroneous merely, where the law provided a way in which his place should be filled.

A judge of a quarterly court issued a summons in his own case, rendered judgment in his own favor, issued executions, certified the transcript to the circuit court, and sued out execution therefrom, and took the property of the execution defendant under the execution. In this action of trespass he is seeking to justify under that judgment. Held—That it is no protection to him, and that his demurrer to the petition alleging the facts stated should have been overruled.

W. H. Botts for appellant; Boles & Basham for appellee.

SCHWAB v. GUTMAN.

Filed January 25, 1888. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Commencement of action—The mere fact that a defendant is a nonresident, is not conclusive that a summons may not be issued against him in perfect good faith that it will be executed.

Suit was instituted by a creditor, within six months after a transfer of property by his debtor, to have the transfer declared to operate as an assignment under the statute. The debtor and transferee were made defendants and summons issued against them directed to the sheriff of the county in which the debtor lived and in which the property was situated. Summons was executed on the debtor, but not on the transferee, who was a nonresident. Held —That suit was instituted within six months within the meaning of the statute. Even if the good faith of the transaction could be called in question by a showing that the plaintiff had no reason to believe that the summons would or could be executed as to one of the parties, the mere fact that one of the parties was a nonresident is not conclusive that the summons against him was not issued in good faith.

W. H. Marriott for appellant; James Montgomery for appellee.

JONES, &c. v. BROWN.

Filed January 25, 1888. Appeal from Casey Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Practice—Papers read in evidence must be made a part of the record by order of court or bill of exceptions, in order that they may be considered on appeal as must also oral evidence heard upon the trial of an action or motion.

F. M. Sympson for appellants; A. R. Clarke for appellee.

GRAY, &c. v. ROBINSON & CO.

Filed January 25, 1888. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Attachments—While it is not proper to sustain an attachment before judgment is rendered for the debt sued on, the defendant is not prejudiced thereby, if the debt sued on is not controverted.

2. Same—Judgment was rendered sustaining an attachment, but the proceeds of the attached property were not then ordered to be paid over to the plaintiff. At the next term judgment was rendered for the debt sued on, and in the judgment it is recited that it appearing that the attachment

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came to the hands of the officer and was executed before a deed of assignment was made, under which other creditors are claiming priority, the plaintiffs thereby acquired a lien upon the attached property, and the court then orders the receiver to pay over the proceeds of the attached property to the plaintiff. Held—That this last judgment is in effect a judgment sustaining the attachment, and for this reason, if for no other, the first judgment was not prejudicial.

3. Same—Where an attachment was issued and placed in the hands of the proper officer and executed on the debtor several hours before a deed of assignment was made by the debtor, the attachment gave to the plaintiffs a lien which was prior in right to the claim of the assignee or other creditors, although the attached property was not taken possession of by the officer until after the deed was executed.

4. Same—A creditor is entitled to an attachment upon the ground that the defendant has not enough property to satisfy his debt, if it appears that the property of the defendant, after allowing him the exemptions to which he is entitled under the statute, is not sufficient to satisfy the plaintiff's demand. And the defendant can not defeat the attachment by declining to claim all the property as exempt to which he is thus entitled.

5. Same—In determining whether or not defendant's property, which consisted of a stock of goods, was sufficient to satisfy the plaintiff's demand, the market value of the goods—what they would sell for at the place—is the true test of their value. And the property having been publicly sold by the receiver soon after the attachment was issued, and the sale being fairly conducted and well attended, this court is not prepared to say that the judge was not authorized from the evidence to fix the amount at which the goods were sold as their true value.

W. E. Selecman for appellants; W. C. McChord for appellees.

BELL v. BANK OF ADAIRVILLE.

Filed January 25, 1888. Appeal from Logan Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Sureties—Where a creditor has sued the principal debtor and acquired a lien upon his property by the levy of an attachment, and voluntarily releases the lien, he releases those who are bound for the debt as sureties.

2. Indefiniteness in pleading is not a ground for demurrer; the objection should be taken by a motion to make more definite.

In an action against appellant as surety upon two notes, he averred in his answer that he was surety merely in "the note sued on;" that plaintiff brought suit on the note in a justice's court, and obtained an attachment upon the property of the principal sufficient to satisfy the plaintiff's demand, and that plaintiff, against appellant's protest, dismissed the suit and had the levy discharged. A demurrer was sustained to the answer. Held—That while the answer is indefinite, in that it does not refer to both notes, and does not designate upon which the suit in the justice's court was brought, nor fix the time at which the suit was brought as after the maturity of the note, the objection should have been made by motion to make more definite.

W. W. Frazier for appellant; J. S. Rhea for appellee.

HUBBLE v. FIRST NATIONAL BANK OF STANFORD.

Filed January 25, 1888. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, affirming, Judge Bowden, dissenting.

Sureties—Misrepresentations—Wherever there is a misrepresentation, or even concealment from the surety of any material fact which, if disclosed, might have prevented him from entering into the contract of suretyship, it will render it invalid and the surety will not be liable. But the concealment, to be material, must be of some fact or circumstance immediately affecting the liability of the surety and bearing directly upon the particular transaction to which the suretyship attaches. And the facts concealed must

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be such as are peculiarly within the knowledge of the creditor, and such as the surety has the right to rely upon the creditor for information concerning.

Appellee sold to M. a flouring mill. A part of the purchase price was secured by M.'s note, with appellee as surety. Appellee, to induce appellant to become surety, fraudulently represented that the mill was worth an amount which was twice its real value, and that M., who had been renting it, had the month before made a net profit of $600, whereas he had, as appellee knew, in fact lost $500. Appellee also knew that the mill had been so damaged in its machinery and reputation that it could not be operated without great loss. Appellant was ignorant of these facts, and relied upon appellee's representations. Appellee also represented that it would furnish M. $2,000 without security to enable him to stock and operate the mill. Appellee failing to furnish the $2,000 as agreed, M. borrowed from appellee $1,000 and executed his note, with appellant as surety. Appellee knew that this money was intended for and used in stocking the mill, but, on account of the condition of the mill, the whole $1,000 was sunk. Appellant became surety on this last note, relying upon the representations originally made by appellee, being still ignorant of the facts. Both appellant and appellee knew from the beginning that M. was insolvent.

In a suit upon the $1,000 note, appellant pleaded the facts stated as a defense, but a demurrer to his answer was sustained. Held—That appellant is liable, as there was no connection between the transaction in regard to the sale of the mill and the loaning of the $1,000. The true value of the property and its unfitness for successful operation were matters about which the surety could inform himself as well as the principal could, and in such a case it is the duty of the surety to look out for himself, and ascertain the nature of the obligation he is undertaking, and the probability of his being required to discharge the debt.

O. H. Waddle, Frank Hubble and Robert Harding for appellant; Welch & Saufley and John S. Vanwinkle for appellee.

GOUGH v. GOUGH'S ADM'R.

Filed January 25, 1888. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Final order—The answer pleads the pendency of another action between the same parties for the same cause. The order appealed from recites that "the motion to dismiss the case is overruled," and it is ordered that this cause be consolidated with another action. Held—That this is not a final order, and that no appeal can be prosecuted therefrom.

James W. Head for appellant; Bullock & Beckham for appellee.

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KENTUCKY COURT OF APPEALS.

HILL v. DOWN'S ADM'R, &c.

(Filed February 2, 1888—Not to be reported.)

Vendor's lien—D. sold land to R., and executed to him a bond for title. R. sold to B. and B. to W., D. accepting the note of each vendee as the land was sold from the one to the other, the note of the one vendee being substituted for that of the other. W. owing to B. a balance upon the land above the amount due D., for which he gave his note to D., executed to B. his note for that balance, and B. assigned the note to appellant. In an action by appellant to enforce his lien upon the land, to which D. was not a party, appellant became the purchaser at the sale under the decree obtained by him. D. now seeks to enforce his lien for the amount of the note executed to him by W. Held—That D. has a lien, and that it is superior to the lien of appellant, who is not in the attitude of an innocent purchaser. D. continued to hold the legal title, and the substitution of the one note for the other did not affect his rights as vendor.

H. W. Rives for appellant.

Thompson & McChord for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Pryor.

We can not well see how the facts of this case place the appellant, Hill, in the attitude of an innocent purchaser. Downs, while the owner and invested with the legal title, sold the land to one Ray, and gave him a bond for title, with a stipulation that Downs would make to Ray a deed when the purchase money was paid.

This was in October, 1864.

In the year 1867 Ray sold the land to Bowman and assigned to the latter the title bond of Downs, the latter accepting Bowman's notes in lieu of the notes executed to him by Ray, to the extent that Ray had failed to pay. Bowman sold the land in 1870 to Warren and assigned to Warren the bond of Downs, Warren executing to Downs his notes for the balance due on the land. So on the 4th of October, 1870, Warren held the bond of Downs for title, and Downs held Warren's notes for the purchase money,

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or for the balance due on the land. Bowman also held the notes of Warren for the purchase money due him by Warren, there being a balance owing by Warren after he had assumed to pay to Downs, the original vendor, what was then owing him on the land.

Bowman assigned these notes for value to Hill, the appellant, who instituted an action on them in the year 1881 against Warren, and sought to enforce the lien, asking for the production of the title papers, to show boundary, etc. Downs, the original vendor, was not a party to this action, but yet the land was sold and purchased by Hill, the present appellant. Now, in the present action, Downs is seeking to enforce his lien, viz: The purchase money due by Warren—the first note due in 1871, with a credit endorsed as of 1882, and the second note due in October, 1871.

The statute of limitation is no bar to the recovery by Downs, nor would it be a bar to a specific execution of the contract by Warren. Although the original bond is dated in 1864, still the assignment to Warren was made in 1870, with his notes executed to Downs, payable in 1871. These notes Downs accepted, and it was in fact a new contract between Downs and Warren. Credits were endorsed on the first note as late as 1882, and hence the record conduces to show that the appellant knew the title was in Downs before the judgment in his action against Warren was rendered, and if not the title of Downs was of record in the county where all the parties lived, and there is no pretense that either of the vendees from Downs ever claimed under any other title, or to have obtained a deed from their vendor. There was no concealment as to the title, but, on the contrary, it is evident that any investigation would have shown that Warren held only a bond for title from Downs.

The agreement by Downs by which he accepted the notes of each vendee, as the land was sold from one to the other, did not release his lien. He held the legal title, and the notes were for the purchase money, and the substitution of the one note for the other did not affect his rights as vendor.

There is an error in the judgment that gives the appellant a lien equal in priority to that of the vendor. This is erroneous, and the judgment is reversed on the cross-appeal, with directions to give the appellee priority, and for proceedings consistent with this opinion.

DOUGHERTY v. HALLORAN.

(Filed February 2, 1888—Not to be reported.)

Separate estate—Mortgage—A husband conveyed real estate owned by him to the separate use of his wife, the fact that the money used in paying for the property had been obtained from the wife, constituting the only consideration for the conveyance. Husband and wife afterwards mortgaged the property to a creditor whose debt was created prior to the execution of the conveyance to the wife. The wife resists the enforcement of the mortgage upon the ground that the property is her separate estate. Held—That while the wife can not bind her separate estate for the debt of her husband or others where she derives no benefit from the contract, yet in this case the conveyance from the husband to the wife was voluntary, and, therefore, void as to the mortgagee whose debt existed prior to the execution of the conveyance. The mortgage can, therefore, be enforced.

Matt O'Doherty for appellant.

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John Stites for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

The cases of Hirschman v. Brashear, 79 Ky., 258, and Baird v. Bruning, 4 Ky. Law Rep., 206, determine the want of power in the wife to bind her separate estate for the debts of her husband or for others where she has no interest and derives no benefit from the contract. This case, however, presents a different question as to the liability of the wife's estate to the payment of this debt owing the appellee. At the time the debt was contracted, that seems to have been for the benefit of the husband alone, he was the owner of the realty by legal title and the property subject to the payment of his debt. The husband, subsequent to the creation of the debt, had the property conveyed to the separate use of the wife, based, as is attempted to be shown and as the proof conduces to show, on the consideration of the wife having contributed her means in paying for the property. It is not pretended that the money was her separate estate or that she was ignorant of the conveyance to the husband, but, on the contray, she knew that the conveyance was made in that manner, and whether she did or not the money was that of the husband when reduced to possession, and being invested in the realty in his own name, the conveyance to the wife was merely voluntary as against this creditor, and the mortgage by the husband and wife was valid as between the husband's creditors and the wife. The equity of the creditor to subject the property followed the conveyance and the effort of the wife to secure it should not be used so as to bar the recovery, because the conveyance had not been assailed at an earlier date. If the facts connected with the transaction had been recited in the mortgage there is no doubt that it could be enforced, and it plainly appearing that it was executed to secure a debt of the husband on the realty owned by the husband when the debt was created and subsequently conveyed to the wife, the two, husband and wife, could properly secure its payment by a mortgage of the realty, and the chancellor will not hesitate to subject it.

The judgment below is affirmed.

To a petition for re-hearing Chief Justice Pryor delivered the following response:

There was no fraud in this case upon the creditor. The land was liable for the debt and the claim of the wife subordinate thereto. In this condition of things, the husband and wife had the right to secure the debt by mortgage and the land should be subjected to its payment. The reason there is no fraud consists in the fact that the husband and wife have done that which the chancellor would have required them to do.

CRAIG v. TURLEY'S ADM'R.

SAME v. SAME, &c.

(Filed February 2, 1888.)

Judicial sales—Trust—Notice—At a judicial sale of land made to satisfy, first, the costs of the action; second, a debt to H., and third, a debt to C., the land was purchased by S. for the benefit of C. under an agreement

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whereby S. was to advance the amount necessary to pay the costs of the action and the debt to H., and hold the land in trust for C. until repaid out of the rents the amount so advanced, with interest, and as a part of this agreement C. executed upon the margin of the order book, in which the order was recorded, the following: "For value received of S. * * * I hereby assign to him all my right, interest, claim or demand, either in law or equity, in and to the within judgment, he to assume and pay such claims, fees and costs as I am liable for under this judgment." Thereupon S. executed a mortgage on this land to W. to indemnify him as surety. Both upon a motion by S. for a deed, and in an action by W. to enforce his mortgage lien, C. set up the foregoing facts, and the additional fact that he had repaid to S. the money the latter had advanced, and asked that a deed be made to him. Held—That as against W. claiming under an intervening mortgage C. has neither a prior right to the land nor prior lien upon it, as it does not appear that W., at the time he became surety and took the mortgage to indemnify him, had notice of the agreement between C. and S. And the assignment by C. on the margin of the order book operates as an estoppel to his assertion of a lien on the land superior to that of the mortgagee as well as to his claim to an interest in the judgment.

J. J. Landrum for appellant.

Montgomery & Perry for appellees.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Lewis.

In September, 1876, in the action of Craig v. Howe and others, judgment was rendered for the sale of a tract of land now in controversy, and distribution of the proceeds of sale to pay, first, the costs of all parties to the action; second, a debt to Howe for about $187; and, third, a debt of appellant Craig for $530 and interest from 1860.

At the sale made by the commissioner, November 20, 1876, Samuel Turley, now dead, became the purchaser at the price of $570, for which he, February 19, 1877, executed bond. And on the last named date Craig executed on the margin of the order book, in which the judgment was recorded, the following: "For value received of Samuel Turley I hereby assign to him all my right, interest, claim or demand, either in law or equity, in and to the within judgment, he to assume and pay such claims, fees and costs as I am liable for under this judgment."

At the succeeding term of court the sale was confirmed, and under writ then ordered, Turley got possession of the land, and by his tenants held it until his death in 1883.

November 9, 1882 Samule Turley executed a mortage on the land and other property to appellee, William Turley, to indemnify him as surety for certain debts.

The present litigation was commenced by William Turley, who, as administrator of Samuel Turley, and in his own right, upon notice to the original parties to the action, made a motion to redocket it, and for an order of court directing a commissioner's deed made to Samule Turley, which for some cause had not been before done.

In his response to the motion Craig stated that the purchase was made for his benefit by Samuel Turley under an agreement between them that he, Turley, would bid for the land and advance the amount necessary to pay the costs and fees of the action and the debt to Howe, and hold the land in trust for him,

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Craig, until repaid out of the rents the amount so advanced, and interest thereon at the rate of 8 per cent. per annum, and that the execution of the assignmet on the margin of the order book was part of the agreement between them. He further stated that no consideration was in fact paid to him for the assignment of the judgment, and that the amount advanced by Samuel Turley and interest thereon had been repaid to him.

The allegations of the response were all controverted by the plaintiff in the motion, and subdivision 6, section 1, chapter 22, General Statutes, was pleaded and relied on as a defense at law.

After the motion was made, and while it was pending, William Turley, as administrator, and in his own right, instituted an action against the crditors of Samuel Turley to settle his estate alleged to be insolvent, and also to sell the land in dispute to pay him the amount he had paid as surety of the decedent.

In that action appellant, Craig, set up the same claim to the land, and the same issues of law and fact were made as in the motion referred to. And the two actions having been consolidated and tried together, the court adjudged in substance that the land in contest was the property of Samuel Turley at the time of his death; that William Turley had acquired by the mortgage a lien thereon, and directed the proceeds of the sale of it and of the other mortgaged property be applied to pay his claim.

We think the evidence in this case clearly shows that the land was, in pursuance of a verbal agreement between the parties, purchased by Samuel Turley for appellant, Criag, and held by him in trust.

The testimony of the person who signed the sale bond as security for Samuel Turley, the tenants who leased the land from him and a person who applied to him to purchase it, all swear to statements made by him, which place it beyond question that he made the purchase for Craig and agreed to hold it in trust for him until reimbursed what he had paid of the costs of the suit and to Howe.

Having purchased the land, and after the sale was confirmed, having nothing else to do to entitle him to a deed but satisfy the sale bonds, his failure to apply for the deed can not be explained except upon the theory that he had agreed and intended to transfer his bid to Craig when reimbursed. For after he paid the costs and the Howe debt, and received from Craig the assignment of his part of the judgment, he was entitled to the deed, and if he had purchased the land for his own benefit, and not Craig's, he would have caused it to be made to him.

We are convinced that though so stated in the instrument, no consideration whatever was paid by Samuel Turley to Craig for the assignment of the judgment. The evidence makes it equally manifest that Samuel Turley received of rents and payments made by Craig more than the amount he paid of the costs and to Howe and agreed interest thereon.

It is thus clear that Samuel Turley, by paying about $265, which he got back, obtained the land for which he bid $570, and Craig has given up for lost his entire interest in the judgment without any equivalent whatever.

If, therefore, this was a contest between Samuel Turley and Craig merely, the latter would be entilted to either the land or an enforceable lien on it for his part of the price at which it was sold by the court in 1876. But as against William Turley, claiming under an intervening mortgage, Craig has neither a prior right to the land, nor prior lien upon it. For as it does not appear, but is denied by William Turley, that at the time he became

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the surety of Samuel Turley, and took the mortgage to indemnify him, he had notice of the alleged agreement by which the land was to be held in trust for Craig, clearly the trust, conceding there was one, would not be valid against his mortgage. And the assignment by Craig on the margin of the order-book operates as an estoppel to his assertion of a lien on the land superior to that of the mortgage, as well as to his claim to an interest in the judgment. For by the terms of that assignment he not only transfers all his right and interest in that judgment, but acknowledges value received therefor. Having thus done an act inconsistent with his assertion of a lien on the land, which did or might have misled purchasers or creditors of Samuel Turley, it seems to us he is now precluded from enforcing such lien in preference to the mortgage, which appears to have been accepted by the mortgagee in the belief Samuel Turley owned the land free from encumbrance.

It does not make any difference that Samuel Turley had not procured a deed at the date of the mortgage, for his interest in the land was the subject of transfer by deed or mortgage, and Craig had in an effectual way declared the purchase price was in effect paid.

As it appears the entire proceeds of the mortgaged property, including the land, were insufficient to pay the mortgage debt, there was nothing arising from a sale of the land that could, according to the views we have indicated, be applied to the claim of Craig, and as he was thus without remedy the judgment must be affirmed.

CREUTZ, &c. v. KNECHT, &c.

(Filed February 4, 1888—Not to be reported.)

1. Judicial sales—The defendant excepted to the commissioner's report of the sale of his land upon the ground that the commissioner declined to receive his bid. The chancellor extended to him the privilege of giving bond and taking the property at his bid. This he failed to do, and the chancellor then confirmed the report of sale. Held—(Without determining the propriety of the commissioner's action)—That the defendant can not complain.

2. Practice—As the exceptions to the report were heard on evidence and the evidence does not appear in the record, the court can not consider the questions raised by the exceptions.

E. P. M. Creutz for appellants.

John S. Ducker and Jas. O'Hara for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Pryor.

We find no appeal from the original judgment but an appeal only from the order overruling the exceptions to the commissioner's report of sale and the confirmation.

One of the complaints made is that the commissioner making the sale declined to receive the bid of the defendant, the debtor. The chancellor, to relieve the defendant and give to him all that he claimed in this regard, extended to him the privilege of giving bond and taking the property at his bid, and this he failed to do and then the report of sale was confirmed. So, without determining the propriety of the return by the commissioner, the appellant had the full benefit of his offer before the chancellor and

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declined to comply with the order made for his benefit. Again the exceptions were all heard on evidence, and what that evidence was we are not informed by the record. No bill of evidence accompanies it, and, therefore, the questions made in the exceptions can not be considered.

Judgment affirmed.

O'BRIEN & OTT v. MARKLAND.

(Filed February 4, 1887—Not to be reported.)

Street improvement—The charter of the city of Paducah provides for "the grading, paving, curbing or guttering of one side of any street where the other side of such street has been improved theretofore." In this action to recover of abutting property owners the cost of such improvement, Held—That as the property upon each side of the street pays the cost of such an improvement upon that side, the improvement may be ordered without regard to the character of the improvement previously made upon the other side, it not being necessary that the improvement upon the two sides of the street should be of the same character or equal in cost or value.

J. W. Bloomfield for appellants.

L. D. Husbands for appellee.

Appeal from McCracken Chancery Court.

Opinion of the court by Judge Holt.

In June, 1884, the city council of Paducah directed the improvement of the eastern side of Chestnut street, from Broadway to Jefferson street, a distance of one block, by laying down a brick pavement with guttering and curbing of limestone rock to support it. The work was done under contract by the appellants, O'Brien & Ott, who now seek, by this suit, to enforce the lien given to them by the city's charter against the abutting lot of the appellee, Markland, for its part pro rata of the contract price of the improvement.

It is admitted that all of the proceedings were regular and the only defense presented is that the ordinance was ultra vires, and, therefore, void.

It appears that the opposite side of the street was improved under an ordinance of the city as early as 1866 by laying down a pavement and guttering of brick with a wood curbing. This has been changed until now both the curbing and guttering are part brick and part stone. The cost of it, however, was only about one-third of that of the improvement made by the appellants upon the east side of the street. The ordinance directing the last named work to be done was based upon the 64th section of the city's charter, approved May 12, 1884, and which provides:

"The council shall have power to pass ordinances to require the improvement of streets and alleys, subject to the mode and manner herein designated, either by grading and paving, or by grading, paving and macadamizing or graveling, guttering, curbing and paving or planking of sidewalks, any portion thereof, not less in length than one block, or the whole of any street or alley now established, or which hereafter may be established, or by guttering, curbing, paving and grading any number of feet less than a block upon either or both sides of any street where the same shall be necessary to com-

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plete such class of improvement on any square or street, or by grading, paving, curbing or guttering of one side of any street where the other side of such street has been improved theretofore, or the reconstruction or repairing of the sidewalks by recurbing, reguttering or repaving on any or all streets at the cost of the owner or owners of the ground fronting such improvement, and the cost of such improvement to be apportioned according to the number of feet front each may own in front of said improvement, and a lien is hereby created on the said ground for the cost thereof, all of which improvements, when required to be made, the council shall order done by the passage of an ordinance for that purpose, which shall fully declare and prescribe the kind and extent of improvement to be made; that the council may require, by ordinance, the improvement of any street or alley simply by grading or graveling, or may require by ordinance the whole of any street to be improved by grading, gravel ing, guttering, curbing and paving or planking the sidewalk, th whole or any part, not less than one block, of any street." * *

It is contended that Chestnut street, including the sidewalks, is an entirety; that the lots on both sides of it, between Broadway and Jefferson streets, for purposes of taxation for street improvements, is the smallest taxing district known to the charter, and as both sides of the street are a part of the district, and as the ordinance did not require the opposite side to be likewise improved and at as great cost and it had never theretofore been done, that therefore, the council had no right to pass the ordinances in question.

In other words, it is insisted that as only a pavement of an inferior character had been required upon the opposite side of the street and costing less than the one constructed by the appellants, that, therefore, the municipal legislature had no power to order the latter to be made, and could only direct the construction of a similar one.

This argument is based upon the idea that any other course would produce unequal taxation and open a door for spoliation.

The street, however, is not the center of the taxing district as to the sidewalks, and it, as to a sidewalk, does not embrace the property on both sides of the street, but only the abutting property upon the side where it is located. The property upon each side pays the cost of the sidewalk upon that side, and, in this instance, each abutting owner contributes in the proportion that the number of feet front owned by him bears to the entire front, bordering upon the improvement. The property upon the opposite side of the street contributes in no way, of course, to the cost. It does not front upon it, but upon its own sidewalk, and the taxing district in the case now under consideration consisted of the property from Broadway to Jefferson street, adjoining the improvement made by the appellants.

The legislature had the power to say, as they did in the 64th section of the charter, what territory the taxing district should embrace.

It is unreasonable to suppose that the legislature intended to so limit the power of the council that it could only order the construction of a sidewalk upon one side of the street similar to the one it may have theretofore had built upon the other side. A moment's consideration will settle the question. It is only necessary to bring to mind the fact that often a sidewalk of a certain character or cost is necessary upon one side of a street and unnecessary upon the other. It is often the case that one side of a street is so used that it is always a crowded thoroughfare while the other is traveled but little. Public buildings upon one

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side may cause this or it may be built up while the other side is yet almost vacant property, and without the need of such a sidewalk as is necessary for the use of the public upon the other side.

There is no inequality in the taxation within the limits of what is the taxing district as to the sidewalk. The owners upon that side of the street are peculiarly benefitted by it and not those owning property upon the opposite side, and, therefore, the former should pay for it, and the burden is placed upon them equally.

The same class of improvement, that is paving, guttering and curbing, was ordered upon the one side of Chestnut street that had previously been built upon the other, but even this was not required, and the council were not thus limited in power as to the improvement they might see fit to make. They had the power to order the construction of the pavement merely without the guttering or the curbing.

The 64th section, supra, however, expressly says that the council may order the improvement "by grading, paving, curbing or guttering of one side of any street where the other side of such street has been improved theretofore." This is without regard to the character of the previous improvement upon the other side. If the legislature had intended it should be similar or of equal or less cost they could easily have said so, and we can not suppose they so intended, as they have not said so, and it would be unreasonable, in view of the public interest, to so presume.

Judgment reversed and cause remanded, with directions to render a judgment in conformity to the prayer of the petition.

MILES v. MONARCH.

(Filed February 4, 1888—Not to be reported.)

Trust—Lien—M. conveyed to H. a tract of land in trust, first, for the payment of the grantor's debts and then for the use and benefit of his wife and children. The deed provided that if the grantee should pay the grantor's debts with his own money, he should have a lien on the property to secure the amount so paid. H. accepted the trust, but never took charge of the property conveyed, which was held and enjoyed by the wife and children of M. By this action H. seeks to enforce a lien on the land for the price of a horse which he sold M. after the deed was executed, and also for the amount paid by him in discharging debts created by M. after the execution of the deed. Held—

1. The contract for the sale of the horse was not such a contract as bound the wife's estate, for the reason that it was not made by the wife or the credit given to her, and for the further reason that it was not in writing.
2. The trustee had no power to bind the trust estate for the value of the horse, although it may have been necessary for the use of the wife and children, as no obligation devolved on him for their support.
3. The trustee has no lien for the amount paid by him in discharging debts of the grantor created after the deed of assignment was executed.

C. T. Atkinson for appellant.

Harrison & Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

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On the 1st day of February, 1855, Henry Monarch, by deed, which was duly acknowledged and recorded in the Madison County Court, conveyed to the appellant his tract of land and slaves.

This conveyance was in trust, first, for the payment of the vendor's debts; second, for the use and benefit of the vendor's wife and children during the wife's life, and at her death for her children. The deed also provided that if the vendee should pay the vendor's debts with his own means he was to have a lien on the property conveyed to secure the repayment of the sum so paid and the interest thereon.

The appellant accepted the trust, but he never took charge of any of the property conveyed to him. The same was held, used and enjoyed by the beneficiaries under the deed.

The appellant, prior to 1862, paid the vendor's debts with his own means.

It appears that the appellant, prior to the time of his payment of these debts, was indebted to Mrs. Monarch over $700 for her interest in some slaves.

In 1862 the appellant, as trustee, settled his accounts with the Nelson County Court. In this settlement he was allowed the sum of money that he had paid in discharge of his vendor's indebtedness. This sum was credited with the amount that he owed Mrs. Monarch. In this settlement he was allowed the price of a horse which he sold to his vendor after the deed of assignment. By allowing him this sum there was a balance due him of about $70.

In 1878, Henry Monarch having died a year or two before then, the appellant made another settlement with the Nelson County Court, in which he was allowed two sums of $21 each, which sums were contracted by Henry Monarch after the deed of assignment, and which sums the appellant paid.

These two sums and the price of the horse were outstanding charges in favor of the appellant until September, 1886, when he brought this suit against the children of Henry Monarch, Mrs. Monach having died a short time before, for the purpose of subjecting the tract of land conveyd by the deed of trust to the payment of these sums and interest thereon.

The children resisted his right to recover. The lower court, upon the hearing, dismissed his petition, and he has appealed to this court.

The appellant states that the two notes which he assumed to pay were the personal obligations of Henry Monach, created after the deed of assignment.

It is neither alleged nor proven that the wife contracted for the horse, and that credit was given to her for the price. It also appears that the contract of sale was verbal. Therefore, leaving out of view, for the present, the question of the appellant's power as trustee to bind the estate for the price of the horse, and testing the question by the Revised Statutes, which were in force at the time, it is clear that the contract was not such a one as bound the estate, for the reason, first, the contract was not in writing; second, the contract was not made by the wife and credit given to her.

But it is contended that as the horse was necessary for the use of the wife and children, the appellant, as trustee, had the power to bind the trust estate for its value.

The purposes of the trust negative that idea, for the reason that the appellant, after paying Henry Monarch's debts out of the estate, had no power over the estate except to hold the legal title in trust for the wife and children, and, by and with the consent

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of the wife, to sell the estate for the purpose of reinvestment in other property, the legal title to which he was to hold in like trust.

The rule is well settled that a trustee is entitled to charge the trust estate with the expenses incurred by him, and for any advancements made by him, when such expenses or advancements are reasonably necessary to carry out the purposes of the trust.

But this is as far as he can go.

After paying the debts of Henry Monarch, the appellant's power to charge the estate was exhausted. He was not required to use the estate for the support of the wife and children. No obligation devolved upon him to provide for their support. He was simply to hold the legal title for their use. They were entitled to the use and enjoyment of the estate itself for their support.

It is clear, therefore, that the appellant had no power to charge the estate with the price of the horse.

The same rule applies with greater force to the two notes. These notes were the personal obligations of Henry Monarch, created after the deed of trust was made, and there is no pretense for saying that Mrs. Monarch joined in creating said indebtedness

The appellant also contends that by the terms of the deed of trust he was to have a lien upon the trust estate for any money of his own that he paid in the discharge of Henry Monarch's debts.

It is conceded that the three debts above mentioned were created after the making of the deed of assignment.

The debts referred to in the deed of assignment undoubtedly referred to Henry Monarch's indebtedness or liabilities at the date of the assignment, and not to such debts or liabilities as he might thereafter create, for the reason that the deed of assignment passed the title to the estate from him and vested it in the appellant for the use and benefit of his (Monarch's) wife and children, and to subject the estate to Monarch's debts thereafter created would defeat one of the main objects of the assignment.

It is also contended that these claims should be deducted from appellant's indebtedness to Mrs. Monarch on account of the price of the slaves. It is clear that the price of the slaves was intended to be applied to the discharge of the estate indebtedness to the appellant on account of the money that he had advanced in the payment of Henry Monarch's debts, created prior to the deed of trust, and thus it must remain.

The judgment of the lower court is affirmed.

BUSH v. WALKER, &c.

(Filed February 7, 1888—Not to be reported.)

Trusts—A brother having redeemed his sister's land, which had been sold to satisfy a mortgage lien, under an agreement with her to hold it merely as security for the money advanced and interest, and to allow her to redeem, a trust was thereby created, which is enforced in this action. The evidence of the alleged agreement, which was denied, is held to be sufficient.

B. F. Bennett for appellant.

T. H. Paynter for appellees.

Appeal from Greenup Circuit Court.

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Opinion of the court by Chief Justice Pryor.

The appellee, Mrs. Walker, is a sister of the appellant. Her land had been sold, under a judgment rendered by the chancellor enforcing a lien created by mortgage, for greatly less than its value. Thompson was the beneficiary of the mortgage, and had purchased the land. The sum required to redeem it was $163, and the land worth from $400 to $500. Mrs, Walker, in making an effort to redeem the land, applied to her brother, who seems to have been able to assist her, to advance the money for her to Thompson and then hold the land as security for the purchase money. This fact the appellant denies, and says the only agreement between them was that he, the appellant, agreed to exchange the land he had redeemed from Thompson, with the mother-in law of Mrs. Walker for some land the latter owned adjoining his land, and that was intended for the benefit of his sister. He exhibits an agreement between the mother-in-law and himself by which he agreed to make the exchange, dated in January, 1880. That agreement was never carried out, and, as the proof shows, the present appellee was no party to it, and, besides, the agreement she alleges that was made with her was prior to the August term of the Greenup Circuit Court, in the year 1878, and in this she is fully corroborated by other witnesses and the circumstances surrounding the transaction.

Thompson, who bought the land, having made an advantageous purchase, swears that he declined to let the appellant redeem it unless the redemption was in behalf of the appellant's sister, and, being assured by the appellant that he was not seeking the benefit of the purchase for himself but for his sister, Thompson consented to receive the money, and at the next term of the court the appellant obtained the deed of the commissioner. He took possession of the land and rented it out, receiving the rents, and as one witness states, declined to rent to him without obtaining Mrs. Walker's consent, and this he did obtain and then rented the house. Other witnesses say that the appellant stated to them that he had redeemed the land for his sister. It is also shown that he employed one of the sons of his sister to work for him at 50 cents per day, and that a portion of this money earned by the boy was applied to the payment of taxes on this land, and the entire testimony conduces to show an agreement made by the appellee, such as she alleges.

It was some rents from land belonging to her mother-in-law that she expected would enable her to refund the redemption money.

It was perfectly natural that the brother should have interposed for the benefit of his sister when she was about being deprived not only of a home but all she had, and her testimony, corroborated as it is, is perfectly consistent with what should at least have been his conduct when redeeming this land. He says that he did not want the land and paid all it was worth. If so, he is not injured by this judgment. If he is made whole it is all that, in equity and good conscience, he is entitled to have. (Williams v. Williams, 8 Bush, 241.)

The judgment is affirmed.

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SMITH, &c. v. CITY OF LOUISVILLE, &c.

(Filed February 9, 1888—Not to be reported.)

Towns and cities—License of vehicles—An "act concerning license taxes in the city of Louisville" in enumerating the various subjects of license, and the tax therefor provides: "For each vehicle running in said city not less than two nor more than thirty dollars; and vehicles thus licensed shall not be subject to an ad valorem tax." Under this law the city council passed an ordinance grading the tax for vehicles to their uses and the number of horses used. Held—That the law evidently looked to such a classification, and there is no discrimination, as all of the same class are subjected to the same tax. The ordinance is, therefore, valid.

Lane & Burnett and Brown, Humphrey & Davie for appellants.

T. L. Burnett and H. S. Barker for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

The "act concerning license taxes in the city of Louisville," passed by the legislature May 8, 1886 (volume 2, Acts 1885-'6, page 511), in enumerating the various subjects of license and the tax therefor, provides:

"For each vehicle running in said city not less than $2 nor more than $30, and vehicles thus licensed shall not be subject to an ad valorem tax."

Subsequently the city council adopted this ordinance:

"Section 1. Be it ordained by the general council of the city of Louisville, That no vehicle shall be run within the city of Louisville without a license therefor being first granted as hereinafter graded and classed. The price of license for one year, to be paid into the treasury of the sinking fund of said city, shall be as follows, to wit: For each and every wagon, cart, dray, omnibus or other vehicle not specially designated herein, drawn by a single animal, $3; drawn by two animals, $5; drawn by three animals, $10; drawn by four animals, $15; drawn by five animals, $20, and drawn by six animals, $25. For each and every hack, coupe or coach, $5; for each and every hearse, $10; for each and every buggy, sulky, gig, phaeton or like vehicle, $2; for each and every family carriage, drawn by one animal, $2; drawn by two animals, $5."

The remaining two sections provide respectivley as to fines for violations of the ordinance and the repeal of prior ordinances relating to the same subject.

The appellants seek, by injunction, to resist the enforcement of this ordinance, first, upon the ground that it is ultra vires, and second, that the tax thereby imposed is not uniform, and, therefore, illegal. They contend that, under the provisions of the legislative act, supra, the council had no power to classify vehicles, and could only fix one certain sum between $2 as the minimum and $30 as the maximum, and impose it as a license tax upon each vehicle, and that when this was done the vehicle was exempt from all further tax for the year, but that under the ordinance in question if the owner uses one animal in his vehicle one day and pays the tax therefor, and then upon another day

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uses two animals therein, he is doubly taxed by being liable to another and a different license tax.

The tax is one upon the privilege or use, rather than the specific article. It is for "each vehicle running in said city." The law evidently looked to a classification as to this use or privilege. Its language, already quoted, points strongly in this direction. It gives the power to the municipal legislature to fix the tax at not less than $2 nor more than $30. This wide margin, when considered in connection with a subsequent provision of it, leaves no room for doubt as to the legislative intention.

This latter clause reads thus:

"The secretary and treasurer of the sinking fund shall, from the oath of the applicant or other evidencce, recommend to the general council the grade in which the applicant shall be classed under the ordinance of said city, when the application is to license a tavern, coffee house or other place where spirituous, vinous or malt liquors are sold.

"In granting all other licenses the secretary and treasurer of the sinking fund shall, from the oath of the applicant or other evidence, ascertain the grade in which such applicant shall be licensed, but such applicant shall have the right, within ten days, to appeal to the commissioners of the sinking fund from the action of said secretary and treasurer, and the commissioner shall have power to determine in which grade the applicant shall be placed."

This provision applies to licenses to run vehicles. Granting that it confers no power upon the council not theretofore given in the act, yet it plainly shows that the legislature, in saying that the tax sould not be less than $2 nor more than $30, intended to confer upon the council the right to classify and grade the privilege according to the character of the use made of the vehicle. In fact, it in substance says so.

Moreover, it is reasonable to suppose that this was the intention. It would be grossly unjust to require all vehicles running in the city to pay the same license tax. If the legislature had so intended, it would have said so.

A four-horse wagon, loaded with iorn or other heavy material, of course wears out the street much faster than the one-horse wagon of the poor marketman.

Perhaps the entire outfit of the latter is not worth over $30, or the highest sum authorized by the law as a license tax. While as to the one this sum might be a reasonable tax, it would be spoliation as to the other.

Plainly, the grading of this tax, according to the character of the use, comes nearer to equal taxation than would the imposition of a fixed sum upon each vehicle.

Absolute equality of taxation is impossible. It can only be approximated. No double tax can of course be imposed. This is a fundamental maxim in the law of taxation. But in this instance the vehicle in use pays a license tax, and is exempted from an ad valorem tax.

The owner certainly knows the character of the use to be made of his vehicle, and there is no discrimination, because all of the same class are subjected to the same tax. It operates upon all alike. There is no distinction of persons. Every one using one horse to his vehicle is taxed alike, and so of each class. The tax is uniform as to each subject of the given class. Such a license or occupation tax, wisely guarded, serves to equalize taxation, and the power of the legislature to authorize it is so well

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settled by judicial opinion that the citation of authority is unnecessary.

Judgment affirmed.

FRANK, &c. v. QUAST, &c.

(Filed February 9, 1888.)

Negotiable instruments—Accommodation drawers—Where a bill of exchange is drawn and indorsed for the accommodation of the acceptors, upon the condition that it shall be discounted at a particular bank, a purchaser of the bill before maturity, without notice of the secret agreement is not affected by it, although he may have taken the bill in payment of a pre-existing debt; and he may, therefore, recover upon the bill in an action against the drawers.

Lewis & Fairleigh for appellants.

James G. Haswell and M. A. Mason for appellees.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Chief Justice Pryor.

Frank & Sons were merchants, doing business in Breckinridge county. They desired to raise money, and induced the appellants to become the drawers of a bill payable to themselves, addressed to Frank & Sons, who accepted it. The bill was then endorsed in blank by the drawers and delivered to the acceptors, Frank & Sons, to be presented for discount to the Breckinridge Bank, where it was agreed, at the time the accommodation paper was drawn, it should be negotiated. This agreement was between the drawers and the acceptors, and it is alleged by the defense here that it was on this express condition that the paper was executed by the drawers.

The bill was made payable at the Breckinridge Bank, but when presented, the bank declined to discount it, the bill remaining in the possession of the acceptors, Frank & Sons. The drawers, ascertaining that Frank & Sons were embarrassed, notified the bank not to discount the paper, and one of the drawers went to the home of Frank & Sons to obtain the paper, but failed to do so.

Frank & Sons had been purchasing goods in the city of Louisville, and while in that city and being indebted to the appellees, Quast & Schulten, they induced the latter to accept the bill in payment of a debt due them and made purchases of goods with the balance raised. The paper was discounted by one of the Louisville banks and sent by that bank to the Breckinridge Bank for collection, where it was protested. The appellees, Quast & Schulten, having endorsed the paper, took it up, and now bring this suit against the drawers, who make the defense that one of the conditions of its execution was that it should be discounted at the bank in Breckinridge county at a particular time. It appears that when the paper was presented to the appellees, or when the appellees asked Frank & Sons, or the member representing the firm at the time, for payment of their debt, that Frank replied he had been making efforts to raise the money, and had failed to get it, saying further that he had a bill drawn for his accommodation, payable at the Breckinridge Bank, and that bank had declined to discount it. Then it was the appellees said to Frank that it could be discounted in the city, to which

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Farnk readily assented, and delivering the bill to the appellees they had it discounted in the manner and for the purposes already stated.

The paper had not matured when discounted, and there is no evidence conducing to show bad faith on the part of the appellees in discounting the paper, or that they had any notice of the agreement between the parties to the bill that it should be negotiated at the Breckinridge Bank and nowhere else. The appellees had no reason to suspect the honesty of its debtors, and took the paper as innocent holders for value.

This defense is based on the idea that the party for whose benefit it was made was the agent of the drawers, and that the agent having no more power than that given him by the principal, his acts beyond that authority are void. If Frank had notice of the restriction, or was placed on inquiry in regard to the manner in which this paper was to be disposed of by the acceptors, there might be some plausibility in the defense. The fact that the proceeds of the bill were applied to the payment of a pre-existing debt was not evidence of notice, nor did it destroy the bona fides of the transaction. In fact the very purpose of the drawers and acceptors in making the paper was to enable these debtors to pay their debts, the drawers knowing that they were hard pressed for money, and being assured by Frank & Sons that as soon as they sold their tobacco the money would be replaced, they drew the bill. Frank & Sons had the right to transfer the paper. It was endorsed by the appellants and delivered to Frank that he might transfer it and obtain the money. It may have been that the money raised was intended to be applied to the payment of these Louisville debts, and the appellees being bona fide holders of the paper, the court will not inquire into the question of agency for the purpose of relieving parties who have placed it in the power of others to discount such paper. There was no defect in the title, and the right to transfer the paper was unrestricted by any of its stipulations. The paper was made for the accommodation and use of Frank & Sons, and no restriction as to the application to be made by them of the money. Mr. Daniel, in his work on Negotiable Instruments, says:

"It is immaterial that ppaer executed or endorsed for accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. No change in the mere mode or plan of raising the money, though not applied to the purpose intended by the accommodation party, will constitute a misappropriation." (Volume 1, page 742.)

Again:

"The accommodation party must have some interest in the application of the money, otherwise he is in no condition to contend there has been a misapplication of it, or of the security on which it has to be raised."

This doctrine was applied to a case where the party had applied the proceeds to a pre-existing debt:

"It is now well settled that when a note is endorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in the payment of a debt or otherwise for the credit of the maker." (Daniel on Negotiable Instruments, volume 1, page 742.)

Here the drawers and endorsers gave to Frank & Sons the use of their names to raise money in any way beneficial to that firm without restriction or condition, except, as they say, the money

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was to be obtained from a particular bank. Such a condition, unknown to a bona fide holder, can not affect the validity of the bill in his hands, and from the facts before us we perceive no merit in the defense.

Judgment affirmed.

HARGIS, &c. v. DITMORE, &c.

(Filed Feburary 9, 1888.)

Deeds—Estoppel—R. died, leaving three sons, I., W. and P., his only heirs. I. and W., having received each his portion of his father's land, in consideration of that fact, and at the request of P., executed to the wife of P. a conveyance to "the remaining one-third of said land, * * * with covenant of general warranty." Although P. was not named in the body of the deed as one of the grantors, he signed and acknowledged it as well as I. and W. P. having died, his widow sold the land, and the purchaser resists the payment of the purchase money on the ground that she has no title. The children of P. claim the land as his heirs at law. Held—That as P. requested I. and W. to convey with warranty the entire tract, although they had title to only an undivided two-thirds, he, to that extent at least, became a party to the deed, and could not, while living, have recovered any part of the land, and if he could not, neither can his heirs now do so, and to confirm the title to his then wife is but carrying out the purpose of the deed and enforcing his implied agreement to convey to her.

G. W. Roark for appellants.

Milliken & Bush for appellees.

Appel from Simpson Circuit Court.

Opinion of the court by Judge Lewis.

The question in this case is, what effect is to be given to the following deed:

"This deed of conveyance between I. H. Miller and wife, W. B. Miller and wife, grantors, and Ann Miller, wife of Philip Miller, grantee, witnesseth that whereas, in the division of the lands of Randolph Miller, deceased, among his three sons and heirs, I. H., Wm. B. and Philip Miller, the said I. H. and W. B. have already received each their portion of the land. Now, in consideration of said fact, and at the request of said Philip, the grantors hereby deed and convey to Ann Miller the remaining one-third of said land, bounded as follows: * * * Containing sixty-three acres, the said Ann Miller to have and hold the same to herself, her heirs and assigns forever, with covenant of general warranty. In testimony," etc.

The deed was signed and duly acknowledged by Philip Miller, as well as those specially designated in the body of it as grantors. Philip Miller having died, and his widow having become the wife of Ditman, she sold the tract of land described in the deed to appellant, Hargis, who resisted payment of the purchase price upon the ground she had no title to it, and the three children of Philip Miller, being parties, claim it as his heirs at law.

Notwithstanding the other two shares of the original tract had previously been conveyed respectively to I. H. and W. B. Miller, the legal title to two-thirds, undivided, of the sixty-three acres, was still in them, though Philip Miller was entitled to the actual

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ownership of the whole of it, and might have compelled them to convey the legal title to himself. But instead of doing so he requested them to convey, not their legal title to two-thirds undivided of the land, but to Ann Miller "the remaining one-third of said land," and to covenant the title thereto. They were, therefore, bound to her for a good title to the whole tract of sixty-three acres, and she could have at any time sued them upon that warranty. But Philip Miller, having requested them to thus convey with warranty the entire tract, and to that extent, at least, become a party to the deed, could not himself, while living, have recovered any part of the land, and if he could not neither can his heirs now do so.

If it was not the intention of Philip Miller to have conveyed to his then wife the entire estate in the land, it is hard to tell what was the purpose of the parties in the execution of the deed. Though Philip Miller was not in terms named in the deed as a grantor, nevertheless he is as much bound by the conveyance and covenant of warranty as if he had, in the usual form, been so named. And to confirm the title of the land to his then wife is but carrying out the purpose of the deed and enforcing his implied agreement to convey to her.

Judgment affirmed.

ALLEN v. COMONWEALTH.

(Filed February 2, 1888.)

1. Practice—Presence of accused—In cases of felony, the accused has the right to be present, and must be present, during the whole of the trial and until the final judgment.

In this case it was error in the absence of the accused to submit the case to the jury to consider of their verdict, and unless it affirmatively appears from a record that such an error was not prejudicial, there should be a reversal, but as the judgment in this case must be reversed for another error, it is not necessary to determine whether it appears that this error was not prejudicial.

2. Instructions must be based upon the evidence, and it is error to instruct the jury as to their duty in the event they find a certain state of facts, the existence of which the evidence does not tend to show. It was, therefore, error in this case to instruct the jury that the defendant had no right to act in self-defense if he brought on the difficulty, unless he had, in good faith, abandoned it, there being no testimony tending to show that he did or said anything with the intention of provoking a difficulty, or which made the conduct of the deceased excusable. The mere fact that the accused went to where the deceased was, explained as it was by the circumstances, and what he then and there said, did not authorize the qualification of the instruction.

3. Self-defense—One can not be deprived of the benefit of the plea of self-defense, because words innocently spoken by him or in jest, or some act not calculated or intended to do so, may have contributed to bring on the difficulty. It is, therefore, error to instruct a jury that if the defendant "brought on" the difficulty, he can not rely upon the plea of self-defense, because the language is too general.

4. Same—Instruction—It is error to instruct a jury that the defendant can not rely upon the plea of self-defense if they "believe from the evidence," that certain facts existed. They should be required to believe, "to the exclusion of a reasonable doubt," that such facts existed.

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Lewis McQuown for appellant.

P. W. Hardin for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Holt.

This is a conviction for manslaughter.

At the close of the argument to the jury they were properly put under the charge of an officer, the accused being remanded to jail, and the court then adjourned for dinner. Upon assembling again, but in the absence of the accused, he being then in jail, the case was finally submitted to the jury, and they, under the charge of an officer, were sent to their room to consider of their verdict.

It is a rule of the common law, that the trial of one charged with felony must be had in his presence.

In Sperry's case, 9 Leigh, 623, it was said:

"The well established practice in England and in this State is, that a prisoner, accused of felony, must be arranged in person, and must plead in person, and in all the subsequent proceedings it is required that he shall appear in person."

This is his right.

Judge Cooley says: "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment.

"If he be absent, either in person or by escape, there is a want of jurisdiction over the person, and the court can not proceed with the tiral, or receive the verdict, or pronounce the final judgment." (Cooley's Cons. Lim., page 319.)

Section 12 of our Bill of Rights provides: "That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel," and in the case of Temple v. Commonwealth, 1 4 Bush, 769, it was properly said:

"The right to be heard by himself and counsel necessarily embraces the right to be present himself, and to have a reasonable opportunity to have his counsel present also, at every step in the progress of the trial, and to deprive him of this right is a violation of that provision of the fundamental law."

In the case last cited a judgment of conviction was reversed, because the verdict was received in the absence of the accused, and when he was in jail.

The Constitution of Alabama contains a like provision, and in the case of the State v. Hughes, 2 Ala., 102, a judgment, based upon a verdict similarly received, was reversed.

The same result followed from a like cause in The People v. Perkins, 1 Wend., 91.

In Meece v. The Commonwealth, 78 Ky., 586, it was held, that instructions to the jury in a felony case should not be given or modified in the absence of the defendant, because he has a right to be present at every step taken in his case.

This rule is well founded. The life or liberty of the accused is in peril. He has the right to see that nothing is done or omitted to his prejudice, and his presence may exert an influence in his favor with his triers. If so, he is entitled to the benefit of it.

Let us now see if the reason for the rule applies to the case in hand.

When the jury are brought into court they should be called, so that it may be known that all, and only those selected, are upon

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it. The accused has a right to know that those who retire to the jury room to settle his fate are the same persons whom he has selected as his triers.

The Criminal Code, by section 183, provides that the defendant must be present "during the trial" of a felony. This is but declaratory of the common law. The trial begins with the swearing of the jury, and ends when the verdict is rendered.

Every step taken in the interim is a part of the trial. Submitting the case to the jury, and sending them to their room, is, therefore, a part of it, and should not be done in the absence of the accused.

In addition to the reason for this already suggested, the Criminal Code provides, by section 245, for the selection and swearing of an officer to take charge of them. He is the only person who has access to them. He is in authority, and if dishonest might inflict great injury upon the defendant by influencing them against him. The latter has the right, therefore, to know who he is, and to object to him if unfit from bias or any other cause. The ground of objection may, and is likely to be known, only to the accused. He has also a right to see that he is sworn, as required by law.

Again: It is the duty of the court to deliver to the jury when they retire to consider of their verdict the indictments and the instructions, and by section 248 of the Criminal Code "the jury may take with them all papers and other things which have been received as evidencce in the case."

The defendant has a right to see that the proper papers, and no others, are given to them.

In this instance his enforced absence prevented the exercise of these rights. He was entitled to them, not ex gratia curiæ, but of right.

It is unnecessary, however, to decide whether, upon a view of the entire record in this case, the judgment should be reversed for the error indicated, because this must be done upon another ground.

The right of the accused to appeal is altogether statutory, hence in giving it the legislature may impose such terms as it sees proper, and it has chosen to say that if, upon the entire record, it appears that the accused has not been prejudiced by the error, that then it can not avail him.

It is manifest, however, for various reasons that the action of the court, which we have been discussing, was improper, because of the defendant's absence at the time, and unless it affirmativley appears, from a record, that the accused was in no wise prejudiced by such an error, a reversal would result.

The third instruction given to the jury reads as follows:

"If, at the time of the shooting, the defendant believed, and had good grounds to believe, that he was then in danger or apparent danger of losing his life or receiving serious bodily harm at the hands of John Miller, he had the right to rid himself of such danger by the use of any means then in his possession, even to the shooting of Miller, unless they shall believe, from the evidence, that defendant brought on the difficulty, in which Miller was shot, and in that event, he (defendant) could not avail himself of the plea of self-defense or apparent necessity unitl he, in good faith, abandoned the difficulty."

Instructions must be given to suit the facts proven. As this case must be tried again, it is proper for us not to discuss the testimony in detail. It is sufficient to say that the evidence upon

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the trial already had did not warrant the qualification above italicised of the instruction as to self-defense.

The mere fact that the accused went to where the deceased was, explained, as it was, by the circumstances and testimony, and what he then and there said to the deceased, as detailed by those present, did not authorize it. Upon the evidence introduced the single question should, by proper instructions, have been submitted to the jury, whether or not the shooting was done in self defense.

If, however, the testimony had authorized it, yet the qualificaiton, as given, was improper.

The jury were told in the broadest language that the accused could not rely upon the plea of self-defense if he "brought on" the difficulty.

This gave them too much latitude. It left out of view any intention upon the part of the accused, and authorized them to find, for instance, that he had "brought on" the difficulty by merely going to where the deceased was, or opening a conversation with him. Guided by such an instruction, a jury might infer that a defendant had "brought on" a difficulty by a mere idle word, or one spoken in jest and without any intention of injuring the other party.

Moreover, it only required them to "believe, from the evidence," that the accused brought it on. They were left to act upon a preponderance of testimony, and could find that he did so without believing it, to the exclusion of a reasonable doubt, although it was a matter upon which his guilt or innocence in a certain state of case depended.

It is true some writers, in genearl terms, say that if an accused "provokes the difficulty," he thereby divests himself of the right to say that he acted in self-defense.

Bishop says:

"For he who seeks and brings on a quarrel can not in general avail himself of his own wrong in defense." (2 Bisohp on Crim. Law, section 702.)

This doctrine, generally speaking, is correct, but it is improper to say to a jury if the defendant "brought on" the difficulty, he can not rely upon the plea of self-defense, because the language is too general, and opens altogether too wide a field for inference and supposition upon the part of the jurymen.

If, however, one by his own wrongful act makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it, then the former can not, upon the plea of self-defense, excuse the taking of life or the infliction of great bodily harm.

Nor can he do so, if he seeks the other party, not innocently, but with the intention of provoking a difficulty and does so.

He must not, however, be deprived of the benefit of the plea of self-defense, because words innocently spoken by him or in jest, or some act done by him not calculated or intended to do so, and not resorted to as a shelter for intended wrong, may have contributed to bring on the difficulty.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

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SIMPKINSON & CO. v. SANDERS, &c.

(Filed March 8, 1888—Not to be reported.)

1. In an action to set aside a mortgage as fraudulent or to have it declared to operate as an assignment under the act of 1856, slight circumstances, that at best amount only to a suspicion of unfairness should not be allowed to outweigh the testimony of both the mortgagor and the agent of the mortgagee as to the validity of the mortgage, and to convict both of them of perjury, they having been called on by the plaintiff to testify. And the testimony of the agent of the mortgagee that the money was loaned in each instance when the mortgages were executed, not being contradicted, should be accepted as conclusive upon that point, although the witness is directly interested in the result of the litigation.

2. Same—Although the court properly adjudged that the mortgage was valid and should have priority over other liens, it was error to dismiss the plaintiff's petition as against the debtor. The decree should have been, first, for a sale of the land to satisfy the liens upon it, and then to satisfy the debts of the plaintiff.

J. W. Greene and C. Strother for appellants.

Hargis & Eastin for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Pryor.

We perceive nothing in this record to contradict the sworn statements of Sanders and Davis, who were called on by the plaintiff to testify as to the validity of the mortgages made to Phelps & Co., and whose testimony must be held as conclusive on that branch of the case. Slight circumstances that at best amount only to a suspicion of unfairness, should not be permitted to convict both Davis and Sanders of perjury by reason of their testimony. Besides, while Sanders may not have satisfactorily explained the extent of his losses, and the manner in which those losses were settled, Davis swears that the money was loaned in each instance when the mortgages were executed, and there is no reason to doubt the truth of his statement. His direct interest in the result of the litigation might affect the weight of his testimony if there was any evidence of a substantial character conflicting with the history he gives of the two transactions, but as there is none, and being the witness for the appellant, and making, so far as this record shows, a full disclosure of the business relations between himself and Sanders, the chancellor acted properly in subjecting the mortgaged property to the payment of all the liens upon it, giving to Davis priority.

The court below erred, however, in dismissing the petition as to Sanders, and in failing to give to the plaintiffs what was left, if anything, after satisfying the prior liens. The land should have been sold first to satisfy the mortgage liens, including the mortgages paid to the bank, and then the debt due the plaintiffs, and should have also subjected the notes to sale held by Sanders and disclosed by him as his property under that prayer of the petition for a discovery.

The judgment must be reversed at the cost of Sanders (the defendant, Davis, being entitled to the judgment given him), with directions to include in the judgment of sale the amount going to the plaintiffs—that to be paid after the mortgage liens are satisfied, and also to sell the notes to satisfy plaintiff's debt, etc., and for proceedings consistent with this opinion. If the land had

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been sold, then the proceeds to be applied in like manner. As there was no supersedeas, it may have been sold, and if so, the rights of the purchaser can not be disturbed by reason of this reversal. Remanded for proceedings consistent with this opinion.

Appellants are entitled to a judgment for costs against Sanders alone. Sanders should be required to deliver up the notes he says are due him that may be sold or collected by the commissioner.

To a petition for rehearing Chief Justice Pryor delivered the following response:

We understand distinctly from Davis that there was no pretense, sham or subterfuge in the loan of this money to Sanders; that the witness obtained money from Phelps & Co. to loan out, or rather advance on tobacco; that witness was responsible for the parties to whom he advanced the money; that he let Sanders have the money on the day the mortgage was executed, and afterwards settled with Phelps the entire amount of monies advanced, including that advanced by witness to Sanders, and thereby became entitled to the benefit of the mortgage. Phelps & Co. have now no interest in the controversy, and, as said in the opinion rendered, this is a bona fide transaction, or Davis is guilty of perjury. He stands uncontradicted on the record by any other witness, and there is no reason for doubting the truth of his statements.

Petition overruled.

JONES, ASS'EE, &c. v. JOHNSON, &c.

EMORY & SONS v. TRADERS' BANK AND WAREHOUSE CO., &c.

(Filed January 14, 1888.)

1. Banks—Duties and liabilities of directors—The directors of a corporation, or a president who is a mere figure head of the institution and does not receive sufficient salary to compensate him for devoting his entire time and attention to its business, are liable only for gross neglect in the management of the affairs of the corporation, in the absence of fraud. The directors of a bank were not chargeable with gross neglect in discounting paper which they had every reason to believe was good, although it turned out to be worthless; nor in allowing the cashier, who was regarded as solvent, to overdraw his account, it appearing that such overdrafts, when not too large, are not unusual with those connected with such institutions, the directors in this case having no reason to believe that the cashier was drawing such large sums of money as was afterwards discovered.

2. Same—The directors of the bank had the right, in their discretion, to allow the cashier, after he had been removed from that position, compensation to which he was not entitled, in order to obtain a settlement and secure what he owed the bank on account of overdrafts.

3. Same—The stockholders can not complain of the fact that the cashier, after he was removed from that position, was elected a director, as it does not appear that any damage or injury resulted from his appointment as director.

4. Same—Priority of creditors over stockholders—The board of directors of a bank, by resolution, authorized the president and cashier to issue to the latter 400 shares of stock in consideration of his two notes for $20,000 each, the resolution reciting that the purpose was to enable the cashier to borrow money on the stock as collateral, for the use of the bank, and that the bank would "take care to protect him in the transaction." The stock was issued

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to the cashier and money borrowed by him from E. & Sons, the stock being pledged as collateral. The money thus obtained by him was deposited in the bank to his credit, less the discount, which was restored to him. In this action by the stockholders of the bank for a settlement and distribution of the bank's assets, in which E. & Sons appeared and sought to make the bank liable as its creditors, and the directors personally liable on the ground of fraud. Held—That whether the stock was sold to enable the cashier to raise money to pay his debt to the bank, or for the purposes of the bank, it is apparent that the bank resorted to this means of raising money for its own benefit, and, therefore, E. & Sons have the right as creditors of the bank to priority over stockholders.

5. Joinder of actions—The right of action against the directors, if any existed, was purely in tort and could not be joined in the suit by stockholders to settle the affairs of the insolvent bank, or by creditors to enforce their contracts.

6. Principal and agent—Where an agent deals with another without disclosing his agency he is personally liable, as is also the principal, but the liability is not joint, and the creditor may relieve the principal by electing to look alone to the agent, after the fact of the agency has been discovered. But whether there has been such an election is a question of fact which is not determined by the mere act of charging the agent after knowledge of the principal.

In this case an election had been made, and an action was progressing in which the creditors were seeking to make the real principal liable, when the creditors filed their claim in an action for the settlement of the agent's estate, which was insolvent, and received a small pro rata thereon. Held—That it would be unreasonable to hold, as a matter of law, under such a state of facts as exists in this case, that the right to pursue the principal was lost, and that the creditors intended to look alone to the agent's estate for their money.

Wm. Reinicke, J. S. Pirtle and Speeds for appellants.

Muir, Bijur and Davie, R. W. Woolley, I. & J. Caldwell and Chas. H. Gibson for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

A number of defendants in this case, having made motions to dismiss this action on account of a misjoinder and for other causes, the action was dismissed by a judgment below that, on an appeal to this court, was reversed, and will be found reported in 10 Bush, page 649.

The action was instituted by stockholders of the Traders' Bank and Warehouse Company, to compel its assignee, Ullman, to settle the business of the corporation and distribute its assets, and to make the president and directors of the bank liable for the negligent manner in which they had managed its affairs. By an answer and cross-petition Thomas Emory & Sons set up a large claim against the corporation, asking a judgment for the amount against it, and that the stockholders be compelled to pay up their stock for its satisfaction. The court below adjudged that Emory & Sons were not creditors of the bank and dismissed their complaint, from which they have appealed. It was also adjudged that the directors were not liable to the stockholders by reason of any neglect of duty, and from that judgment the stockholders have appealed.

The organization of the Traders' Bank and Warehouse Company, as well as the subscription to its capital stock, was money due to the personal exertions and influence of Julius Dorn, its cash-

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ler, who was supposed to be a man of much wealth and regarded as possessing the highest order of personal as well as business integrity. His father-in-law, Munberger, had retired from business, owning, as was supposed, a large estate, and was endorsing and sustaining Dorn in all of his business transactions.

James Johnson was made president of the bank and his co-appellees, Thurman, Clifton, Chase, Hecht, &c., were the directors. They seem, from the facts before us, to have been inexperienced in the business of banking. Dorn was elected cashier by reason of his superior business qualifications, and for the additional reason no doubt that himself and his father-in-law owned more than one-half of the stock subscribed.

The stockholders and directors were looking to Dorn as the medium through which the enterprise was to be made a success. A great deal of the stock taken had not been paid, but notes executed for the amount by the stockholders under the belief that one-half of the amount subscribed would soon be paid in dividends. Some $40,000 of stock taken by Dorn was paid for in real estate, or at least that much was unproductive capital. Dorn, as cashier, seems to have had almost the complete control of the bank, and the directors, having the utmost confidence in his integrity, as well as his pecuniary ability to meet all his engagements, were not vigilant in the examination of his accounts with the bank, and within less than a year he had become largley indebted to it, and in fact had wrecked the entire enterprise.

The corporation having assigned to Ullman, and Ullman declining to sue the directors for their alleged neglect of duty, the stockholders, or a portion of them, instituted this action, charging, first, that the directors, knowing Dorn to be insolvent, allowed him to largely overdraw his deposit account, and with a full knowledge of the facts, permitted him to take cash out of the teller's drawer and apply it to his private use, he placing his tickets in the drawer, showing the amount taken, and the directors counting the tickets as cash; second, they had discounted Dorn's papers for large amounts, when they knew it was not good, and the parties to it insolvent, and had permitted insolvent parties to overdraw their respective accounts and had afterwards accepted Dorn's check for these overdrafts; third, that the directors had canceled the bond of Dorn, executed as cashier, and released his sureties; fourth, that the directors had sold to Dorn four hundred shares of stock, and took his note therefor, and when he paid in $20,000 on his notes, they made him a present of or permitted him to check out $1,492.32 of the amount; fifth, they elected him a director after he was removed as cashier, and had paid him his salary as cashier, when he was entitled to nothing; sixth, that the directors, after settling with Dorn and his father-in-law of his own debts, had permitted Dorn to check out the balance said to be due him on settlement; seventh, that they had released certain stockholders, Horace Scott and Wm. Johnson, from the payment of their stock subscribed; eighth, that the directors, except Chase, drew from the bank various sums, amounting to $4,344 for their own use, and surrendered worthless stock therefor.

Other charges of mismanagement and neglect are made, not necessary to be considered, as those enumerated, and more specifically alleged as to amounts and dates than here stated, embrace the principal subjects of controversy.

This corporation was organized in September, 1871, and in March, 1872, it was discovered that the balance books showed an indebtedness by Dorn of near $40,000. Dorn was then removed

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as cashier, and a settlement demanded, resulting in the execution of the notes of Dorn and his father-in-law for the amount of this indebtedness, and secure by a mortgage on real estate then of ample value to satisfy the indebtedness.

That Dorn had at times drawn more than his deposit account was a fact known to the directors, his account showing at times credits to Dorn by way of deposit of more than he had drawn out, and at other times an amount exceeding his deposit account, but that he had overdrawn so largley was a fact unknown to the directors until March, 1872. It is shown by Johnson, the president, that when the committee appointed to investigate the condition of the bank and the accounts of the cashier, that the money was always on hand and no tickets accepted as cash; that the accounts were proper, and no reason existed for the belief that Dorn was betraying the confidence of the directors, or withdrawing such large sums of money. It appears that Dorn was a commission merchant, engaged in the purchase and sale of whisky, and when his account was overdrawn, he gave as a reason that he was then engaged in settling up his commission business with a view of closing his house, and required more funds than he otherwise would, as he was compelled to pay out and was making few collections. He was then regarded as amply able to meet all his engagements, and his solvency not doubted by any of the directors, and but by a few business men. He and his father-in-law owned a majority of the stock, and overdrafts that were not too large were not unusual, as the evidence shows, with those connected with such institutions, if regarded as solvent. An exercise of the utmost vigilance might have produced different results, but this was not required of the directors, but when they did discover the condition of Dorn's accounts, and that practices had been resorted to by him in order to deceive, they obtained the settlement and the mortgage to secure this indebtedness. Several of these appellants who were stockholders in common with the officers of the bank had been permitted to overdraw their deposit accounts, and now complain of the directors for permitting the cashier to do the same thing. But it is evident that the directors secured the bank and its stockholders for every dollar that Dorn had overdrawn by the mortgages executed to secure the notes of the latter and those of his father-in-law, given in settlement of this claim. So it is needless to discuss this branch of the case further than to show the confidence of these trustees, who were representing the stockholders, in the cashier, Dorn, and their belief in his ability to pay his entire indebtedness, indulged almost to the moment of trial, at which the corporation was declared to be insolvent. Their only remedy was in a settlement with the cashier, and to secure, as much as possible, the amount of his indebtedness. This they seem to have done in good faith, and to protect the bank regardless of the rights of others.

It is proper to notice next the character of paper discounted by the bank, for the benefit of Dorn. It is alleged that the parties to the paper were insolvent, and known to be so by the directors, and if the facts proven establish the charge made, they are no doubt liable. This controversy between the stockholders and directors renders it proper to determine the question of diligence to be exercised by the directors in the control of the bank, its officers and business. Thompson, in his work on officers and agents of corporations, says that "directors of a corporation are not liable to the corporation for mistakes of judgment, however

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disastrous such mistakes may be. In all these cases the question is: Have directors been guilty of negligence of a gross and flagrant character?" Every case must depend, necessarily, on the facts and circumstances surrounding it, and here it is plain that Dorn, Caldwell, Chambers & Co., and Chamberlain, Dorn's endorsers, were believed to be perfectly solvent when the paper was originally discounted. The testimony of Chambers would confirm that belief, and the directors, in the exercise of a discretion that must necessarily pertain to the exercise of their power, saw proper to discount the paper. That it turned out to be worthless is not sufficient of itself to convict the directors of gross negligence in discounting it, but on the contrary they had every reason to believe that Dorn's name made it desirable paper. There is no fraud shown, or combination between the directors and Dorn to defraud the bank, or any fact tending to establish neglect, except the implicit confidence they had in Dorn's financial ability and personal integrity, and so far as the discount of his paper is concerned, although worthless, these directors are not liable. That a higher degree of vigilance is to be required of the president of a bank, whose salary, for a general supervision of its affais, is sufficient to compensate him in devoting his entire time and attention to its business, may be conceded, but directors who receive no compensation, or a president, who is the mere figurehead of the institution, are liable for only gross neglect (in the absence of fraud) in the management of the corporation, and this rule must certainly apply where stockholders are attempting to make them liable.

It is further urged that after Dorn was removed as cashier he was elected a director of the bank, and that he was allowed pay for his services when he was entitled to no compensation. We find no damages resulting to the bank by reason of the position assigned Dorn after his removal as cashier, and when the directors attempted to make a settlement with him, so as to secure his overdrafts, they saw proper to remunerate him that a settlement might be obtained. This allowance was made in the exercise of a discretion that belonged to the directors. It was done in good faith, and to protect the corporation. They seem to have made an effort, as they swear, to reconcile Dorn by making him a director, so as an expense might not be made, and suits under the act of 1856 instituted, under which, if the mortgages made by Dorn and his father-in-law had been assailed by creditors as a preference within six months, the bank would have lost the security, except in a pro rata distribution between all creditors, and if this reason should be regarded as not satisfactory, no injury or damage having resulted from his appointment as director, the stockholders can not complain.

The appellants also complain that the directors released Horace Scott and Wm. Johnson from the payment of their stock subscriptions without any reason therefor, and in disregard of the rights of those interested with them.

After the organization of the bank Dorn, the cashier, importuned Scott to take $100,000 of the stock upon condition. The note he gave evidenced the terms of the contract, and that he had the option at a certain period of time to determine whether or not he would take the stock, is conceded by the directors and shown by the notes of Scott, executed for the stock, all of which were left, including the certificates of stock, with the bank. The note stipulated that the certificate should be received in discharge of the note. It was so recorded, and this ended Scott's connection with the bank. The contract was binding on the bank, and if so the stockholders were in no manner misled by it, can not enforce the contract when the party, the corporation they repre-

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sent, is bound by its terms. As to the claim of Wm. Johnson for his services as superintendent of the warehouse, its validity not being questioned, the directors surrendered to him his note, executed for stock, in full discharge of the claim for services. The value of his services exceeded the value of his stock, and as between him and the other stockholders they can not complain.

The court below held that the stock issued to some of the directors for extra services should be cancelled, and further held that the shares of stock purchased by the directors in their own names, although done to sustain the credit of the bank, and for which they gave their individual notes, should be enforced, each director being liable to the extent of the stock purchased by him. In this conclusion we also concur. A careful examination of this entire record, so far as it affects the rights of the stockholders, leads to the conclusion that the board of directors acted in the best of faith, and while a careful and vigilant business man might have detected the fraudulent purposes of the cashier at an earlier date, still the financial standing of Dorn, connected with his business capacity, influenced the directors and stockholders to give him the control of an experiment in banking, connected with the business of a warehouse, upon a limited capital that was constantly begging for additions to its capital stock, resulting in less than one year in a complete financial wreck. Those ordinarily careful in business transactions could not well have done more than these directors to protect the bank's interest, and preserve the rights of stockholders. Other charges of neglect of less importance than those noticed have been made, and were properly disposed of by the court below. No bond seems to have been executed by Dorn as cashier, although a resolution of the board shows that it was cancelled. If, however, a bond had been executed the settlement by the directors with the cashier included his liabilities as such, and would have released his sureties. His sureties would not have been liable by reason of the failure of Dorn to pay his notes discounted by the bank. Whether or not the charter required the directors to take a bond is not a question raised, and if so the settlement made in good faith by the directors extinguished Dorn's liability, caused by the abuse of his official position. A large number of the stockholders, who were among the original plaintiffs, disclaimed, in open court, the intention of making charges of bad faith and neglect against the directors before this action terminated in the court below, and those who made no such disclaimers, and must, by their connection with the bank and the directors, have been conversant with its management, have failed to testify. We find no bad faith or gross neglect on the part of the directors.

The question arising in the cross-petition of Emory & Sons is more difficult of solution than any other question in the case. The appellants maintin that the bank is liable to them for $20,000, the money having been obtained from them by Dorn, its cashier, for the benefit of the bank. The money was loaned on the notes of Dorn, with the stock of the bank pledged as a collateral, and without any knowlege at the time that the money borrowed was for the bank. The bank insists that it sold Dorn, through its directors, four hundred shares of its capital stock, and took from Dorn in payment his two notes for $20,000 each; that these notes were received in full payment of the stock, based on the belief by the directors that Dorn was perfectly solvent. He is charged with $40,000 as the price of the stock, and credited by

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his two notes as cash for $40,000. The bank, through its president, then certified that no lien existed on the stock, to enable Dorn to raise money on the stock by placing it as a collateral with those of whom he obtained the money.

Armed with this certificate of stock, Dorn obtained from Emory & Sons $20,000, and left with them a part of his stock as security for its payment.

It is evident that Dorn was either borrowing this money for the bank or he was obtaining it to enable him to satisfy his debts to the bank. The directors say it was a sale of the stock and for a valuable consideration, and not intended to raise money for the bank. This they may have supposed, as they then had the greatest confidence in Dorn's ability to pay, but the manner of the sale to Dorn as evidenced by the resolution of the directors under which the alleged sale of the stock to Dorn was made and the subsequent disposition of the money negatives the idea that such was the purpose of the directors or Dorn when the alleged sale was made. The resolution passed by the board of directors is as follows:

"It was moved and carried that the president and cashier be authorized to issue to Mr. Julius Dorn four hundred shares of Traders' Bank and Warehouse Company stock in consideration of his two notes of $20,000 each, dated October 20th, 1871, payable respectively in five and six months, with the understanding that when certificates for said stock, equivalent in amount of either of said notes, are presented, that the said notes shall be surrendered to Julius Dorn. The purpose of this arrangement is to enable Mr. Dorn to borrow money on the deposit of said stock as collateral for the use of the Traders' Bank and Warehouse Company, which will take care to protect Mr. Dorn in the transaction." The money thus obtained was deposited by Dorn in the bank to his credit less the discount that was restored to Dorn. Whether the stock sold was to enable Dorn to pay his debt to the bank or for the purposes of the bank, it resorted to this means of raising the money, all of which was for the benefit of the bank. The resolution shows plainly the object in view. It was not a conditional sale of stock but a sale to Dorn to enable him to raise money for the bank, and in this the bank agreed to protect him. It is plainly written and the deposit made by Dorn with the discount returned to him, showing beyond doubt that Dorn was executing the original purpose of the resolution. Emory & Sons were either loaning this money to Dorn for the general use of the bank or loaning it to the bank to enable Dorn to discharge his indebtedness to it. Emory & Sons were, it is true, dealing with Dorn alone and were ignorant of the resolution when the loan was made, still this does not alter the liability of the bank. The loan was in fact for the benefit of the bank, and Emory & Sons became its creditor. The money arising from the pledge of this stock went into and formed a part of its assets.

The object of the resolution was "to enable Dorn to borrow money on the deposit of the stock as collateral for the use of the bank and warehouse company, and Dorn was to be fully protected in his acts." Dorn had the authority to raise greatly more than his indebtedness by reason of this stock. With what was supposed to be his financial standing, as the proof conduces clearly to establish, he could have raised as much as the entire stock sold him, by pledging it as a collateral, and such was manifestly the intention when the resolution was adopted.

The money of Emory & Sons went into the bank at the instance

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of its directors and for the purpose of increasing its assets or to enable its cashier, by the pledge of the stock of the bank, to meet his liabilities, and when the fact was discovered by Emory & Sons they sought to make the bank liable as its creditor, and the directors personally liable on the ground of fraud. They appeared in this action brought by the stockholders for a settlement and distribution of the bank's assets and had the right as creditors to priority over stockholders. If they had a remedy against the directors it was for their tort in permitting the stock of the bank to be transferred to them in such a manner. Their liability was several and not joint, and no implied contract arose between them and Emory & Sons to save them harmless by reason of the power conferred on the cashier of the bank. The action against them, if any existed, was purely in tort, and could not be joined in the suit by stockholders to settle the assets of the insolvent bank or by creditors to enforce their contracts. It is argued, however, that the cross-plaintiffs, Emory & Sons, had, after a full knowledge of the transaction, elected to proceed against Dorn or his estate for the payment of their debt and are now precluded from looking to the bank, the unknown principal, at the time the loan of the money was made to Dorn and the stock of the bank pledged.

The cross-action of Emory & Sons was pending against the bank when they presented Dorn's notes to his administrator in the settlement of Dorn's estate. Dorn had died, and the action being pending for a distribution of the assets of his estate between his creditors, the notes were presented and proven as claims, and the pro rata of a few cents on the dollar paid to and received by Emory & Sons.

The bank had filed the notes executed by Dorn for the stock pledged to Emory & Co. as claims against Dorn's estate, and the commissioner reporting that the stock was not, in fact, purchased by Dorn, but to raise money for the bank, the latter, or its assignee, withdrew the notes without prejudice to any claim that might therafter be asserted. That Dorn was liable to Emory & Sons is evident, and that the bank was also liable, after the discovery that it was the real principal is also plain. It was not, however, a joint liability, and Emory & Sons, after being in possession of all the facts, could abandon the right to claim against the bank and look alone to Dorn. The contract was either with the principal, so far as Emory & Sons were concerned, or with the agent, and both could not be made liable in a joint action. Dorn's estate was insolvent, and known to be such by the creditors when the claim of Emory & Sons was presented. The bank was also known to be insolvent, and the assets of both combined were insufficient to pay Emory's debt.

The actions to settle the affairs of the bank and Dorn's estate were in chancery and pending in the same court, with the cross-action of Emory & Sons pending in the bank case to make the bank liable. It is now insisted that the filing of the notes in the Dorn suit, and collecting the pro rata, was a conclusive election, on the part of Emory & Sons, to look to Dorn's estate for the money, and not to the bank. If such facts constitute, in law, an election, then the judgment below, dismissing the claim of Emory & Sons, was proper; but if the question is one of fact, by which the intent of the creditor to make the election is to be determined, then there was no such election as precluded Emory & Sons from looking to the bank for payment. That the plaintiffs in the cross petition had elected to sue the bank, and were prosecuting the claim when it was filed in the case of Dorn's estate against the bank, and continued to prosecute it, is conceded. The assets from Dorn's estate scarcely paid the cost

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of presenting the claim in order to obtain the pro rata, and under such circumstances it would be unreasonable to hold that it was an election to abandon the action of the principal and look alone to the agent. Story, in his work on Agency, says that while the creditor has his election to sue either in a distinct and separate action, the creditor is not precluded by such an election from maintaining another action against the party not sued unless he has, in the first action, obtained a complete satisfaction of his claim. (Story on Agency, section 295.)

While this doctrine in its broad statement is not sustained by the weight of authority, the genearl rule, as laid down by Wharton, is sustained by nealry all the authorities, and that is: "In order to relieve the principal, there must be something equivalent to an election not to charge the principal, and whether there is such an election is a question of fact, which is not determined by charging the agent after knowlege of the principal." (Wharton on Agency, section 472.)

The English rule is "that after the agent has been sued to judgment the right to resort to the principal is lost." (Priestly v. Fernie, 3 H. and C., 977.)

We think the undoubted rule is that if when the creditor discovers the principal, and with a full knowledge of the circumstances connected with the transaction, he then gives the sole credit to the agent, or proceeds to judgment against him, it is equivalent to an election to abandon all claim against the principal.

That such facts may exist as would preclude the creditor, as a matter of law, from proceeding against the principal, is not doubted, as in the case given, where the creditor, with a full knowledge of all the facts, should elect to sue the agent to judgment, nothing else appearing, the law would say that it was an election to look to the one sued, and an abandonment of all claim against the other.

In the case of Curtis v. Williamson, 10 Law Reports, Court of Queen's Bench, 57, where the goods were purchased in the name of Bowlton without disclosing his agency, the fact of the agency having been subsequently discovered the creditor, Bowlton, having filed a petition for the liquidation of his estate, enclosed his claim, to be filed for payment, properly proven. His attorneys, fearing that it might prejudice the claim against the principal, telegraphed to the commissioner not to file the affidavit, but the dispatch not being received in time, the claim was filed, but no money paid on it. After this was done proceedings were commenced against the principal, and the defense was, that the creditor had elected to proceed against the agent. The court held that it was no bar. "That the creditor had the right, within a reasonable time, to elect to proceed against the principal, and unless, in the meantime, with full knowledge as to who were the principals, and with the full power of choosing between them and the agent, they had dishonestly and unquestionably elected to treat the agent alone as their debtor," his right to proceed against the principal had not been lost. The court further said: "In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge." In Priestly v. Fernie, supra, where the party had sued the agent and obtained judgment, nothing else appearing, it was held that no action could be maintained against the principal.

In Calder v. Dobell, 6 Common Pleas British Law Reports, 486, the creditor had taken the note of the agent, where the name of the principal had been disclosed, and it was held that the parol circumstances under which the contract was made were

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admissibl , and the taking of the note from the agent did not necessarily amount to an election on the part of the plaintiffs to give credit to the agent only. In Paige v. Stone, reported in 10 Metcalf, Mass., 160, it was held that the taking of the note of the agent alone, under a knowledge of the circumstances, was a discharge of the principal. In Calder v. Dobell, parol evidence was admitted to explain the circumstances under which the note was taken, and the only question raised in that case was as to the admissibility of that character of testimony when attempting to charge the principal. No such question was raised or made in the case of Paige v. Stone, supra, that case having been decided on the want of authority by the agent to execute negotiable paper for the principal. The doctrine laid down in that case is, however, the correct rule. If the creditor, with a knowledge of the facts and the liability of the principal, sees proper to take the note of the agent, the principal is released. The creditor may give the exclusive credit to the one or the other, and in doing so, with a knowledge of all the facts, he must look to the one to whom he has given the credit. In Raymond v. Crown & Eagle Mills, 2 Met., Mass., 319, the creditor proceeded in the lower court against both the principal and the agent, and when it reached the Supreme Court the writ or proceeding was dismissed as to the agent.

The principal then agreed that as the creditor had continued to charge the agent after he knew the liability of the principal, it was an election to look to the agent, but the court held that the creditor might have erroneously supposed that he could charge both at the same time in the same action, and it was clealry open to any reasonable explanation, consistent with the purpose of relying on the liability of the principal at all times after their liability was discovered; that it was one of those cases where the party, intending to retain all his legal rights, was yet uncertain upon whom the legal responsibility might be fixed, etc.

In the case before us an election had been made and an action progressing, in which the creditors were seeking to make the principal liable, and the mere fact of the claim and allowance to them, in the distribution of the assets of the insolvent cashier, was not an abandonment of the action againt the bank. It would be unreasonable to hold, as a matter of law, under such a state of facts as exist in this case, that the right to pursue the principal was lost, and that Emory & Sons intended to look alone to Dorn's estate for their money.

The judgment below is, therefore, affirmed, except as to the complaint of Emory & Sons on their cross-petition. They are the creditors of the bank, and its assets and stock must pay their debt. Some of the stock was sold or transferred prior to the bringing of this cross-action. Other stockholders have their discharge in bankruptcy, and the names or number of stockholders require to contribute, if the assets on hand are not sufficient, is not ascertained by this opinion. The amount received by Emory & Sons from the sale of the stock, and from Dorn's estate, must be credited in their claim. The case is remanded on the cross-petition of Emory & Sons for proceedings consistent with this opinion.

Thompson v. Davenport, 9 B. & C., 78; United Society of Shakers v. Underwood, 9 Bush, 609; Dunn's Adm'r, &c. v. Kyle's Ex'or, &c., 14 Bush, 134.

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CAMPBELL v. CINCINNATI SOUTHERN R. R. CO.

(Filed January 10, 1888—Not to be reported.)

1. Practice—Where the case before the chancellor involves purely questions of fact his decision will be regarded by this court in the same light as the verdict of a properly instructed jury, and will not be reversed unless it is palpably against the weight of the evidence.

2. Contracts—A written contract between appellant, a contractor, and appellee, whereby appellant undertook to construct a part of appellee's road, provided that appellant should receive a certain sum for every mile the stone was hauled "by wagon." Held—That this does not entitle appellant to recover for the hauling of stone by rail and steamboats.

3. Same—Appellee's engineer had no power to contract with appellant as to the compensation appellant should receive for hauling stone, nor did he have the power to change or modify the written contract.

J. G. Carlisle and Paxton & Warrington for appellant.

Wm. Lindsay and C. B. Simrall for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

The appellant brought this action in the Kenton Chancery Court to recover of the appellees the sum of $231,451.78, with interest thereon, from May 14, 1876. The appellant alleged that this sum was due him as contractor on sections 2, 3 and 4 of division A of the Cincinnati Southern Railway. The appellant also alleged that the appellee's engineer's estimate of the work done by him in constructing the appellee's "railway was false, fraudulent and erroneous, both in quantity and classifications." He asked that the engineer's estimates be set aside and he be allowed pay for his work and labor according to the contract price. The material points of difference are:

First. The appellees estimate 124,944 cubic yards of earth excavation at twelve cents per cubic yard. The appellant claims that there were only 106,047 cubic yards of this work. Second. The appellees estimate 58,121 cubic yards of loose rock excavation, at forty cents per cubic yard. The appellant claims that there were only 41,775 cubic yards of this work. Third. The appellees estimate 1,450 cubic yards of solid rock excavation, at $1.25 per cubic yard. The appellant claims that there were 11,086 of this work. Fourth. The appellees estimate 415 cubic yards of excavation in water at $1 per cubic yard. The appellant claims that there were 2,010 cubic yards of this work. Fifth. The appellees estimate 177,137 cubic yards of embankment at twelve cents per cubic yard. The appellant claims that there were 203,143 cubic yards of this work. Sixth. The appellees allow, in their estimate, $9,133.52 for hauling stone. The appellant's claim $156,449.44 for this work. Seventh. The appellant claims that he excavated 52,225 cubic yards of hard pan at 75 cents per cubic yard. The appellees deny that he did this work. Eighth. The appellant also claims for extra work.

The lower court rendered judgment for the appellant for the sum of $28,726, with interest on $25,000 of this sum from the 19th of October, 1876, and interest on the remaining $3,726 from the 7th of July, 1869. The appellant has appealed to this court.

From the foregoing points of difference it will be seen that the appellant and appellees mainly differ about the classification of the material and the hauling of stone. It is to be observed that

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the points of difference relate exclusively to matters of fact, except the sixth point which involves a construction of one clause of the written contract made by the appellant and appellees.

This record contains over twelve hundred pages of printed evidence. All of this evidence relates to the questions of fact put in issue by the pleadings.

To attempt to give an analysis of the evidence in this opinion would extend it far beyond a reasonable length, and the result would at last be what we can express in a few words. Therefor, it is sufficient to say that the appellant sustains each of his contentions by such evidence as establishes, if uncontradicted, a prima facie case. On the other hand the appellees, by evidence equally as positive an apparently trustworthy, not only contracts the appellant's evidence, but establish each of their contentions. In this connection it is proper to remark that it devolved upon the appellant to make out his case by a preponderance of evidence.

This court, in the case of Cummings against the present appellees, 6 Ky. Law Rep., 441, which case is, in many respects, similar to this, decided that where the case before the chancellor involved purely questions of fact, the decision of the chancellor thereon must be regarded by this court in the same light as the verdict of a properly instructed jury, and the chancellor's decision would not be reversed unless it was palpably against the weight of the evidence. The appellant's contention here is not that there is no evidence to sustain the judgment of the lower court, but that the judgment is against the weight of the evidence. As just said, the burden was upon the appellant to make out his case. His evidence, if uncontradicted, establishes a prima facie case. On the other hand the appellees' evidence, if uncontradicted, establishes a prima facie case for them. The contentions of both appellant and appellees are sustained by positive and direct testimony. The testimony on the one side is positively irreconcilable with that on the other side. The chancellor having a better opportunity than this court to know the standing of the witnesses, and it being peculiarly within his province to weigh their evidence and give it such credence as, in the exercise of a sound and impartial judgment, he thought was due, this court can not reverse his decision, although we might come to a different conclusion as to the mere weight of the evidence. But before reversing we must be able to say that his findings are clearly against the weight of the evidence. This we can not do.

By the terms of the written contract the appellant was to receive, for hauling stone, seventy-five cents per cubic yard for every mile the stone was hauled by wagon, and a proportional rate for every fraction of a mile. The appellant claims $156.49.44 for extra haul of stone. The haul of this stone was by rail and steamboats. The appellant claims, first, that these means of transportation are within the meaning of the contract. To this proposition we can not agree: First, because the language "hauled by wagon" does not, in the common acceptation of the term, mean a transportation by rail or steamboats; second, in the original specifications, which were submitted to the appellant, the word "wagon" was not used, but the word wagon was written in the contract signed by the appellant. By the original specifications the appellant would have been entitled to pay for transporting stone by any kind of conveyance, but the word wagon was inserted in the contract as an expressed limitation, by which the appellees bound themselves to pay for the hauling of stone by wagon only.

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The attempt of the appellant to prove that by verbal contract with the appellees' engineer, he was to have the same price for hauling this stone, must fail for two reasons: First, his evidence is flatly contradicted, and the lower court passed upon it, and we see no reason for disturbing the decision; second, the engineer had no power to contract with the appellant in reference to that matter, nor did he have power to change or modify the written contract.

The judgment of the lower court is affirmed.

METCALFE v. BRAND.

(Filed November 29, 1887)

1. Trade-marks—A trade-mark may consist of a name or a device, or a peculiar arrangement of words, lines or figures, or any peculiar mark or symbol not theretofore in use, adopted and used by a manufacturer or a merchant for whom goods may be manufactured, to designate them as those which he manufactures or sells. It may be put either upon the article itself or its case, covering or wrapper, and is assignable with the business.

2. Same—While one who sells a product of a particular region of country can not appropriate the name of that region to indicate the article he sells, to the exclusion of others who produce or sell a similar product of the same region, yet a geographical name, as applied to a manufactured article, in connection with which the manufacturer was the first to use it, may acquire a secondary meaning, and thus become a valid trade-mark, but such a right will not be declared or protected unless clearly shown.

"In this case, in which the plaintiff claims the words 'Lexington Mustard' as a trade mark, and seeks to enjoin the defendant from using them to indicate mustard manufactured by him at Lexington, Ky., it is held that as it does not clearly appear whether the plaintiff's assignor or the defendant first began to use the word 'Lexington' in connection with the word 'mustard,' and ir was sometimes used by the plaintiff's assignor as an address, and sometimes as the name of the article, neither of the parties to the controversy will be allowed to appropriate the word 'Lexington' in and of itself to his exclusive use as a trade-mark, although if the plaintiff had acquired the right to the use of the word he would be allowed to continue its use to the exclusion of the defendant, although he now manufactures his mustard in Louisville, while the defendant's is manufactured in Lexington.

2. Imitation of label—Every manufacturer has a right to indicate his goods in some way, as by a particular label or wrapper, and he is as much entitled to be protected in the use of a particular label or wrapper as in the use of a trade mark. Therefore, if a label, which has been adopted and is in use by a manufacturer to indicate his goods, be substantially imitated, and the imitation is so essentially like it that persons of ordinary observation and the unsuspecting public are likely to be deceived, it is sufficient to authorize equitable intervention.

Appellee and appellant were both manufacturers of mustard in Lexington, Ky. Appellant began the manufacture many years after appellee and those through whom he claims commenced the business. After appellant had been in business several years appellee moved his business to Louisville, Ky., and soon thereafter appellant commenced to use a blue label upon his cans similar in size, form and color to the label which had long been in use by appellee upon cans of the same size and shape; the letters used upon the two labels are of the same color and strikingly alike in size; the directions for use are the same, and the words of caution, although unusual, nearly resemble. In addition, the tops of the cans are fastened with a strip of cloth similar in color to that used by appellant for the same purpose. In this action by appellee against appellant to enjoin the imitation, Held—That ap-

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pellant was properly enjoined from packing, labeling or making his mustard with any colorable imitation of appellee's blue label, and also from using the words of caution thereon.

4. Pleading—If there was a defect of parties plaintiff, it was shown by the petition, and, therefore, as there was no demurrer upon this ground, the objection was waived.

Z. Gibbons and R. W. Woolley for appellant.

Beattie & Winchester and Simrall & Bodley for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

This case presents some interesting and rather novel trade-mark questions.

As early as 1810 one Burrowes began to make, by a secret process, a particular kind of mustard at Lexington, Ky. It soon became noted for its excellence, and widely known as "Burrows' Lexington Mustard," or, more commonly, as "Lexington Mustard."

By this name it was quoted in the market, and soon had an extensive sale at a high price. It was put up in round tin cans of different sizes, with a label upon each of this character in size, color, letters, words and other indicia:

Burrowes continued to manufacture and put it upon the market in this form, and thus labeled, for nearly or perhaps quite thirty years, and until his death, or near it, in or near 1841, when his wife succeeded to the business, and carried it on in the same way for several years, and until it was transferred to her son,

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Samuel D. McCullough. He appears at first to have continued the use of the same label, but subsequently used a different one, of the following character, and in which the word "Lexington" is similarly used, save as to place:

[Blue background and white letters.]

SAM'L D. McCULLOUGH,

sole manufacturer of

BURROWES MUSTARD,

Lexington, Ky.

All other brands purporting to be
"Lexington Mustard," or the same
as made at Lexingotn, Ky.,
are wicked counterfeits.

He continued the business until 1869, when he sold out to the firm of Yates & Dudley, and they carried it on until July, 1877, when they transferred it to the appellee, J. H. Brand. While conducted by them they used upon their packages this label:

[Blue background and white letters.]

YATES & DUDLEY,

successors to S. D. McCullough,

sole manufacturers of

BURROWES MUSTARD,

Lexington, Ky.

Keep it dry and cool. Mix with nothing but cold water into a thin batter one hour before using on the table.

All other brands, purporting to be
"Lexington Mustard," or the
same as made at Lexington, Ky.
are wicked counterfeits.

They also used another label, different in color and other respects, upon which were these words, inter alia: "Burrowes Celebrated Lexington Mustard. Manufactured by Yates & Dudley, Lexington, Ky." They advertised it as "Burrowes' Lexington, Ky., Mustard," and appear to have branded some of their cans "Burrowes Lexington Mustard." Their contract of sale with the appellee, Brand, dated July 12, 1877, speaks of it as "Burrowes Lexington, Ky., Mustard." It had been manufactured during all this time in the same building, probably, and certainly in the same locality, and Brand continued to so make it from about the first of August, 1877, until September following, when he associated one Osborne with him, and removed the business to Louisville, Ky., where it was conducted under the firm name of John H. Brand & Co. They used two lables upon their cans or packages, the following being that known as their blue label, and which was used upon the round cans:

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[Blue background and white letters.]

JNO. H. BRAND & CO.

Louisville, Ky.

successors to Yates & Dudley.

sole manufacturers of

BURROWES LEXINGTON MUSTARD.

Keep it dry and cool. Mix with nothing but cold water into a thin batter one hour before using on the table.

All other brands, purporting to be "Lexington Mustard," or the same as was made by Burrowes at Lexington, Ky. are wicked counterfeits.

The ground color of the other was yellow, with various devices and words upon it, among them being "Burrowes Celebrated Lexington Mustard," and it was used upon the square cans.

They subsequently also used the following label, which, as will be seen, is almost identical with that used by Burrowes:

and also by printed placards advertised their manufacture as "Burrowes Lexington Mustard." So far as shown, however, all of the labels and advertisements used after the removal to Louisville showed upon their face that the firm was located there. The tin cans used in putting up the mustard were round, with

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flat tops, around which were pasted, in order to more securely fasten them, strips of light-red or brownish cotton cloth.

The appellant, Metcalfe, began to make mustard at Lexington about 1873, and has so continued ever since. Some two or three years before Yates & Dudley sold out, he used a blue label, but upon his square cans only, and it was, according to his own testimony, quite different and easily distinguishable from the blue one used by them, and that subsequently used by the appellee, Brand. It is not exhibited in the record, but Metcalf testifies, without contradiction, that it contained the words, "H. C. Metcalf's Improved Lexington, Kentucky, Mustard."

In November, 1877, he, for the first time, began to use upon his round tin cans, corresponding in size and shape with those then in use by the appellee, Brand, both the following lable, and a strip of cloth similar in all respects to that then employed by Brand:

[Blue blackground and white letters.]

H. C. METCALFE'S

LEXINGTON, KENTUCKY,
MUSTARD.

Keep it dry and cool. Mix with nothing but cold water into a thin batter one hour before using on the table.

All other brands, purporting to be
"Lexington Mustard," or the
same as made at Lexington, Ky.,
are wicked counterfeits.

He also in December, 1878, moved his manufactory into the same building where the Burrowes Mustard had formerly been made.

The lower court held that the appellee, Brand, had an exclusive right to use the words, "Burrowes Lexington Mustard;" that the appellant, Metcalfe, had the right to use the words, "H. C. Metcalfe's Lexington, Kentucky, Mustard," but that his package, with the strip of light red cloth around its top, and the blue label upon it, was an illegal imitation of Brand's package, and he was enjoined from using it, and from packing, labeling or marking his mustard with any colorable imitation of Brand's blue label, and also from using the words of caution on his (Metcalfe's) label from the end of the first line and after the word "be," to the word, "made," on the third line. He now by this appeal complains of this injunction.

The court below declined to decide whether Metcalfe could use the words, "Lexington Mustard" or "Lexington, Kentucky, Mustard" without being preceded by his name, but decided that he might use the round tin can or cotton strips to bind the top, or a paper lable, provided they were not so combined as to colorably imitate Brand's package. The appellee, Brand, by a cross-appeal, also complains, insisting that he has an exclusive right to the use of the word, "Lexington," as a trade-mark, in connection with the word, "mustard," and its manufacture.

These complaints, therefore, present two questions: First, has the appellee, Brand, an exclusive right to the use of the word, "Lexington," as the name or part of the same of his mustard? Second, has the appellant, Metcalfe, wrongfully and so far imitated, by label or otherwise, the article manufactured and offered for sale to the public by Brand as to authorize equitable interference?

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The law as to trade-marks is by no means ancient. It is one of the results of multiplied invention and modern commercial growth. Especially is the doctrine of equitable intervention for their protection of recent origin. The right to sue for their improper use doubtless arose originally from the common law right to maintain an action for a false representation, and as the wrong was calculated to work an injury, not only to the purchaser, but to the maker or manufacturer of the article, right of action at common law was given to the latter in such a case. Then the common law advanced another step. It was held, although the original purchaser was not deceived, but knew who was the real manufacturer, yet if the trade-mark was put upon the article in order to deceive a future purchaser, and cause the public to believe that it was the manufacture of the person to whom the trade-mark in fact belonged, then this entitled him to sue, because it was equally a deception. Next the courts of equity—æquitas supplet legem—declared that, although a person had honestly purchased goods from one maker with the trade-mark of another upon them, or had manufactured them to order, not knowing that he was wrongfully putting the trade-mark of another upon them, yet he could not put them upon the market, because it would both injure the true owner of the trade-mark and deceive the public. Thus gradually the law extended its protecting arm until the right of the first user to what is known as a trade-mark was recognized, the underlying principle being that one person shall not be permitted to sell his goods as those of another, or use the means likely to lead thereto, thus not only injuring such other person but deceiving the public.

It will aid us in the consideration of this case to first see, under the rule of stare decisis, what principles of this branch of the law are to be regarded as settled. It is somewhat difficult to give a concise definition of a trade-mark. It may consist, however, of a name or a device, or a peculiar arrangement of words, lines or figures or indeed any peculiar mark or smybol, not theretofore in use, adopted and used by a manufacturer or a merchant for whom goods may be manufactured to designate them as those which he manufactures or sells. It may be put either upon the article itself or its case, covering or wrapper, and is assignable with the business. The term can not be properly applied to a mere label. It, however, may contain one. It may be the vehicle or embodyment of it. The object is to show the origin of the article. The general rule is against the use of mere words as a trade-mark. An exception to this, however, is where they indicate origin, ownership or the maker. If they are of common use, indicating merely kind or quality, as, for instance, "superfine" or "first quality," or are merely descriptive of the nature of the article, or of a generic character, as "hemp" or "cotton," then they can not be so appropriated. (Amoskeag M'f'g. Co. v. Spear, 2 Sanford's Sup. Court Rep., 599; Boardman v. Meriden Brittania Co., 35 Conn., 402; Hembold v. Hembold M'f'g Co., 17 Am. Law Reg. (N. S.), 169; Manufacturing Co. v. Trainer, 101 U. S., 51.)

Such words are the common property of all men. They may be used truthfully by one man without infringing upon another's right or creating a possibility of the public being thereby deceived. Thus the word "hemp" is a generic one, embracing the hemp of every man. The mark, "A No. 1," upon a firkin of butter is a common one, indicating its quality. A trade-mark must be specific. It must mark the goods of the manufacturer as his goods, and not as his in common with all other persons.

Keeping in mind the above rules, which we think will be con-

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ceded as now settled, we, in the light of them, proceed to the consideration of a question which is by no means beyond dispute. It is, can a person under any circumstances acquire a trade-mark right in the name of a place when associated with the name of the article manufactured by him? In other words, could the appellee, Brand, acquire an exclusive right to use the word "Lexington" as part of the name of his mustard? It is clear that prior use by him is essential to such a claim. (Manufacturing Co. v. Trainer, supra.)

If he had acquired such right, then he could continue to use it after the removal of his manufactory to Louisville, provided he did so without fraud. Equity will not protect a trade-mark that expresses a falsehood as against one which expresses a truth. To do so would sanction a fraud. (Hembold v. Hembold M'f'g Co., supra.)

It, however, appears that the appellee's package of mustard, put up after the removal, always located the firm in Louisville. If a geographical name be used as such it can not be protected as a trade-mark. Clearly all persons living in a town or city may use its name as an address, and of course many persons may make the same article in the same town, and show that it is so manufactured by having the name of the place stamped upon it or printed upon the label or covering, as their address or place of business. Otherwise, monopolies, which are destructive of individual right and public interest, would be created and fostered.

The right of one person to appropriate the name of a region of country to the exclusion of others, who produce or sell a similar product of the same region, may be regarded as settled by the Supreme Court in Canal Company v. Clark, 13 Wall. 311, commonly known as the "Lackawanna Coal Case." Lackawanna is the name of a considerable region of country. Lackawanna coal is a natural product of that region, and the name was descriptive of the general character or quality of the product. It not only indicated the place from whence the coal came but the general quality of the article. Being generic and thus descriptive, it was held that each of the constestants had a right to call his coal "Lackawanna coal," but this case can not be regarded as holding that the name of a place can, under no circumstances, become a trade-mark.

The general qualities of a natural product are indicated by the name of the region from whence it comes. All have a right to sell it, and in doing so to call it by the name of the section where it is produced or from whence it originally came, as that in effect descibes the article. Such a name indicates the quality and not the producer or the ownership. All may use it with equal truth. It is not like a sale of one man's goods as those of another. There is no invasion of a man's business reputation, and no imposition practiced upon the public.

For these reasons such phrases as "Sea Island cotton," "Hungarian grass," "Kentucky hemp," or "Virginia tobacco," will not be protected as trade-marks.

This is not so, however, of a manufactured article. The name of the place where it is made serves in no possible way to indicate its quality or composition, and where the manufacturer has given it a geographical name, which he was the first to use in connection with the article, it seems to us that it may, from long use in such connection, acquire a secondary meaning, and instead of designating the place where the article is made indicate its origin, or that it is the product of a particular manufacturer, or made according to his method. When this is the case it becomes, in our opinion, a valid trade-mark. It then designates

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the particular goods of this one man. The public so understand it, and this is the aim and end of a trade-mark. The name is no longer used to indicate the place where they are made, but becomes the name of his goods. It gives notice that he is the maker. It, by reason of first and continued use, and association with the name of the article made or sold by him, acquires an understood reference to him. It is the trade denomination of his article. It acquires a secondary meaning in connection with a particular manufacture.

Thus we will suppose that John Doe has, for years, made at Mt. Sterling, Ky., a revolving book-case, which he has called, during all that time, "The Mt. Sterling Rovolving Book-case," the materials out of which he constructs it come from different places; no one else has made such a case there or used this name, and it does not express in any way the quality of the article, save as referring to Doe as the maker. The public, when they ask in the market for the "Mt. Sterling Revolving Book-case, "understand that it is the one manufactured by him. The name "Mt. Sterling," as used in this connection, and under such circumstances, indicates the particular book-case of this one man. His skill has given it excellence and reputation in the market, and justice to him, as well as the protection of the public, require that its name should be protected as a trade-mark. It will create no monopoly. Upon the contrary, it will serve to stimulate invention and competition. It will not hinder Richard Roe or others from making the same article at the same place, and using the name of the place merely geographically, or to show their place of business, or as their address, but they must not use it as the name of their book-case.

Indeed, unless they aim to deceive the public, they would not desire to so use it. If their article is as good or better than that of Doe, there would be no incentive to do so. It will not do to say, in such a case, that as Roes manufactory is at Mt. Sterling, that, therefore, he, a new comer, may give his book-case the same name as Does, because equity will not enjoin against telling the truth. It is done for deceit, and when so done it can not be said, in a true sense, that it is done truthfully. It is at best but a nominal truth, amounting to a deception. There is really a false representation which equity, from a sense of common justice, will enjoin. A person's name may be a trade-mark, as "Decker Brothers" upon pianos. There may be other brothers of the same name, and they could, in a certain sense, truthfully use the same name upon pianos which they might, subsequently, begin to manufacture, and a man can not be deprived of the right to use his own name, but, in such a case, he must use it as his own name, and not as the name of his goods. Each case must, of course, turn upon its own particular circumstances.

'Browne, on the Law of Trade-marks, section 192, says: "A word may be considered to be geographical or not, according to the cicumstances of the case," and evidently a distinction should be drawn between the use of a geographical name, indicating the particular manufacture of a certain person, and its use in describing a natural product of a particluar locality, possessing qualities depending upon the place. The above view, we think, is supported by both reason and authority. We shall refer to but few cases, although many have been examined.

In the Anatolia Licorice case, 10 Jurist (N. S.), 550, the complainants were manufacturers of a new character of licorice out of materials obtained from different places, upon which they

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stamped the name "Anatolia." The name as used was held to be a trade-mark.

Mr. Browne. in speaking of this case, says:

"This is a recognition of the doctrine that a geographical name may cease to be merely such, and acquire a new function as an arbitrary symbol." (Browne's Law of Trade-marks, section 184.)

The Glenfield Starch Case (5 E. and I. Appeals, 508), appears to have been well considered. There the plaintiffs, as in this case, were the assignees of the business, and had removed their manufactory from the little village of Glenfield to Paisley, but still continued to use the word "Glenfield" upon their starch.

The defendant, residing at Glenfield, and doing business in the very house previously used by the plaintiffs, began to make what he termed upon his labels "Glenfield Starch." He was enjoined from so using the name. (Siegart v. Findlater, L. R., 7 Chan., 801, is to the same effect.)

The opinions in Newman v. Alford, 51 N. Y., 189, and Lea v. Wolf, 15 Abb. Pr. (N. S.), 1, appears to have been based mostly upon an intended fraud, but where a trade-mark is infringed the false representation, either directly or indirectly made, is really the essence of the wrong.

The Moline Plow Case (Candee, Swan & Co. v. Deere & Co., 54 Ill., 439), and that of the Brooklyn White Lead Company (25 Barb., 416), do not, when closely examined, raise any conflict. In the one the word "Moline" was used as an address, while in the other the complainant was not the first user of the word "Brooklyn."

In the case now in hand, however, there is a conflict of testimony as to the prior use of the word "Lexington" in connection with the word "mustard." The labels of Burrowes show that he used it as an address. There is evidence tending to show that both McCullough and Yates & Dudley used it both ways. One of their labels indicates its use as a part of the name of their article, while another shows it as an address merely. There was, at most, no uniformity as to its use by them.

It is shown that Metcalfe used it in connection with the word "mustard" upon a former lable of his, and while Yates & Dudley were engaged in the business, but the exact time when he began to do so does not appear further than that it was two or three years before they sold to Brand. The evidence that either Metcalfe or Yates & Dudley used it with any uniformity as a distinctive part of the name of their articles is not of a satisfactory character.

This uncertain use, whether as an address or as the name of the article, together with the doubt necessarily arising therefrom as to the prior use in the last named way, forbid either party to this controversy from appropriating the word "Lexington" in and of itself to his exclusive use as a trade-mark.

It was settled by the leading case of Amoskeag Company v. Spear, supra, and a line of cases following it, that such a right will not be declared or protected unless clearly shown, and in the Moline Plow case it was said: "The mark must be so clear and well defined as to give notice to others, and must not be deviated from at the suggestion of whim or caprice.."

This rule does not, of course, interfere with the right of the same person to two different trade-marks, but if he seeks to appropriate one to himslef he must do it by no uncertain use.

The question whether the appellant, Metcalfe, has so far imitated the packages of the appellee, Brand, as to entitle the latter to protection from a court of equity, remains to be considered.

Every manufacturer has a right to indicate his goods in some

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way, as by a particular label or wrapper. The law gives this right not only to secure to him the just reward of his skill and enterprise, but to protect the public from imposition and fraud. This is the basis of all legal interference in the trade-mark cases, and upon principle a person is as much entitled to be protected in the use of a particular lable as in the use of a trade-mark. If one uses the lable of another or a colorable imitation thereof it is a false representation, done for the purpose of imposing his goods upon the public as those of his rival in trade, thereby injuring the one and defrauding the other. Equity will not permit the use of means that are calculated to deceive and to divest another of his right. It will not permit A to sell his goods as those of B, or use means contributing to this end, and in preventing him from doing so it protects both, upon the ground of protection to A's right and the public interest. The simulation need not be exact. The label or covering need not be copied with slight changes even. If it be substantially imitated and so essentially alied that persons of ordinary observation and the unsuspecting public are likely to be deceived it, is sufficient to authorize equitable intervention. There need be no mala mens toward the first purchaser of the imitation article. The simulation may enable him to retail it as the genuine article, but at a lower price, and thus injure the manufacturer and delude the public. Here again each case must depend upon its own circumstances.

How is it in this one? We have before us the two round tin cans of the same size. The tops of each are fastened with a strip of similar colored cloth. One has upon it the blue lable of Brand, and the other the blue lable of Mectalfe. A glance is sufficient to satisfy one of the resemblance of the two packages, it is so striking. We would disbelieve the evidence of our senses if we were to doubt that the one is an imitation of the other. As to the labels the size is the same; the ground color is the same; each has a white border; the letters are of the same color and strikingly alike in size; the directions for use are the same and the words of caution, although odd, nearly resemble. It is noticeable that the label of the appellee grealty resembles the blue label of both McCullough and Yates & Dudley. He began using it in the latter part of September or first of October, 1877. He moved to Louisville that fall, and then and in November, 1877, Metcalfe began, for the first time, to use this blue label, the cautionary words upon it and the strip of cloth. He had formerly used a different blue label, but even it upon square cans only. It is impossible to account for all this imitation, so complete in form and detail; so likely to deceive, save upon the theory that the purpose was to obtain the benefit of the reputaiton of the appellees' mustard. It could hardly have been accidental. One can not be allowed to sail under a piratical flag. Even if there was no intentional fraud, yet the simulation is such as is quite likley to deceive customers as to an article now on sale, and the impending or further actual injury to the appellee should be checked by injunction. (Burke v. Cassin, 45 Cal., 467; Partridge v. Menck, 2 Sandford's Chan., 622.)

It is one of the principal offices of equity to prevent injury and imposition. Therefore, even if the imitation was unintentional, yet be colorable, and of such a character that a majority of persons would never notice the differene, its use will be enjoined. Otherwise the purchaser would have imposed upon him a spurious article and the maker of the genuine be deprived of the profit, which he has labored for years to realize. A person may, of course, use any color or words in common use or other indicia

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upon his label or in connection with his goods, but fair competition and common honesty require him to so use them as not to imitate those of another. Any other rule would but sanction fraud and deceit.

If there was a defect of parties plaintiff by the non-joinder of Osborne it was shown by the petition. There was no demurrer upon this ground, and, therefore, under section 92 of the Civil Code, it was wa ved.

Judgment affirmed, upon both the original and cross-appeal.

KENTUCKY SUPERIOR COURT.

KENNON v. TOLLE.

(Filed February 15, 1888.)

1. Statute of frauds—Promise to pay another's debt—When goods are sold to one person upon the faith of another's promise to pay for them, and credit is given to such other person alone, it is not necessary that his promise should be in writing in order to bind him. And in this State he is bound, even though the person to whom the goods are sold be jointly liable with him for the debt.

2. Same—That the plaintiff charged the accounts upon his books to the person to whom the goods were furnished is not conclusive that he looked to them for pay; it is a circumstance susceptible of explanation.

3. Same—Pleading—As the petition shows that the goods were sold and delivered upon the faith of the defendant's promise and the credit given to him alone, the averment in the petition that the goods were sold and delivered to another can not be taken as an averment that such other person was the debtor of the plaintiff. In construing a pleading the whole instrument must be considered.

Wall & Worthington for appellant.

Cochran & Son for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barbour.

This is an action for the price of goods furnished and delivered by the appellee to Wallace and George Nelson on the credit of the appellant.

The evidence for the plaintiff shows that the defendant, before any of the goods were furnished or delivered, came to the plaintiff's store and told him to furnish Wallace and George Nelson, who were defendant's tenants, with supplies to enable them to raise their crops, and that he would be responsible to him for what they got. The plainitff agreed to furnish the goods, and the defendant having an individual account with the plaintiff requested him to keep separate accounts with the Nelsons, and, in accordance with that request, the plaintiff charged the Nelsons separately with what each got. The plaintiff says he furnished the goods sued for upon the credit of the defendant alone and looked alone to him for payment—that he had no contract or bargain with either of the Nelsons, and did not look to either of them for pay. The appellant's counsel insists that this promise was only a collateral undertaking upon his part to pay the debt of the Nelsons, and as it was not in writing the action can not

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be supported by it. Counsel cites many cases to the effect that if the person for whose use the goods are furnished be at all liable, any promise by a third person to pay therefor must be in writing, and that this rule applies both where the promise was made when or before the goods were sold and where the promise was made after. It must be admitted that the weight of authority outside of this State sustains this position. On the other hand there is quite an array of respectable authority holding that where the promissor assumes to be the paymaster, and thus makes himslef directly and unconditionally, although jointly liable for the debt, the statute is inapplicable. And the latter rule is the one adopted in this State in Leisman v. Otto, 1 Bush, 226.

This latter case has never been overruled, or, in any subsequent case, doubted, and if the question was before us we would be compelled to regard it as controlling and conclusive authority upon the points decided. But this case does not come within the class discussed in the authorities referred to. The plaintiff's theory was that the goods were sold upon the faith of the defendant's promise, and the credit was given to him alone, and it was only upon this hypothesis that the court, in its instructions, permitted him to recover.

If the goods were delivered to the Nelsons upon the faith of the defendant's promise to pay for them and the credit was given to him, and he alone was looked to for payment, it goes without argument that the case was not within the statute, which provides "that no action shall be brought to charge any person upon a promise to recover for the debt, default or misdoing of another." His undertaking is all original, not a collateral undertaking. The debt which he promised to pay is his debt.

As far back as Birkmyer v. Darnell, reported in Smith's Leading Cases, the court said: "If two come to a shop, and one buys, and the other, to gain credit, promises the seller, if he does not pay you I will, this is a collateral undertaking and void without writing by the Statute of Frauds. But if he says, let him have the goods, I will be your paymaster, or, I will see you paid, this is an undertaking for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." The correctness of the latter proposition has never since been doubted.

Whether the credit was given alone to the defendant and he alone held liable, were questions of fact for the jury. That the plaintiff charged the accounts upon his books to the Nelsons is not conclusive that he looked to them for pay, it might be a circumstance tending strongly to show that fact, yet it was susceptible of explanation.

These were all questions of fact which it was the province of the jury to determine, and upon this record we can not disturb their finding as against the weight of the evidence.

While the petition allges that the goods were sold and delivered to the Nelsons, this, in connection with the other allegations of the petition, can not be taken as an averment that the Nelsons were debtors of the plaintiff. In construing a pleading, as well as other writings, the whole instrument must be considered. The petition shows that the goods were sold and delivered upon the faith of the defendant's promise, and the credit given to him alone.

Perceiving no error to the prejudice of the appellant, the judgment must be affirmed, with damages.

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SUPERIOR COURT ABSTRACTS.

SMITH v. MITCHELL.

Filed February 1, 1888. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Sheriffs—Lien and sale for taxes—While it is the duty of the sheriff in levying on property for taxes, before levying on the real estate of the delinquent, first to exhaust his personal property, still, until collected, the lien stands upon all the property, and if, at the time the levy is made or the lien sought to be enforced, all the personalty has been disposed of, the delinquent taxpayer can not complain that the personalty was not taken before it was disposed of, or demand that it shall be pursued and subjected in the hands of an innocent purchaser to the relief of his real estate.

At a sale by a receiver of property, both real and personal, which belonged to a firm of which C. was a member, the property was purchased by C., who knew that there were taxes due and unpaid, which were a lien upon all the property. C. executed sale bonds for the purchase price, with M. as his surety. M., who afterwards purchased the realty with actual notice that a lien existed on it for the taxes, now insists that the realty shall not be subjected, although he knew when he purchased that C. had bought the personalty, and was enabled by his becoming surety to take and dispose of it. Held—That the realty is subject to levy and sale for the taxes.

2. Arbitration and award—There being a controversy between appellant and appellee as to whether appellant had a lien upon certain realty, the question was submitted to an arbitrator, each party agreeing to be bound by his award. The arbitrator, after hearing the evidence and argument of counsel for each party, determined that the lien existed. The award was in writing, and a copy of it delivered to appellee. Held—That the award is good as a common-law award, and is conclusive as to the existence of the lien, which should be enforced.

Wright & McElroy for appellant; John M. Galloway and Wilkins & Sims for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. GEIKEL.

Filed February 1, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroad—Damages from smoke, etc.—An individual owning property adjacent to a railroad may recover of a railroad company damages occasioned by having smoke, cinders and fire from passing engines thrown or blown into or against his house, but the ordinary noise of moving trains is not an element of damage in such an action.

2. Same—In such an action the plaintiff alleges, in addition to the blowing of smoke and cinders upon his property by passing trains, that the approach to the bridge in front of his property is very steep, "and is a purpresture in the street, and greatly damages his property." It appears that there is an unusual amount of smoke and cinders thrown upon his premises, in consequence of the extra or unusual engine force required by the steepness of the approach to the bridge, but the plaintiff does not in his petition claim damages on this account. It does not appear that the track or trestle obstructs the plaintiff in the free use of the street. Held—That he is not entitled to recover damages on account of the manner in which the roadbed or trestle was constructed.

3. Same—In estimating the damages in such an action the jury should ascertain the value of the property just before it became generally known that the defendant's road was to be located in front of it, and then determine what proportion of that value was taken from the property in conse-

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quence of the smoke and cinders being thrown or blown against it by the passing trains.

Yeaman & Lockett for appellant; M. Merritt and Ball & Dorsey for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. REUTLINGER.

Filed February 1, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, reversing.

Railroads—Evidence—In addition to the points decided in the foregoing case of L. & N. Railroad Co. v. Geikel, the court holds it was error to allow witnesses to testify as to the effect of the smoke, etc., upon their property, which was situated in the neighborhood of the plaintiff's property, as such evidence could have no bearing upon the question as to the damage sustained by the plaintiff.

Yeaman & Lockett for appellant; M. Merritt and Ball & Dorsey for appellee.

SCHNEIDER, &c. v. HESSE, &c.

Filed February 1, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, dismissing.

1. This court will take judicial notice of its own records so far as they pertain to the case under consideration. The court, therefore, judicially knows that the judgment appealed from in this case was affirmed upon a former appeal, to which all the parties to this appeal were parties, and that judgment is, therefore, a bar to the prosecution of this appeal.

2. Bills of exceptions—Even if the fact that the record on the former appeal was filed by the appellee, and was not complete by reason of the omission of what purports to be a bystander's bill of exceptions, which is embraced in this record, would authorize the prosecution of this appeal, the so-called bill of exceptions can not be considered, as it is not attested by the affidavits of two bystanders. The affidavit of one of the jury, even if he could be regarded as a bystander, is not of itself sufficient. Nor are the affidavits of one of the plaintiffs and his attorney sufficient, as a "bystander" is one who has no concern with the business transacting. Nor, again, do the affidavits of witnesses, relating alone to their own testimony, each one speaking merely of his own evidence, satisfy the requirements of the Code.

D. M. Rdoman for appellant; Kohn & Barker for appellee.

ADAMS EXPRESS CO. v. HOEING.

Filed February 1, 1888. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Common carriers—Contracts limiting liability—While a common carrier may, by special contract, limit his common law liability, he can not stipulate for exemption from the consequences of his own negligence.

A contract by an express company with a shipper, whereby it recognizes its liability to pay for the goods in every event that it would be liable by the principles of the common law, but simply restricts that liability to an agreed valuation, is valid, and will be enforced, but a contract exempting the carrier from all liability except for its gross negligence or fraud, and even then limiting its liability to a certain amount, is against public policy and void, and although the shipper has agreed to such terms and shipped under them, he may entirely disregard them and recover the full value of the goods if lost by the negligence of the carrier.

2. Same—The shipper under such a contract is not estopped from claiming that the goods were of greater value than the amount to which the carrier attempted to limit its liability, no questions having been asked him as to value, and the carrier having failed to notify him that if it was his desire that the company's liability should be for a greater sum, he must fix the sum and pay increased charges, the receipt executed to the shipper containing no such notice.

3. Same—Where no fact appears from which fraud or imposition upon the

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part of the shipper could be inferred, the package not being packed other than one of its value or character should have been packed, the shipper is entitled to recover its full value, no question having been asked as to value, and there being no valid contract limiting the amount of recovery.

4. Measure of damages—Where the goods lost have no market value, the measure of damages is their actual value separated from any inconvenience resulting from the loss. And where the thing lost has an actual value as part of a work and its loss must be supplied, the measure of value is the cost of supplying it, which, nothing else appearing, is the cost of its production.

In this case the property lost consisted of maps prepared for the geological survey. The evidence shows that it took two and one-half months to make them. They had no market value. The testimony of witnesses is that they were worth $300, which the court found to be their value. Held—That the evidence sustains the finding as to the value. The court has judicial knowledge that such work could only be performed by skilled labor, and it does not seem to the court that $120 per month is more than the value of such labor.

Breckinridge & Shelby for appellant; D. G. Falconer for appellee.

NANNY'S ADM'RS v. PAYNE'S EX'TX.

Filed February 1, 1888. Appeal from Warren Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Committee of lunatic—Bond—Limitation—One of the distributees of the estate of N. being a lunatic, a committee was appointed for her by the county court, and the administrators of N.'s estate paid to the committee the amount found due the lunatic upon a settlement of their intestate estate. The lunatic having died, her administrator brought suit against the administrators of N. to recover the amount due by them to his intestate, alleging that the appointment of the committee by the county court was void, and that the payment to the committee thus appointed was unauthorized. The defendants filed their answer, making it a cross petition against the committee and his surety in the bond executed in the county court, and asking judgment against them in the event they, the administrators of N., should be held liable. The surety pleaded limitation. The court rendered judgment against the administrators, but dismissed their cross petition against the surety of the committee. The administrators appeal. Held—

1. The county court had no jurisdiction to appoint the committee, and his appointment was, therefore, void, and the payment made to him by the administrators of N. affords them no protection.

2. Even admitting that the bond executed by the committee is good as a common-law bond, the right of appellants to sue thereon accrued upon the making of the payment by them to the principal in the bond, as they were not obliged to rest upon the consequences of the mistake until they were made to pay the distributee. The action on the bond is, therefore, barred by limitation, more than seven years having elapsed after the cause of action accrued before the bringing of suit

3. Even if it be admitted that the appellants would not be barred of a right of action against the surety in the committee's bond until the lunatic was also barred, there is no fact pleaded to show that the action was not barred as to her. The exception in favor of a lunatic in section 2 of article 4, chapter 71, General Statutes, does not apply to an action against sureties referred to in section 4 of article 6 of that chapter.

Rodes, Settle & Rodes and Edward W. Hines for appellants; John E. DuBose for appellee.

MATTINGLY v. SPALDING & MATTINGLY.

Filed February 1, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Contracts—A. having agreed to pay B. the cost of pasturing cattle, C.

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agreeing to pay A. what he had to pay B., it was A.'s duty to pay B., and that he did not do so, but suffered himself to be sued. is no reason why he should recover of C. the cost thus incurred.

2. Same—Instructions—In this action to recover cost of pasturing cattle it is admitted that by the contract, as originally made, the defendant agreed to furnish slop for plaintiffs' cattle until the 1st of June. The plaintiffs claim that because this contract had been violated, defendant agreed to give them the slop through June, and that in consideration of being released from this last agreement, defendant agreed to pay pasturage on the cattle. Defendant claims that he performed the original contract, and denies the promise to furnish slop through June, and alleges that his promise to pay pasturage was, therefore, without consideration Under this evidence the court instructed the jury to find for plaintiffs if, on account of any agreement for an extension of time to furnish slop, which defendant failed to furnish, defendant agreed to pay the pasturage of the cattle. Held—That this instruction was erroneous, and that the court should have instructed the jury that if plaintiffs claimed there was a failure to furnish slop under the first contract to June 1, and that by reason of such failure they had sustained damages, and defendant recognized such a claim, and in settlement thereof agreed to extend the time and furnish slop for plaintiffs' cattle through June, and in order to be released from this agreement agreed to pay pasturage on cattle, then the jury should find for plaintiffs the value of such pasturage.

Rountree & Lisle for appellant; H. P. Cooper and H. W. Rives for appellees.

PEDIGO, CHAIRMAN, &c. v. COOMBS, JAILER.

Filed February 1, 1888. Appeal from Barren Circuit Court. Opinion of the court by Judge Bowden, reversing.

Jailer's fees—Liability of town—It is the duty of the county to pay the jailer's fees for keeping and dieting prisoners charged with misdemeanors, except in cases where prisoners are confined by the authorities of a town for breaches of its ordinances; and the mere fact that the charter of a town grants to the town all fines imposed in the name of the Commonwealth for violation of law within the town limits, does not make the town liable, by implication, for the jailer's fees where the State punishes by imprisonment for violations of law within the town limits.

J. B. Leslie and E. W. Hines for appellants; Boles & Duff for appellee.

TRIMBLE v. CITY OF MOUNT STERLING.

Filed February 1, 1888. Appeal from Montgomery Circuit Court Opinion of the court by Judge Bowden, affirming

Municipal taxation—Section 1 of article 8 of appellee's charter, fixes the rate of taxation on "real and personal estate directed to be assessed." Section 6 of the same article, provides that "all property not exempt from taxation under the general laws of this State shall be subject to taxation as herein mentioned for city purposes." Held—That the word "property," as used in section 6, embraces whatever may be owned, including money and choses in action, and while the words "personal estate" do not include money or choses in action when used to define the subject matter of municipal taxation, they are not used for that purpose in section 1, but are used as a general term with reference to section 6, which was meant to declare what should be taxed. Therefore, appellee has the right, under its charter, to tax money and choses in action.

Wood & Day for appellant. W. A. Wilson and Salyer & O'Rear for appellee

FARMER v. EDWARDS.

Filed January 25, 1888. Appeal from Logan Circuit Court. Opinion of the court by Judge Bowden, affirming.

Appeal bond—Limitation—The right of action on a bond executed for an appeal from the quarterly court to the circuit court accrues when the judg-

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ment is rendered on the appeal, and limitation runs from that date, since an action can be maintained on the bond without issuing an execution.

And in this action, in which limitation is pleaded by the surety, it is immaterial that the principal died insolvent, and that proceedings to settle his estate were pending, as the plaintiff could have sued the surety alone without assigning any reason for omitting the principal.

E. W. Hines for appellant; W. L. Reeves for appellee.

ROUNTREE, &c. v. LEB. AND P. C. T. R. Co.

Filed January 25, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Appeals in road cases—An appeal to the circuit court from an order of the county court, closing a road, need not be prosecuted within sixty days, as required of other appeals from the county court, but may, under section 43, article 1, chapter 94 of General Statutes, be prosecuted at any time within one year.

2. Correction of clerk's certificate—When a party has attempted to appeal from an inferior court to the circuit court, and there is a defect in the clerk's certificate to the transcript, the court should allow the certificate to be amended.

3. Prejudicial error—This court can not acknowledge that there is no merit in the appellant's case, and that, therefore, they were not prejudiced by reason of the dismissal of the appeal, because of a defect in the clerk's certificate. That is a matter upon which they are entitled to have the judgment of the circuit court.

Rountree & Lisle for appellants; Rives & Spalding for appellee.

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KENTUCKY COURT OF APPEALS.

NEVIN, &c. v. ROACH, &c.

WATSON, &c. v. NEVIN, &c.

(Filed November 3, 1887.)

1. Street improvements—In order to make adjacent property liable for the cost of improving a street it is not necessary that the city or the contractor should show an immediate pecuniary benefit to the owner.

2. Same—The hearing which the taxpayer has when a lien upon his property for the cost of a street improvement is sought to be enforced is all that is necessary to constitute "due process of law." No other notice is necessary.

3. Same—A single entry by the clerk upon the records of the city council that ordinances for the improvement of several streets, naming them, were passed, does not show that all were voted upon at one time, but the presumption is that they were voted upon separately, as required by the charter.

4. Same—The second reading of an ordinance of the city of Louisville may be dispensed with at the same meeting of the council at which it has its first reading, although the charter provides that no ordinance shall be passed until it shall have been read in each board "at two several meetings unless that provision be suspended by a vote of all the members elected."

5. Same—When the apportionment of the burden for a street improvement is reported by the engineer to the city council, and his report adopted, it then becomes the act of the council as much as if the council had made the estimate and directed the apportionment warrants to issue.

6. Same—It is not necessary that an ordinance for a street improvement, or the contract and apportionment made pursuant thereto, should be spread in full upon the records of the city council.

7. Same—While a square may be of such dimensions as to authorize the conclusion that it was never contemplated that so large a territory should be deemed a square within the meaning of the provisions of the charter as to street improvements, the mere fact that a square is larger than the usual squares of the city will not authorize such conclusion.

8. Same—The fact that an ordinance for the construction of a carriageway in a street merely defines the width of the way, and leaves it to the engineer to locate the way, will not enable the owners of abutting property to escape the burden for the cost of the improvement, although the engineer may not have located the way in the center of the street so as to leave equal spaces on either side of the carriageway for sidewalks, the property owner not being entitled, as a matter of right, to have a certain space assigned him for making a sidewalk.

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Lane & Burnett and S. B. Richardson for Nevin, &c.

B. F. Buckner and Bacon & Stites for Roach, &c.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

These two cases were heard together in the court below, and as nearly all the questions raised in the one case apply to the other they have been argued and will be considered as one case in this court.

The question made as to benefits to be derived from the local improvement in order to impose the burden has been raised, if not directly decided, in many of the reported cases, and while it has been shown, and particularly in this case, that no pecuniary gain by an increased value of the property is apparent by reason of such improvements, it is manifest that such improvements conduce to the rapid and prosperous growth of cities and result in increasing the value of real estate as such improvements are extended. All such assessments are made upon the idea that the property subject to such improvement is benefited by reason of the charge upon it, but to require the city or the contractor in every case to show the immediate advantage resulting to the owner from the construction and improvement of streets in the way of pecuniary benefit would be to prohibit in effect such improvements by means of local burdens. As said by the special chancellor below, the land may be benefited in many ways not easily determined upon the basis of money value. Such improvements make the land more desirable to purchasers and create emoluments that the owner would not otherwise have, and while corner lots and the land bordering on the street are necessarily increased in value, it must also affect the value of contiguous property within the square, although at the time the improvement is made the increased value may be difficult to ascertain. Corner lots are, therefore, taxed higher by the provisions of the city charter than the lots less adavntageously located, the object being to make the burden as equal and uniform as practicable.

This method of assessment has been so long followed by the city government and approved by this court that it no longer remains an open question, and the same may be said of the question of notice to the taxpayer that he may appear and show why he should not pay his proportion of the cost of the improvement.

The inquiry was made in the court below as to the character of the burdens imposed and where the exactions are illegal. The taxpayer can be heard and the assessments of the municipal government supervised when it has transcended its power or has imposed burdens that are so oppressive as to amount to a confiscation of his property. He then has his day in court. The city government must judge the necessity for the improvement, and is not required to consult the wishes of those who are to be taxed to pay for its construction. Notice was given of the time and place for receiving the work or for a hearing by the parties interested, and if none had been given the appellants are now objecting to the validity of the assessment, etc. "In all such cases," says Mr. Justice Field in Hagar v. Reclamation Dist., "all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. (111 U. S., 709; Preston v. Roberts, 12 Bush, 570.) In the case of Thomas Watson and others,

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one of the cases being considered, the improvement existed in the construction of the carriageway on Chestnut street to the east line of Twenty-sixth street, to be thirty-six feet in width and improved by grading, curbing and paving, with McAdams' pavement, with crushed stones at the intersections of streets and alleys, block stone gutters and footway crossings, etc., in accordance with the provisions of an ordinance approved the 21st of August, 1880, entitled "general ordinance concerning the improvement of streets." The contract was entered into between the city and Nevin, the contractor, and the work executed in compliance with the contract and the ordinance directing the improvement.

Various objections were made in the court below to the manner in which the ordinance was passed, all of which were properly disposed of by the chancellor. It was objected that several ordinances for improvements were passed at one time as one ordinance, and, therefore, the charter requiring that an ordinance shall embrace but one subject, and that to be expressed in the title, was in effect disregarded.

This contention by the appellant is based on the fact that the clerk, in making the entries for the said objects, and to save time and expense in making the orders, recited that ordinances for the improvements of streets A, B, C and D were passed, etc. There is nothing in such an entry to show that the organic law of the city has been violated, but on the contrary the presumption is, or should be, that the ordinances were voted upon separately as the charter requires. The parol proof shows that such was the case, and if incompetent to supply the record it strengthens the presumption that would be indulged if such testimony was not in the record.

The charter also provides that no ordinance shall be passed until it shall have been read in each board at two regular meetings, etc., "unless this provision be suspended by a vote of all the members-elect in which the proposed ordinance is pending, nor shall any ordinance embrace but one subject, and that expressed in the title."

The record shows that a member of the board introduced the following ordinances, which were read once and ordered to be read a second time, etc., the second reading being dispensed with, and the same were passed by the preliminary vote. It is argued that the second reading should be dispensed with at a subsequent meeting of the board, or the record should show, at the subsequent meeting, that the second reading had been dispensed with.

In Dulaney v. Bowman, MS. opinion delivered in January, 1875, this question was disposed of: "To dispense with the second reading was to dipsense with the reading a second time at a subsequent meeting. Having dispensed with the one second reading it was not necessary to recite on the record that such reading at a subsequent meeting had also been dispensed with."

The apportionment of the vendees was reported in this case by the engineer to the city council, and his report adopted. It then became the act of the council as much so as if the council had made the estimate and directed the apportionment warrants to issue.

Another objection is made to the validity of the ordinance and the proceedings under it because the ordinance, contract, apportionment, etc., are not all spread in full on the journals of the city legislature. These journals show a complete record with the exception that the entire ordinance, contract, etc., do not appear in full.

It appears that an ordinance for the improvement of Chestnut street to the east line of Twenty-sixth street was introduced—passed by the following vote—

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Then the contract was sent in with the message from the mayor, he asking its approval.

Every order appears showing a compliance with the charter, but the entire contract, ordinance, etc., are not written in full, nor is this necessary—not more so than to require every paper that is filed in a court of record to be spread in full upon its record books. Besides, there is a record book kept by the council in which the ordinances in full appear. The proceedings are sufficiently certain and authentic, and the case of the City of Louisville v. McKegney, 7 Bush, 651, has no application, as in that case no journal whatever was kept of the proceedings. Other objections were made as to the grading, etc., that appear upon the maps reported, as well as other questions involving the authenticity of the proceedings that were fully considered in the court below and now approved by this court. In fact nearly every question raised has heretofore been passed on, and if not the exhaustive and convincing opinion of the special chancellor should set such questions at rest. Since this improvement has been made a street has been dedicated and accepted by the city called Madison street, running parallel with Chestnut and Walnut streets, and dividing the territory as it existed when the ordinance in controversy was passed. It was urged in the court below, and has been argued here, that when the ordinance was enacted Madison street was in fact one of the streets of the city, but we find a decided preponderance of the testimony opposed to this view of the case. The owners had in contemplation the dedication of the street, but it had never been accepted by the city, and, therefore, the case must be considered without regard to such a street, as it was not in existence when the improvement was ordered and the contract entered into, nor when the work was completed. The dimensions of the square between Chestnut and Walnut streets, although larger than the usual squares of the city, and much larger than the square on the south side of Chestnut street, affords no argument against the imposition of the tax. The square might be of such dimensions as to authorize the conclusion that it has been contemplated that a territory embracing so much land in one square should be deemed a square within the meaning of the law. Such is not the case here. Squares, when considered for the purpose of taxation, within the city of Louisville, are of different shapes and dimensions, and if unequal taxation in the one case it must apply to all, and the council and the courts left to determine the dimensions of the square, or the particular location of the property within it in order to regulate the amount of assessment.

The entire system under which these improvements have for years been made in the city would be subverted, and those in authority with no fixed rule to guide them in imposing such burdens, therefore the necessity for adhering to a rule recognized and established for so long a period, although cases of individual hardship may now and then arise.

The judgment as to Watson and wife is affirmed.

In the case of Nevin v. John G. Roach and others the same questions have been raised, the distinguishing feature between the cases consisting in the failure of the council in the Roach case to locate the way in the street for the improvement. The chancellor below holding this was error, dismissed the petition.

The ordinance provided "that the carriageway of Broadway, from the center line of Twenty-sixth street to the western boundary line of the city, shall be fifty feet in width, and shall be im-

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porved by grading, curbing and paving with the McAdam pavements, with corner stones at the intersection of streets and alleys, block stone gutters and footway crossings across all intersecting streets and alleys," etc. The contract being awarded to the appellant he proceeded to construct, and did construct, a carriageway fifty feet in width as provided by the ordinance under the supervision of, and as designated by, the city engineer, and when completed the work was received by the city. The chancellor below held that the carriageway should have been located in the center of Broadway so as equal spaces should be left on either side of the carriageway for sidewalks, and as the contractor or engineer had so located the improvement as to leave a space for sidewalks much greater on the one side than the other, with scarcely any space for sidewalks on the one side, that no recovery could be had, and dismissed the petition of the plaintiff. The dismissal was based on the idea that the ordinance should have located the carriageway and not left it to the engineer; that to confide such discretion to the engineer was a delegation of legislative power the council could alone exercise. It is made the duty of the city engineer to take the control and supervision of all work executed by the city consistent with the terms of the contract, and in the absence of any statute or law of the city locating the carriageway in the center of the street, or requiring it to be so located, we perceive no reason why the failure to do so destroys the right of recovery by the contractor against the owners of the adjacent property by subjecting it to the payment of the contract price. There was nothing in the contract or ordinance by which sidewalks were to be constructed, or any space of ground required to be left upon which to construct them. While it may be proper, and in fact essential, that sidewalks should be constructed on each side of the street, as no provision was made for this work in the contract the owners of the adjacent property, as well as the city, may have them improved. It is said, and the plat before us so indicates, that the northern boundary line of Broadway is straight continuously from Eighteenth street to the city limits, and that the irregularity is on the southern boundary line from Twenty-sixth street to the city limits, owing doubtless to the location of the lots bordering on that boundary, but whether so or not we see no cause for complaint on the part of the lot owner, after the work has been completed and received by the council, for no other reason than the failure to locate the carriageway in such a portion of the street as would prove the most advantageous to the adjoining property.

In the case of Vollman v. Meyer, MS. opinion (January term, 1880), this court said: "There is no law prescribing any particular plan for the laying out or improvement of streets or requiring that they should be of uniform width, or that all parts of the same street should be of the same width, nor does the law require that there should be sidewalks on each side or on either side."

That opinion was based on the provisions of the act of 14th of April, 1874, which is a general ordinance concerning the improvement of streets, and since that time we have been referred to no general or special ordinance fixing the location of a carriageway upon any of the streets of the city.

In the case of Hydes & Goose, Ass'ees v. Joyes, 4 Bush, 464, a discretion was left the engineer to determine what improvements should be made, and after the engineer had directed the improvement the work was to be done subject to his control and supervision. So in this case, if the city council had conferred upon the engineer the right to determine whether this carriage-

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way should or not be constructed, it would, as in Hydes & Goose v. Joyes, have been delegating to him legislative power; but we find that the council has ordered the carriageway to be made fifty feet in width from Twenty-sixth street to the western limits of the city. The engineer, whose duty it was to supervise and control the work, entered upon the street with the contractor and made the improvement as directed by the city legislature. The way was constructed in a public street, and while one who is compelled to contribute to pay for the improvement may assail the regularity of the proceeding, if the ordinance and the proceedings under it are valid, the objection merely that the street is too near the adjacent property on the one side and too far from the adjacent property on the opposite side is unavailing. Such complaint should have been made to the engineer or council before the work was completed, and the chancellor will not withhold the remedy afforded the contractor for any such reason.

If the owner of the adjacent property is entitled, as a matter of right, to have a certain space assigned him for making a sidewalk, it would preseut a different question, but whether such sidewalks shall be constructed is a matter with the local legislature and not a right that the citizen can assert upon the construction of a carriageway or other street improvement. It is true the owner of a lot bordering on a street may have an easement in it as well as peculiar privileges that do not belong to the public generally. They are certainly more interested in the street fronting their property than a stranger, but having no right to a sidewalk in connection with the improvement made in the street, and with no prohibition of the right to have one constructed by the consent of the local authorities, we see no reason why they should interpose an objection to the location of a way in the street after the improvement has been made and accepted because the location of the way renders the construction of a sidewalk more difficult, or requires a larger expenditure for its construction than it would have cost if the carriageway had been in the center of the street.

The judgment in the case of Merrick v. Roach and others is, therefore, reversed, with directions to enforce the lien and for proceedings consistent with this opinion.

Response by Chief Justice Pryor to petition for rehearing, filed March 22, 1888:

We fail to find any reason for departing from the opinion already rendered in this case. It follows a long line of decisions on the same subject, and while it may work a hardship because of the burden imposed on some of the appellants, we can not see in what manner the provisions of either the State or Federal Constitution have been violated in the imposition of the burden, or the manner and mode of its apportionment. The dedication of the land to widen Broadway is sufficiently shown by the pleadings and proof.

Petition overruled.

ELLIS v. COMMONWEALTH.

(Filed February 11, 1888—Not to be reported.)

1. It was not error to refuse a continuance because of the absence of a witness whose testimony would have been merely cumulative.

2. Reversible error—There can be no reversal in a criminal case for an error of the court in overruling a motion for a new trial, or because of a

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matter called to the attention of the court for the first time by the grounds for a new trial. Before this case was finally submitted to the jury some one said to one of the jurors: "Send him up for five years." The fact was first called to the attention of the court by the grounds for a new trial. Held—That if this illegal interference with the trial of the case had been called to the attention of the court at the time, and a motion made to discharge the jury, it would have been a reversible error to overrule it, but the court can not reverse for the error in overruling the motion for a new trial.

J. R. Burnam for appellant.

C. J. Bronston for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Lewis.

In the first affidavit for a continuance filed by appellant it was stated Tandy Chenault and Ben Ford were absent, both of whom were present when the trial took place, at a subsequent day of the term of court.

The ground for continuance set forth in the second affidavit filed at the same term of court was the absence of Ben Ford and one Stone Batner.

The statements contained in the two affidavits are not consistent, except in this, that each of the three witnesses was with appellant on the night the larceny with which he was charged was alleged to have been committed. And as he got the benefit of the testimony of Chenault and Ford, the statements of Batner, if he had been present, would have been merely cumulative, for it does not appear, from the affidavits, that he knew or would have testified to any facts favorable to the defense not given in evidence by Chenault and Ford.

It appears from the affidavit of the attorney for appellant that he heard a person, naming him, say to one of the jurors, naming him, while the jury was out, under instructions of the court to permit no one to speak to them about the trial, and before it was finally snbmitted to them, the words: "Send him up for five years."

If this illegal and reprehensible interference with the trial of the case had been called to the attention of the court at the time, and a motion made by appellant to discharge the jury, it would have been an error of the court prejudicial to the substantial rights of the accused, and, therefore, reversible, to overrule the motion.

But the fact was not made to appear until after the termination of the trial, nor was any motion based upon it, requiring the action of the court, made until after the verdict, when it was made one of the grounds for a new trial.

Section 281, Criminal Code, provides the decisions of the court, upon motions for new trial, shall not be subject to exception, and it has been repeatedly held that errors not subject to exception in the lower court can not be considered as grounds for reversal in the Court of Appeals. (Kennedy v. Commonwealth, 14 Bush, 340.) It, therefore, follows, and has been decided by this court, that objections first made in motion, and as ground for new trial, as to alleged errors committed during the progress of the trial, can not be considered by the Court of Appeals. (Kennedy v. Commonwealth, supra; Brown v. Commonwealth, 14 Bush, 398.)

The province of this court is to reverse for only those errors of law occurring upon the trial committed by the trial court, and consequently no right exists to consider any objection which was not then made and passed on, or refused to be passed on by the lower court.

The judgment is affirmed.

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SQUAIR, &c. v. FORD, &c.

(Filed February 11, 1888.)

Settlement of partnership accounts—S., M. and F. were partners in a contract for the construction of a railway. After the completion of the work the partners had a settlement of their accounts and a distribution of the profits. When this settlement was made there were liabilities outstanding against the firm, and by the agreement of all parties S. was allowed to retain a certain sum with which to pay these debts, and, when paid, the balance left to be divided between the partners according to their respective interests in the enterprise. This action at law was instituted by F. against M. and S., alleging that S. had paid the debts, leaving due the plaintiff several hundred dollars as his part of the profits. The defendants answered, denying that the debts were all paid, and alleging mistakes in the settlement of the partnership accounts, which they alleged was not final. The entire case was transferred to a court of equity on the motion of defendants, and a settlement of the partnership asked in order to a distribution. The case was referred to a commissioner, and upon his report, as modified by the chancellor, a judgment was rendered for the plaintiff. It is contended for defendants (appellants) that one partner can not maintain an action at law against his copartner until there has been a settlement of the accounts of the partnership. Held—

1. The case having been referred to a commissioner and a settlement made, it is now too late to raise the question as to the right of the partner to bring the action in the mode adopted.

2. As the books were badly kept under the supervision of the defendants, and in such a manner as to render it impracticable to make a just and equitable settlement of the joint transaction, so far as F. is concerned, the court will adhere to the settlement made by the parties themselves and their bookkeeper when all were present who were presumed to know the nature of the settlement and the items entering into it. F now being dead.

3. It was error to render judgment against M. for the balance left in the hands of S. The parties, by their agreement, made S a trustee to hold the fund for them after the payment of certain debts, and M. was in no way liable for his defalcation.

W. M. Fenley for appellant Squair; W. W. Dickerson for appellant Marshall.

J. M. Collins for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Chief Justice Pryor.

H.H. Squair, one of the appellants, had contracted, in conjunction with T. F. McDonald, to prepare the roadbed of the Cincinnati Southern Railway for the rails to be placed upon it, the contract applying to certain sections designated by its terms. After this contract was entered into the firm of Squair & McDonald made a contract with Thomas Ford, by which he became a partner, or jointly interested, with them in the profits of the enterprise. Ford, by its terms, was to place $2,000 into the adventure, of which sum Squair & McDonald agreed to refund him out of the profits, at the conclusion of the work, $1,000, and to give him one-fifth of the net proceeds, or profits, on the sections, and also one-third of all the profits that might be made on the store of supplies kept by them; also one-third of all the tools, harness, etc., then owned by them, and also one-third of all the stock, tools, etc., that might thereafter be bought for the work. By the terms of this agreement Ford had purchased an interest by giving $1,000 of the $2,000 advanced and the other $1,000 to be refunded

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to him when the work was completed. The work continued for a time under this agreement, when McDonald sold out to the appellant, Marshall, who was substituted as a partner in lieu of McDonald and the work progressed as if Marshall had been a party to the original agreement instead of McDonald. After the completion of this work under the contract, the parties, Squair, Marshall and Ford, had a settlement of their accounts, and there was then paid to Ford the sum of $7,543.45. When this settlement was made there were liabilities outstanding against the firm of several thousand dollars, and by the agreement of all three, Squair, Marshall and Ford, Squair was to retain $9,000 with which to pay these debts, and, when paid, the balance left to be divided between the parties according to their respective interests in the enterprise. This action at law was instituted by Ford against Marshall & Squair, alleging that Squair had paid the debts and was owing him several hundred dollars, his part of the profits, undistributed. To this petition an answer was filed denying any indebtedness—denying that the debts were all paid —and placing on the contract made with Ford a construction, as to its meaning, altogether different from what its language plainly implies. It is also claimed, by various amended pleadings, that mistakes were made in the settlement of October, 1876, that are asked to be corrected, the defendants alleging that the settlement then made was not final, but left open for any correction as to errors committed to the prejudice of either party.

The plaintiff, Ford, insists that the settlement was final and complete, except as to the $9,000 left in the hands of Squair to pay certain debts, and that this sum was not only ample for that purpose, but that the debts were all paid and a balance left.

It is insisted by counsel for the appellants that one partner can not maintain an action at law against his copartner until there has been a settlement of the accounts of the partnership, and, therefore, this action can not be maintained. The entire case was transferred to a court of equity, on the motion of the appellants, and a settlement of the partnership asked in order to a distribution. The case having been referred to a commissioner, and a settlement made, it is now too late to raise the question as to the right of the partner to bring the action in the mode adopted.

The commissioner has made an exhaustive and intelligent statement of the accounts between these parties from the transactions originating since the settlement in October, 1876, and, as modified by the chancellor, we perceive no reason for disturbing it. Ford is now dead, and his administrator left to litigate the questions arising out of the adventure. The settlement made in October, 1876, was under the supervision of the bookkeeper, who was cognizant of all the transactions. The sums of money expended, and the items embraced in certain large sums that seem to have been entered as a credit to Squair, or to Squair & Marshall, were known to the bookkeeper, and subject to explanation by him. This settlement seems to have been recognized as complete in the action pending in the Kenton Chancery Court between Green on the one side and Marshall, McDonald, &c., on the other, and there is nothing in the record before us requiring that the settlement should be disturbed up to that date. In fact the pleadings and the testimony on the part of the appellants, alleging various mistakes in the original contract, and in the settlement under it, indicates a purpose to defeat the claim of the plaintiff by alleging a series of mistakes that should have been known to all, and many of which did not in fact exist.

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The settlement of October, 1876, proceeded on the idea that Ford was to have $1,000 of the $2,000 advanced by him returned, and then the profits to be divided as agreed on. This was in fact the contract between the parties, and is not only the proper construction, but the one followed by the parties themselves. The $1,000 given to the firm, in return for which Ford was to have one-fifth of the profits, included the right to the use of the stock, and no charge should or could have been made for this use, and such was the construction placed upon it by these appellants in their settlement. They had the use of $1,000 without interest, and the other $1,000 paid in consideration of the profits to be received by Ford from the contract, as well as an interest in the tools and stock.

The appellants set up a claim for a credit of $2,856.40 paid by Squair to Connelly in January, 1877, after the settlement had been made in October, 1876, when it plainly appears that Squair was credited by that sum as far back as September, 1876, and this applies to other credits now asserted that are injected into this litigation with a view of defeating appellee's claim. The books were badly kept, and in such a manner as to render it impracticable to make a settlement just and equitable, so far as Ford is concerned, of this joint transaction. They were kept under the supervision of the appellants, and hence the necessity of adhering to a settlement made by the parties themselves and their bookkeepers, when all were present who were presumed to know the nature of the settlement and the items entering into it.

The attempt to charge the estate of Ford in this settlement with the use of the stock in executing this contract; the contention that he was not to be repaid $1,000; the effort to swell the claim of appellants by large credits already given them, and the many mistakes now alleged in the settlement no doubt influenced the mind of the chancellor not very favorably to the appellants' views of these accounts, and induced him, as it should have done, to confine the parties to the settlement made, and to require vouchers of the most satisfactory character as to the justice of claims paid by Squair out of the fund left in his hands. The only question of doubt, it seems to us, is whether the judgment as to the amount due the appellee should have followed the commissioner's report, or be modified as it was by the chancellor. The entire record, in so far as this defense is made by Squair, shows a presentation by him of claims and demands against the partnership or against Ford's estate that he must have known he was not entitled to, and, therefore, his statements as evidence, if conceded to be competent, should have had but little, if any, weight in the settlement of this controversy. It is not necessary, therefore, to determine his competency as a witness against Ford in regard to matters relating to his acts as trustee, as this judgment is proper to the extent that he is affected by it. We perceive no reason for rendering a personal judgment against Marshall, or any grounds for sustaining the settlement against him. It is conceded in the pleadings and sustained by the testimony that the $9,000, by an agreement between all the parties, was placed in the hands of Squair to pay certain debts, and the balance to be divided, if any left, between the partners, upon the terms mentioned in the contract. The appellee, as the administrator of Ford, has recovered his judgment, based on the fact that the settlement of 1876 was final. The three, whether as partners inter se or not, were present with the entire fund, in the way of profits, for distribution.

They made Squair a trustee to hold the fund for them after the

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payment of certain debts. The liability of Marshall, if any ever existed, to Ford then terminated. The settlement as to Marshall was in full. He had none of the profits in his possession, and each had the undoubted right to dispose of his interest in the $9,000 as he saw proper. They agreed that Squair should retain it for certain purposes. This Squair did, but failing to pay to Ford his pro rata portion of the fund left Marshall, to whom Squair is indebted, so far as the record shows, in a greater amount than he is to Ford, is made to answer to Ford for the default of Squair, when the latter's defalcation is to be attributed as much to the act of Ford as that of Marshall.

This judgment is, therefore, affirmed as to Squair, and reversed as to Marshall.

The court will set aside the judgment and discharge the attachment as to Marshall, and adjudge that Squair alone is responsible therefor.

Remanded for proceedings consistent with this opinion.

COOK v. COMMONWEALTH.

(Filed February 14, 1888.)

1. Instruction as to self-defense—Where there is testimony which entitles the accused to an instruction as to the law of self defense, it is not sufficient to instruct them to find the accused guilty unless he acted "in his necessary, or to him reasonably apparent necessary, self-defense." It is the duty of the court to give an instruction defining the law of self-defense.

2. Misconduct of Commonwealth's attorney—The Commonwealth's attorney, not as a witness, but in the hearing of the jury, repeated to the court what purported to be a statement made to him out of court by one of the witnesses whose testimony was favorable to the accused, which flatly contradicted the testimony of the witness, and, if true, was sufficient to convict the witness of perjury. The court reproved the Commonwealth's attorney and admonished the jury not to consider his statement. Held—That it would better accord with the rights of the accused in such a case for the court to suggest to him or his counsel that if he desires it, and will so request, the jury will be withdrawn and another jury empaneled to try the case. If the suggestion should be declined the accused should not thereafter be heard.

3. Same—The Commonwealth's attorney should never make any statement of fact outside of the record or evidence, which may tend in the least degree to prejudice the rights of the accused. The conduct of the Commonwealth's attorney in this case was very reprehensible, and he should have been punished by a heavy fine.

C. W. Lester for appellant.

P. W. Hardin for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

The trial of the appellant in the Whitley Circuit Court for willfully and maliciously shooting and wounding Mose Owsley with the intent to kill him (Owsley), resulted in the conviction of the appellant of the charge, and his punishment was fixed at confinement in the State penitentiary for the term of one year. His motion for a new trial having been overruled he has appealed to this court. Two errors are assigned for a reversal of the case:

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First, the court erred in refusing to properly instruct the jury upon the subject of self-defense; second, misconduct of the Commonwealth's attorney, consisting in making a statement of fact which was not in evidence in the presence of the jury, and which was prejudicial to the rights of the appellant. These grounds will be noticed in their order.

The Commonwealth introduced Geo. Berry as a witness. He testified that a short while before the shooting he and appellant went to Mose Owsley's lunch-room to get a lunch; that Owsley refused to let them have the lunch; thereupon they went to Taylor's saloon, which was about the distance of a hundred yards from Owsley's lunch-room; that while they were in Talyor's saloon Owsley came in and cursed and abused the crowd, that he had a pistol in his hand and pointed it towards the appellant, cursing him at the same time; that the appellant, while Owsley was pointing the pistol towards him and cursing him, drew his pistol and fired it at Owsley, the ball striking him in the breast; that Owsley then left the room, and as he went out at the door he fired two shots back into the room; that Owsley told witness that day and before the shooting that he intended to whip the appellant; that he communicated this threat to the appellant before the shooting. The appellant's evidence in his own behalf was substantially the same as that of Geo. Berry. The Commonwealth introduced other witnesses, whose evidence threw the blame entirely upon the appellant. The evidence of Berry and the appellant, if believed by the jury, strongly tended to make out a case of self-defense. The appellant was, therefore, entitled to an instruction embodying and defining the law of self-defense.

It is contended by the Commonwealth that instruction No. 1, given at the instance of the Commonwealth, gave the appellant the benefit of the law of self-defense. The jury were told by that instruction that if the appellant willfully and maliciously, "and not in his necessary, or to him reasonably apparent necessary, self-defense," shot and wounded Owsley, etc., then they must find him guilty.

The court refused to give any other instruction on the law of self-defense. This instruction left the jury to determine what in law constituted necessary, or "reasonably apparent necessary," self-defense, whereas the appellant was entitled to an instruction defining the law of self-defense, and the court erred in not giving such an instruction. For this error the case must be reversed. The definition of self-defense has been so often given by this court it is not deemed necessary to again give it for the guidance of the lower court upon another trial.

When Geo. Berry's evidence was concluded, and while the lower court was, with the view of fixing his fees as a witness for the Commonwealth, interrogating him as to the length of time he had been in attendance as a witness, the Commonwealth's attorney objected to his being allowed anything for his attendance as a witness, and in response to the inquiry of the court as to the ground of his objection he said, in the presence and hearing of the jury, "because he," Berry, "told me and Judge Harman in the witness room yesterday that Owsley never done anything to defendant, and was doing nothing to him when he was shot." The appellant objected to this statement, but the Commonwealth's attorney did not withdraw it. The lower court, however, told the jury that they should not consider the statement. The court also reproved the Commonwealth's attorney. The conduct of the Commonwealth's attorney was very repre-

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hensible, and he should have been punished by a heavy fine. It is the duty of the Commonwealth's attorney to represent the interest of the Commonwealth fully and fairly with his utmost ability, but it is not his duty to make a statement of fact, the evidence of which is always more or less strengthened by his official position, outside of the record or evidence, which may tend in the least degree to prejudice the rights of the accused. The Commonwealth desires, and is entitled to, the conviction of the guilty by fair and honorable means and upon competent testimony, but it does not desire a conviction by any other means. To accomplish this end it is the duty of the Commonwealth's attorney to devote his entire energy and utmost ability, but as before said he is not excusable in making any statement of fact outside of the evidence which may be in the slightest degree prejudicial to the rights of the accused. In this case the Commonwealth's attorney, not as a witness, made a statement of fact which flatly contradicted the witness, Berry, and if believed convicted Berry, in the mind of the jury, of perjury. There was a plain course for the Commonwealth's attorney to pursue—either to introduce himself or Judge Harman as a witness to contradict Berry, but not seeing proper to take this course he should have kept silent as to what occurred in the witness room, for the reason that a repetition of it not under oath in the hearing of the jury was incompetent evidence, and of a character very damaging to the rights of the appellant, and which doubtless left an unfavorable impression on the minds of the jury, notwithstanding the admonition of the court. In a case like this it would better accord with the rights of the accused for the court to suggest to him or his counsel that if he desired it, and would so request, the jury would be withdrawn and another jury empaneled to try the case. If the suggestion should be declined the complaint of the accused should not thereafter be heard.

For the error of the lower court in refusing to instruct the jury upon the subject of self-defense the cause is reversed, with directions to grant the appellant a new trial and for further proceedings consistent with this opinion.

HENDERSON COTTON MANUFACTURING CO. v. LOWELL MACHINE SHOPS.

(Filed February 14, 1888.)

1. Interest is allowable as a matter of right and law upon an account from the time when, by the contract it is payable, or from the time it becomes a liquidated one, unless the parties agree otherwise.

2. An account is to be considered as liquidated after a demand of payment with knowledge of what is claimed upon the part of the debtor and without objection by him, or after it has been rendered to him without objection to it upon his part within a reasonable time.

3. Partial payments on a debt bearing interest must, under the statute, be first applied to the extinguishment of the interest then due.

It was, therefore, error in this case to add together the principal and interest thereon, and deduct therefrom the credits with interest on each from the time of payment, but as the error was prejudicial to the creditor, the debtor can not complain.

4. Interest—Payment of principal—Where a debt bears interest as a matter of law, the fact that the debtor has made partial payments, amounting in all to a sum equal to the principal, does not extinguish the principal, since partial payments are to be first applied to the extinguishment of the interest. The court in this case, therefore, properly refused to instruct the jury

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that the principal of the account sued on had been paid, and that, therefore, the action could not be maintained. It is only where the allowance of interest is a matter in the discretion of the jury that the mere acceptance by the creditor of the amount of the principal precludes him from claiming interest.

Montgomery Merritt for appellant.

John Young Brown and Edward W. Hines for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

The appellant purchased of the appellee the machinery for a cotton factory. The petition does not aver whether the contract was parol or in writing. The evidence shows that it was made by telegram and letter. It is immaterial, however, to the consideration of the questions involved whether it was one way or the other. It was for the purchase of about $90,000 worth, payable at certain times. It is admitted that the first bill of about $76,000 in value was delivered under this contract. A few months thereafter a second lot, which was necessary to complete the equipment of the factory, was furnished, it amounting to nearly $35,000. The appellant claims that as to it, and the charges for storage, traveling expenses and labor of hands to put up the machiney in the factory, no time of payment was fixed by contract, while upon the other hand the appellee insists that the contract made prior to the delivery of the first lot of machinery embraced the second one. The principal of the account amounted to $116.905. The appellant, during the year of the purchase and that following, made various payments upon it at different times, which in all amounted to a sum equal to the principal. The evidence plainly shows that the last one was not accepted by the creditor in satisfaction of the balance of his claim, and it was not made until long after the time of payment fixed by the contract, and the others were made along at different times during the interim, none of them as early as the contract required. Upon the debit side of the account filed with the petition the items of principal with interest upon each are added together, while upon the credit side the payments appear with interest added to each from the time of payment. The total of one is then deducted from the other, leaving a balance of $3.817.46 in favor of the appellee, and for it this suit was brought. This mode of counting the interest was erroneous. Our statute provides:

"Partial payments on a debt bearing interest shall be first applied to the extinguishment of the interest then due." (General Statutes, chapter 60, article 1, section 5.) It was, however, prejudicial to the appellee, and the appellant can not, therefore, complain.

It contends, however, that the account was an unliquidated one, but whether liquidated or unliquidated, that it does not, as a matter of law, bear interest, and as the interest is but an incident of the debt, and follows the principal as the shadow does the substance, that no action can be maintained for it after the payment of the principal.

The jury were in substance instructed to allow interest upon the price of the lot of machinery from the time it was due, save as qualified by the contract, and to do so as to the subsequent purchases if they were made under the same contract, but if not purchased upon the same terms and no time for payment fixed

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that the price did not draw interest until the account was rendered and payment demanded. The court refused to comply with the appellant's request, and tell them that the principal of the account had been paid, and, therefore, the suit could not be maintained. Of course this was not true if any portion of the debt bore interest because by law any payment had to be first applied to its extinguishment, and the total of the payments only equalled the principal.

It also refused to say to them that the allowance of interest was a matter in their discretion. The appellant admits that the price of the first lot of machinery was, by the contract, payable at certain times, but it avers that the appellee indefinitely extended the time of payment, and it, therefore, denies the right to any interest whatever. It clearly appears, however, that appellee merely indulged the appellant, and allowed the debt to run beyond its maturity. There is no conflicting evidence upon this point. The first installment was due in June, 1884. In October following the appellee notified the appellant that interest was being charged upon the account, and no objection was made to it. In November following the president of the appellant (who was attending to the matter) offered to give the company's note for the balance then owing. In December thereafter he examined the account upon appellee's books, and, as the burden of the testimony shows, he then made no objection to the interest charges. In July, 1885, a sale of the factory was desired. The appellant was fearful that the appellee would interfere with the sale. The president of the appellant, but as an individual, guaranteed to the appellee in writing that the property should bring enough to pay the balance of its debt, the amount named, including interest as well as principal. During the entire period from the time when the first installment for the first lot of machinery became due until the last payment was made on October 16, 1885, the appellee was frequently requesting payment. It is evident that both parties understood that the purchases made subsequent to the first one were upon the same terms. It is equally evident that the jury so found because they allowed the balance shown by the account sued on, and it conformed in its items and charges to this view. This fact renders it unnecessary perhaps to consider further the refusal of the court to tell the jury that the allowance of interest was in their discretion or the direction to them; that in the absence of any contract fixing the time of payment the account would bear interest from the time when it was rendered and payment demanded.

Both reason and authority say that if, by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time in the absence of any agreement otherwise by the parties. The jury having found this state of case as to the entire claim of the appellee, instructions in the alternative and based upon a different hypothesis, whether correct or incorrect, can not affect the verdict. If this were not so yet no error appears.

Prior to the statute of 1799 it is questionable whether in this State any debt carried interest unless it was evidenced by writing under seal. It provided: "All debts founded on any specialty, bill or note in writing, ascertaining the demand, shall carry interest in the same manner as debts due on a bond or bill, with a penalty under seal." (2 M. & B., 853.)

Neither the Revised nor the present General Statutes contain any such provision, and there is now no statute in this State declaring what debts shall bear interest. Guided by reason we

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must, therefore, turn to the general law for a correct solution of the question. Judicial history tells of a conflict of authority, both English and American, upon the subject. Perhaps no question exhibits in the past a greater variety of opinion. In some instances cases were made to turn upon their particular circumstances, and whether it was equitable or inequitable to allow interest. In others arbitrary rules were attempted to be laid down, and often without reference to the reasons upon which they should be founded. They were as variant as the cases, and productive of course of confusion instead of system, hence there is little harmony in the early history of this branch of the law. By the early common law it was unlawful to take any interest upon any debt whatever. All interest was usurious until the statute 37, Henry 8, chapter 9. The first advance was the allowance of it as a matter of right upon claims evidenced by writing under seal. Next, the practice for a while was not uniform. Some judges allowed it upon liquidated claims, supported by simple written contracts, while others were controlled by an almost superstitious reverence for a seal, but at last it became the settled practice to allow interest as a matter of right upon liquidated claims when evidenced by writing. In this country a more liberal rule has generally prevailed than in England. Upon principle there is no ground for a distinction between liquidated claims, whether existing in parol or by writing. Why should the allowance of interest be made to depend upon the character of the mere evidence of the claim instead of the contract of the parties, either express or implied? If A orally promises to pay B $1,000 which he owes him by a certain time, why, after default, should he not in reason, as well as morally, be as much bound to pay interest as if the promise had been in writing? In either case the parties themselves fix the time of payment. Our courts, perceiving the wisdom as well as the justice of it, have, therefore, adopted the rule to allow interest as a matter of law where a claim is liquidated, and by the contract, whether oral or written, express or implied, is payable at a certain time. The common law is of such a flexible character as to admit of such extension. This fact illustrates its wisdom. Its principles are not fluctuating and uncertain, but so framed as to be applicable to the varying conditions of business and society.

The true ground upon which to put the allowance of interest is the fault of the party who is to pay the debt. If he has made default of payment then ex æquo et bono he should reimburse the creditor for keeping him out of the use of his money. He should render an equivalent for the use of what is not his own. If there be a specified time for payment and a failure to then pay, or a demand of payment of a liquidated charge and default, then the debt should, as a matter of law, bear interest from the time of such failure. This is the current of authority, and it is supported by both right and reason.

In the case of Young v. Godbe, 15 Wall., 562, the Supreme Court said: "If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment, and if the account be stated, as the evidence went to show was the case here, interest begins to run at once." Sutherland on Damages, page 596, repeats the same rule when he says:

"In this country the principle has long been settled that if a debt ought to be paid at a particular time, and is not then paid through the default of the debtor, compensation in damages quired assistance from the grantor, seems to have been merged in the stronger desire to provide for those who were strangers in

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equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default. The important practical inquiry, therefore, in each case in which interest is in question is what is the date at which this legal duty to pay as an absolute present duty arose."

In some of the earlier cases in this State, as Harrison v. Handley, 1 Bibb, 443, it was held that interest could not be allowed upon a merchant's account. They were in the line of the old common law authorities, and were decided when the statute of 1799 was in force. Undoubtedly if an account be not payable by contract at a particular time the debtor should be put under a duty to pay by a demand, or what is equivalent thereto, an account rendered. An account is to be considered as liquidated after a demand of payment, with knowledge of what is claimed upon the part of the debtor, and without objection by him or after it has been rendered to him without objection to it upon his part within a reasonable time. (Walden v. Sherburne, 15 John, 409.) The assent of both parties to it as stated is hereby implied. Story says: "An account rendered shall be deemed an account stated from the presumed approbation or acquiescence of the parties unless an objection is made thereto within a reasonable time." (1 Story's Eq., section 526.) The rendering of the account is equivalent to a demand of payment. It informs the debtor as to the character and amount of the claim. He may examine it, and if no objection be made it then becomes a stated one, and from that time a liquidated claim. (Sutherland on Damages, page 615.) He then knows that payment is desired, and he then becomes chargeable with delinquency if he fails to pay. He is using the creditor's means and not his own, and he should, therefore, render an equivalent by paying for its use.

In case of an unliquidated claim, as upon a quantum meruit, interest is not allowable as a matter of law or prima facie because it does not necessarily follow that the duty has been imposed upon the debtor to pay it. In such cases, therefore, its allowance or disallowance is properly left to the discretion of the jury, to be exercised according to the circumstances of the case, and whether he has been delinquent without cause, but where it has been liquidated by a rendering of the account to the debtor or demand of payment made of him with knowledge upon his part of its character, it then becomes due and carries interest from that time like one payable by contract at a specified time, because an implied contract to pay it then arises. In this instance payment of the account was often demanded with knowledge upon the part of the debtor that interest was claimed and being charged upon it. It could hardly be presumed that it expected to be indulged upon so large a debt for so long a period without the payment of interest. Its president inspected the account upon the books of the appellee, and it continued to make payments until they amounted to a sum equal to the principal of the debt. Most assuredly the claim was a liquidated one, hence if it did not appear that the jury found that the entire account was, by the contract, due at a fixed time, yet the court did not err in refusing, upon the facts of this case, to tell them that the allowance of interest was in their discretion. If such had been the case then it is true that the action could not have been maintained after the payment of the principal. Our conclusion, after a careful review of the authorities and as thoughtful a consideration of the matter as we are able to give it, is that interest is allowable as a matter of right and law upon an account from the time when, by the contract, it is payable, or from the time it becomes a liquidated one unless the parties agree otherwise.

Judgment affirmed.

April 15, 1888—2

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BALDWIN, &c. v. CROW, &c.

(Filed February 14, 1888.)

1. Unrecorded mortgages—Deeds of trust and mortgages, though unrecorded, are valid against purchasers and creditors with notice. Therefore, the holder of an unrecorded mortgage upon personal property upon which another creditor of the mortgagor has, subsequent to the execution of the mortgage, levied his execution may, at any time before the sale under the execution, give notice to the execution creditor of his mortgage and arrest the sale, and enforce his mortgage lien in preference to the lien acquired by the levy of the execution.

2. Conditional sales—In determining whether a contract is to be regarded as a conditional sale or a mortgage, the particular form of the conveyance is unimportant; and as a general rule, whenever a conveyance, assignment or other instrument transferring an estate is originally intended between the parties as a security for money, whether the intention appears from the same instrument or from any other, it is always considered in equity a mortgage.

Each of several notes, executed for the purchase price of a piano, recited that the conditions of the sale were that the instrument was to remain the property of the vendor until all the notes were paid, and that in default of payment of any one of them at maturity the vendor should be entitled to the possession of the piano without any liability upon his part to refund any of the purchase money that may have been paid. Held—That the contract should be regarded as an absolute sale and mortgage back.

Ben. P. Campbell, Wm. Cromwell and Simrall & Bodley for appellants.

Bronaugh & Bronaugh for appellees.

Appeal from Jessamine Circuit Court.

Opinion of the court by Judge Lewis.

Baldwin & Co. instituted this action to recover of the sheriff a piano levied on as the property of one Dennis under an execution against him in favor of Crow, and the law and facts having been submitted to the court it was adjudged the property was subject to the execution, and that the action be dismissed. It appears that several years subsequent to the date of the judgment in favor of Crow the piano was delivered to Dennis, who executed therefor to Baldwin & Co. three notes for $150 each, payable in sixteen and eighteen months, and containing the following provision: "This note is of a series given for the purchase of the instrument mentioned below, the conditions of which purchase are that said instrument remains the property of D. H. Baldwin & Co. until all notes given for the instrument are paid, and in default of payment of any of said notes at maturity or at any time after such default before accepting payment of amount thus due, or in case said instrument before payment in full is removed from Nicholasville, Ky., without written consent of D. H. Baldwin & Co., they may receive possession of said instrument without any liability on their part to refund any money previously paid on account of said purchase, loss in case of fire to be borne by Mr. A. I. Dennis."

In determining whether a contract is to be regarded as a conditional sale or mortgage "the particular form or words of the conveyance are unimportant, and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment or other instrument transferring an estate is orig-

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inally intended between the parties as a security for money, or for any other encumbrance, whether the intention appear from the same instrument or from any other, is always considered in equity a mortgage." (Story's Equity, section 1018.)

It is manifest the object of the contract under consideration was to secure payment of the agreed purchase price, and it should, therefore, be regarded as an absolute sale and mortgage back, and such has been the uniform ruling of this court in similar cases. (Grerr v. Church, 13 Bush, 430; Barney & Smith Mfg. Co. v. Hart, 8 Ky. Law Rep., 223.) To decide otherwise in this case would give validity to conditions in the contract which no court of equity could consistently enforce. If, then, this action had been against Dennis, who acquired the legal title, as well as possession of the piano, the plaintiffs could not have recovered it, but it seems he, having paid no part of the consideration, voluntarily surrendered to them whatever claim or title he had. Consequently the single issue now involved may be passed on as, without objection to the form of action, was done in the lower court, and the rights of the parties, Dennis not being one, ascertained and by determined as the record stands. We will, therefore, consider the question whether a lien upon personal property secured by an unrecorded mortgage, of which a contesting creditor of the mortgagor had no notice until after his execution was levied, can be enforced in preference to that acquired by the levy if asserted before a sale by the officer. The decision of that question depends upon the construction of section 10, chapter 24, General Statutes, as follows: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until such deed shall be acknowledged or proved according to law and lodged for record." If the inquiry whether by that action creditors generally were intended to be affected by notice of such conveyances and transfer of property to debtors in the same way, and to the same extent, as purchasers, was an original one, there would, looking alone to the language used, be some difficulty in reaching a satisfactory conclusion, but there is no reason whatever that a creditor, whose debt has been created prior to the conveyance, as was that of appellee Crow, and who has been defrauded or injured thereby, should occupy a better attitude than a purchaser with notice. However, the question before us is rather how the section has heretofore been construed and applied by this court than how it should now be; for as section 4 of the act of 1820, M. & B., 449, and section 11, chapter 24, Revised Statutes, having the same general purpose, but substantially the same in phraseology, have each been passed on and construed from time to time, it is to be presumed the statute, as it now exists, was intended to conform to such judicial construction.

In Helm v. Logan's Heirs, 4 Bibb, 78, decided in 1815, it was held "that a purchaser under execution is not affected by his notice of a mortgage which was not recorded, and, therefore, void as to creditors."

On the contrary, in Campbell v. Mosby, Lit. Sel. Cases, 358, a majority of the court decided that the equity of the holder of a bond for a conveyance was superior to the title of a purchaser under execution with notice, and also that the equity of the purchaser by unrecorded deed was superior to, and would prevail in a contest with, the general creditor or a subsequent purchaser under execution with notice.

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But in Graham v. Samuel, 1 Dana, 166, the principle decided in Helm v. Logan was sustained, and Campbell v. Mosby overruled.

In Morton v. Roberts, 4 Dana, 258, however, where the contest was between the vendee claiming under an unrecorded deed and a creditor and purchaser under execution, the court, upon a full review of these cases, and comparison of them with the English decisions on the subject of registration of deeds, adopted the opinion expressed in Campbell v. Mosby. In that case it was said an unrecorded deed is evidence of a purchase for a valuable consideration, and, therefore, of an equity at least equal to a bond for title, and that the only advantage a general creditor may acquire under the statutes is the privilege of arming himself with the legal title, and with all the legal as well as the equitable advantages which it may afford him in a contest with the prior equity, but in all such cases where the legal title is acquired with notice of a pre-existent equity it will be made to yield to the prior equity in a court of chancery.

The case of Righter, &c. v. Forrester, &c., 1 Bush, 278, was where a mortgage of real estate was prior in date to the execution, but was not recorded or lodged for record in the county where the land was situated until after the levy and shortly before the sale, but the admission of the deed to record was treated as equivalent to notice to the creditor as well as purchaser at the sale, and referring with approval to the principle decided in Morton v. Robards, it was held by the court that although the mortgage was, before being recorded, in operation as a legal conveyance of the title, it was effective to invest the mortgagees with an equity in the land, and between them and the purchaser at the execution sale the question was one of priority of equity, and the purchaser with notice acquired but an equitable interest, subject to that of the mortgagees.

In Low & Whitney v. Blinco, 10 Bush, 331, the question involved the construction of section 9, chapter 24, Revised Statutes, the same as section 8, chapter 24, General Statutes, and is as follows: "No deed conveying any title to an interest in land for a longer time than five years * * * shall be good against a purchaser for a valuable consideration not having had notice thereof or any creditor unless the same be acknowledged by the party who shall execute the same, or be proved or lodged for record in the proper office as provided by law." In that case the deed, though executed by the debtor before the execution, was not recorded nor lodged for record until after the levy on the land, but in the contest between the vendor and creditor, who was also purchaser at the execution sale, and received a deed from the sheriff, the judgment of the lower court in favor of the former was affirmed, and in the opinion it was said "that notice to the creditor at any time before he may purchase affects his conscience, and he may be compelled, in obedience to the equity evidenced by the bond or unrecorded deed, to transfer the legal title to the party against whom he ought not in good conscience to hold it."

The radical and irreconcilable difference between the two cases of Helm v. Logan's Heirs, and Morton v. Robards, is that in the former it was decided an unrecorded conveyance was, as to a creditor of the grantor or a mortgagor, to be held fraudulent and void, whereas in the latter the principle was announced that though such an instrument did not operate to pass the legal title it was evidence of an equity paramount to that acquired by a levy or sale with notice to the creditor and purchaser. In every case decided by this court since the opinion was rendered in Morton v. Robards, where the question arose, whether involving

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the construction of the section last quoted or the one under consideration in this case, the d'st'nction taken in that case between the legal character and effect of an unrecorded conveyance and the equity of the holder thereof has been recognized and applied. In Halley v. Oldham, 5 B. M., 233, the question was whether a purchaser of land at an execution sale, without notice to him or the creditor of a prior executory contract between the debtor and another for the sale of the same land, is to lose his purchase by having notice before he has received a deed from the sheriff, but after he has paid the money or executed a bond for it, having the force of a judgment, and the ruling in that case differs from that in Morton v. Robards only in regard to the time when a purchaser ceases to be affected by notice. In the latter case it was virtually decided that he was liable to be so affected at any time before he actually receives a deed conveying the title, while in the other case this language was used: "In view of the statute the land belongs to the person holding the legal title, and is subject to the payment of his debts. It is not the statute but the court of equity which withdraws it from this subjection to answer a prior equity, and we decide that such prior equity, if kept secret until after the execution sale is complete in its principal objects of paying or securing the judgment, can not be brought forward with the effect of intercepting the purchaser's title or wresting it from him." But it is not intimated in that opinion that the purchaser would not be affected by notice of such prior equity given before he has paid the money or received the judgment. On the contrary, the power of a court of equity to withdraw property subject to execution to answer a prior equity, whether evidenced by bond for title or unrecorded conveyance, is distinctly recognized as not inconsistent with the general purpose of the statute. The question involved in this case did not arise in Barney & Smith Mfg. Co. v. Hart, 8 Ky. Law Rep., 223, nor was it intended to then decide differenlty from the views here expressed.

The clear and necessary implication from the language of section 10 is that deeds of trust and mortgages of real and personal estate, though unrecorded, are not void, but valid against purchasers at sale under execution as well as private sale where notice has been given, and that being the case it would seem to be the intention that creditors should be likewise, though indirectly, affected by notice, for their attempts to collect debts by execution would be generally abortive if notice to those about to purchase could prevent a sale; but be that as it may, by the uniform ruling of this court for many years, creditors and purchasers have, in that respect, been placed on the same footing.

We think, therefore, the plaintiffs, after giving notice to the defendant, Crow, of their mortgage on the piano, had the right to arrest the sale under the levy, and the judgment of the lower court dismissing the action is reversed and cause remanded for further proceedings consistent with this opinion.

ALEXANDER'S GD'N, &c. v. ALEXANDER'S ADM'R, &c.

(Filed February 16, 1888.)

The personal property of an intestate set apart by the statute as exempt from distribution is for the exclusive benefit of the widow where there are no infant children of the intestate residing with her. Infant children of the intes-

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tate not residing with the widow are not entitled to any part of the property thus set apart or to any interest therein, although they be the children by a former marriage and have no natural mother.

O'Neal, Jackson & Phelps for appellants.

C. B. Seymour for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

Lucien Alexander died leaving his widow and a child five years old by a former wife surviving him. The child lived with its grandparents or the kindred of its father, and when the appraisers were called on to set apart the property exempt from distribution the question arose as to the right of the mother and her stepchild in this exempted estate. The court below gave to the infant one-half, and of this the widow, who is also an infant by her guardian, complains.

The statute expressly provides that if there is an infant child or children, and no mother surviving, the infants shall then be entitled, but where there is a widow surviving or mother, whether the natural or the stepmother, she is the beneficiary, being at the head of the household. This provision is made that she may maintain herself and the children (infants) residing with her. The statute also provides that if there are no infant children the widow shall nevertheless be entitled to this exempted property, and again expressly provides that "there shall not be anything set apart for the support of infant children if there be none residing in the family of the widow." It is argued that as this was the stepmother, and no natural mother surviving, that the statute intended to give the children an interest, whether one-half or in equal proportions is not stated. If this stepmother had no children residing with her, and her husband had left six children instead of one, then the stepmother would have received only one-seventh of the exempted property, and the provisions of the statute for the maintenance of the widow disregarded. It is said, however, that the stepmother is under no obligation to support the stepchildren, and, therefore, this pro rata distribution should be made. The statute has excluded the infant children not living with the widow for the reason, doubtless, that they are, as is usual in such cases, supported by those with whom they live, and that to make a distribution of such a small sum between the widow and each child would result in no practical good. If the construction placed on the statute below is proper it would result that whenever an infant left the homestead it would be entitled to its pro rata share of the exemption. It would necessitate the appointment of a guardian to protect this interest instead of placing it in the hands of the widow for the purposes contemplated by the statute.

The widow being entitled to this fund, the judgment is reversed and cause remanded, with directions to enter such a judgment and for proceedings consistent with this opinion.

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MASTER'S EX'OR v. BRINKER, &c.

(Filed February 16, 1888.)

1. Probate of wills—Jurisdiction—The proceedings of a county court in this State in matters of probate and administration are not conclusive as to the jurisdiction, which may be called in question by proper averments.
2. Same—In such matters the county court is not a court of special or limited, but of exclusive and general, jurisdiction.
3. Same—Presumptions—Where the jurisdiction of a court over a matter is exclusive and complete the action of the court will always be presumed to be within it, and the burden is upon a party denying or assailing the jurisdiction.
4. Same—Burden of proof—An executor who had qualified in a county court in this State instituted this action to recover a note and mortgage held by his testator from one who claimed them under a purchase from an administrator of the decedent appointed and qualified in the State of Louisiana. The defendants alleged that the domicil of the decedent was in Louisiana at the time of her death, and that the Kentucky court had no jurisdiction in the matter of probate and administration.
Held—That the burden was upon the defendant to show want of jurisdiction in the Kentucky court.
5. Presumptions—Whenever there is a presumption as to the existence of a fact, he who asserts the contrary must prove it.

John S. Ducker for appellant.

L. J. Crawford and R. Hingson for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Holt.

In October, 1882, Elizabeth Masters, being then a resident of Campbell county, Ky., and the owner of certain real estate therein, made her will. She went to her sister's in Louisiana in October, 1883, where she remained until her death in February, 1884. After the execution of the will, but prior to going to her sister's, she sold the real estate to a citizen of Campbell county, taking his notes for the purchase money, and securing their payment by a mortgage lien upon the land sold. These notes and the mortgage she took with her to Louisiana, and they were there in her possession when she died. The debtor lived in Campbell county, and the property in lien was there. The will was probated in the Campbell County Court on April 21, 1884, and the appellant, who was nominated as executor, qualified as such in said court in October, 1884, and subsequently brought this action.

The facts are to be gathered from the admissions of the pleadings, as no testimony was taken by either side. It is averred in the petition, among other matters, that the testatrix was, when she died, a resident of Campbell county, but temporarily in Louisiana, and that "some time in 1884, in the court of Louisiana, having probate jurisdiction," her sister, Anna Smith, was appointed and qualified as her administratrix, and thereafter she, as such representative, sold the notes and mortgage to her husband at public sale. All parties appear to agree that when the testatrix died she had no property interests in Kentucky unless the land notes are to be so considered. The appellant asked that he be adjudged to be the legal owner of them; that it be declared the Smiths had no right thereto, and that their payment be enforced in his favor. The answer of Smith and wife denies that the testatrix died a resident of Campbell county. It states affirmatively that her domicile was then in Louisiana, and that

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the Kentucky court had, therefore, no jurisdiction in the matter of probate and administration. It admits the appointment and qualification of Mrs. Smith as administratrix by the proper Louisiana court; asserts that the will was procured by undue influence, and asks that it, as well as all the proceedings in the Campbell County Court, be declared void.

The appellant insists that upon the pleadings the burden was upon Smith and wife to show by evidence that the domicile of the testatrix was, at her death, in Louisiana and not in Kentucky, while they with equal confidence assert that the appellant was bound to prove the reverse of this, and that in any event he voluntarily, by the affirmative averments in his petition, assumed the onus as to the question, and can not now be heard to say that it was not upon him. The lower court was of the opinion that the burden rested upon appellant, and, therefore, dismissed his action.

The validity of the will can not, under our law, be questioned in this manner, nor can the proceedings in the Campbell County Court be assailed collaterally save upon the ground of want of jurisdiction. Both sides agree in argument that this is the law. If a court has no jurisdiction then its judgment is void and it may be assailed collaterally. (Freeman on Judgments, 116, 117, 120, 121.)

As the petition merely avers that the Louisiana appointment was made in 1884 without stating the precise date it must, under the rule that the presumption is against the pleader, be taken as having been made prior to the Kentucky county court proceedings, but this can make no difference if, under the pleadings, the burden rested upon the appellees to show by evidence that they were coram non judice. If, in point of fact, the absence of the testatrix was temporary, and her domicile at the time of her death in Kentucky, then beyond question its court had jurisdiction.

It has been said in genearl terms in some of the cases heretofore in this court that the judgment of a county court probating a will can not be collaterally questioed, but this of course is where the court has jurisdiction. The case now in hand turns altogether on the pleadings.

Whenever there is a presumption as to the existence of a fact he who asserts the contrary must prove it.

The proceedings of a county court in this State in matters of probate and administration are not conclusive as to the jurisdiction. It may be called in question by proper averments, but in such matters it is not a court of special or limited but of exclusive and general jurisdiction. It is unlike a case where the existence of jurisdiction depends upon the existence of certain facts. In such a case they must appear to confer it. Where, however, the jurisdiction over a matter is exclusive and complete the action of the court will always be presumed to be within it, and a party denying or assailing it must show the want of jurisdiction. This is the common law rule, and it has frequently been announced by this court. (Abbott's Trial Evidence, pages 56 and 57; Fletcher's Adm''r v. Wies, &c., 7 Dana, 345; Jacob's Adm'r v. Railroad, 10 Bush, 263.) In this instance the burden was upon the appellees to show that the county court had transcended its authority, and this existence of the presumption that it had not was not destroyed by the fact that the pleader, in whose favor it existed, stated affirmatively jurisdictional facts which were denied.

The judgment is reversed and cause remanded for further proceedings in conformity to this opinion.

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BUSSEY'S ADM'R, &c. v. GROSS.

(Filed February 16, 1888—Not to be reported.)

Conveyances—Grantor's want of mental capacity—B., at the age of eighty years, married a widow with four children—two sons and two daughters. He had nine children by a former marriage, but at the time of his second marriage only two of them were living; those who had died, however, had left children surviving them. After B.'s second marriage his wife and three of her children lived with him upon his farm, the other child, one of the sons, living in a tenement house on the same farm. None of B.'s own children or grandchildren lived with him. Two years after this second marriage B. executed a conveyance of his farm and everything upon it, which constituted all his estate except some money, to his two stepsons in consideration that they would take care of him and their mother and their two sisters for life. Ten years after the execution of this conveyance the grantor died, and his administrators and his two sons instituted this action to cancel the conveyance on the ground that the grantor had not mental capacity sufficient to execute such an instrument. Neither the grantor's children nor grandchildren had ever done anything to estrange him from them, and all were poor and needy. Held—That while the testimony is conflicting as to the grantor's mental capacity, yet, when taken in connection with his advanced age and the unusual disposition made by him of his estate, it is sufficient to authorize the chancellor to conclude that he had not sufficient mind to execute the deed.

Hargis & Eastin and J. W. Perry for appellants.

H. P. Montgomery, J. W. Greene and Wm. Lindsay for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Pryor.

William Bussey, at the age of eighty years, married Susan Gross, who was, at the time of the marriage, a widow with four children—two sons and two daughers—by a former marriage. Bussey had nine children by his first marriage, but only two of those children were living at his second marriage, and those of his children who were dead left children surviving them. His second wife owned, at her marriage, some personal property of but little value, all of which she transferred to her children by consent of her husband. Bussey was the owner of a small farm worth about $3,000, and had upon it stock and farming utensils, such as was necessary for its cultivation, and seems also to have had money on hand, the amount of which is left uncertain from the testimony. After the marriage, which took place in the year 1870, his wife and her children went upon the farm of Bussey, and there her children lived as members of his family for several years. One of her sons had married and lived in a small tenement house on the farm, and the others lived with their stepfather. They owned no estate and, so far as appears from this record, were content to live with their mother and enjoy with her the use and profits of Bussey's estate. His two sons lived in distant States, and his grandchildren, or some of them, lived in the same county with him and perhaps in the same neighborhood. He had given to his two sons some property, but had made no gifts to his other children or to his grandchildren. They were all poor and needy, and had never, by any act of theirs, caused their aged parent to forget that they were his offspring and the principal objects of his bounty. In the year 1872 this old man executed to his two stepsons a convey-

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ance of his farm and everything upon it, in consideration that they would take care of him and his wife (their mother) for life, and also their two sisters. In the year 1882 he died, and his children and the administrator instituted the present action to cancel the conveyance and restore the property to those entitled to inherit from him.

The conveyance is assailed for the want of mental capacity on the part of the grantor to execute such an instrument. Much testimony was introduced by both parties upon this issue, and so conflicting in its character as would leave the mind in doubt, but for the advanced age of the grantor and the unnatural disposition made by him of his estate. The second wife of the grantor and her children lived upon the farm with him until his death, and treated him doubtless with the greatest kindness in the discharge of their undertaking. The deed was prepared by an attorney who testifies as to the capacity of the grantor to execute the deed, and in this he is sustained by many witnesses who testify as to their business transactions with him and were fully satisfied, at the date of the deed, he had mind enough to execute it. On the other hand there is much testimony showing a want of capacity, not only by those interested in the result of the litigation, but by friends and neighbors, whose statements, if true, establish beyond controversy that he was in no mental condition, from the date of his marriage to the execution of this deed, to make a rational disposition of his estate. On the day the deed was written the wife and the two sons accompanied the old man to the residence of the attorney and had the deed written. The grantor impressed him with the belief that he was competent to make the deed, and the attorney having known him for years, in addition to the impression made upon him at the time, prepared the writing as directed. That he was honest in his conviction, as well as the other witnesses who testify on the subject, we are not disposed to question, nevertheless their statements are not so convincing in their character as should have led the chancellor to believe that the grantor had a will of his own or the capacity to comprehend the character of the contract he was making, and its effect as to those who should have been the object of his bounty.

The facts of this record undisguised show that this grantor, instead of being provided for by the two stepsons, had furnished them with a home, upon which they lived comfortably from the date of their mother's marriage in 1870 until the death of their stepfather in the year 1882. That the grantor was mentally incompetent to dispose of his estate or to enter into such a contract, we think is manifest. He was not only childish but, according to the testimony for the appellants, was almost an imbecile. His memory was treacherous, failing to recognize at times his most intimate friends, and doubtless had forgotten his own offsprings or that they had claims upon his bounty. He had raised a large family on this farm and from its products had accumulated some money. It would have been a bargain for one without a home to have agreed to support the grantor and his wife for the rent of the place during their lives. Instead, however, of such a contract the two sons, one with a family, undertake to support the grantor and his wife, the two grantes, and the family of the one, and also the two sisters, and in consideration of this obligation an absolute title is vested in these grantees to all of the grantor's estate.

The natural obligation to provide for his own children and their offspirng, when their pecuniary condition was such as re-

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blood, and who had no claims whatever upon him. Such an act on the part of the grantor is inconsistent with reason, and evidences the fact that his mental faculties were gone and the wreck of the man left so as the exercise of his liberality was the offspring of an imbecile and not that of one independent in thought and action.

His mental and physical energies had yielded to the ravages of time, and while many regarded him as of sound mind it is evident that he was in no condition to bargain away his estate. The prime consideration was the support of those who had no claim upon him, and the act itself contrary to the dictates of natuarl affection. That he was simply an imbecile is shown from many instances detailed by those who knew him. The night of the day on which he was married he retired to bed with his pantaloons on. He did not recognize even his own children; would go to feed his stock with an empty basket, forgetting to fill it with corn; would work in his field at midnight, and did many acts that were inconsistent with a disposing mind, and that leaves but little doubt, when considering his advanced age, the character of the contract, and the beneficiaries under it, that at the date of the execution he was incompetent to make it. The appellants have had possession of this land for several years since the death of the grantor. They enjoyed its use from 1872 until his death in 1882. This will fully compensate them for the services rendered and money expended. The stock on the place has long since perished, and no proof appears by which these appellees should be chargd with any money received from the grantor.

As a settlement of the controversy, the testimony being all in, the court below, on the return of the case, will enter a judgment cancelling the conveyance to Riley and Jesse Gross, and allot to the widow her dower, and will charge Riley and Jesse Gross with the rents, less the value of the dower, from the institution of this action. The only reference should be to ascertain the value of these rents. All things else should be regarded as settled. The claim of the administrator for the money and personal property or its value to be dismissed. The appellees will pay the costs.

BANK OF LOUISVILLE v. BAUMEISTER, &c.

(Filed February 18, 1888.)

Mortgages—Options—Fixtures—V. leased to S. a vacant city lot for a term of five years for an agreed rent, the contract providing that S. should erect a house upon the lot, and should have the option to purchase the leased premises at any time within five years for a named sum, to be paid in cash. S. contracted with B. for the erection of a house upon the lot, O. agreeing to become surety for S. for the price to be paid for the erection of the house upon condition that S. would indemnify him. For that purpose S. executed to O. a mortgage upon the lease, and any buildings which might be placed on the premises, "together with the option to purchase said leased premises." V. united in this mortgage for the sole purpose, as was recited, "of signifying her assent to the transfer of the said lease and option." The house having been erected upon the lot, V. conveyed the lot to S. for the price mentioned in the contract, but they so modified the original agreement that only a part of the purchase price was paid, a lien being retained for the residue. Thereafter S. mortgaged the lot, the house being then on it, to appellant. Subsequently he executed to B. a mortgage on the lot, "with all the rents, issues and profits thereof." This action was instituted by B.

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to enforce his mortgage lien. The other parties holding liens, being made defendants, asserted their liens, and the court rendered judgment, fixing the priority of liens and directing the proceeds of sale to be applied accordingly. Appellant contends that the judgment ought to be reversed to the extent that it gives O. priority. Held—

1. Every kind of interest in real estate that is subject to sale and assignment may be mortgaged.

2. A contract for an option to purchase real estate at an agreed price within a specified period, when based upon a sufficient consideration, is enforcible, and such an option may be sold or assigned, and, therefore, may be mortgaged.

3. The owner of unproductive real estate may, as part of a contract of lease, and in consideration of rent to be paid by his lessee, or expense to be incurred in making it productive, as seems to be in this case, bind himself to sell it within a prescribed period, at a stipulated price, at the option of the lessee.

4. But V., the only person ever having any right to deny the validity of that part of the contract, is now estopped to do so, having united in the mortgage, and thus induced O. to become the surety of S. upon the faith of her agreement to convey the lot to S. Moreover, the question of her obligation to convey was closed by her actually making a deed to S. before he executed the mortgage to appellant.

5. The mortgage to O. operated upon and affected the freehold after it was acquired by S., and his lien was subordinate only to that of V., the vendor.

6. There was an implied agreement by S. to make his ownership of the lot complete by paying the purchase price in full, but, independent of this, O. was entitled to whatever S. did pay, as upon the discharge of a prior incumbrance, the mortgage interest has the full benefit of the discharge.

7. Fixtures—The house upon the lot was properly adjudged subject to O.'s mortgage, it being evident, under all the circumstances, that it was intended by S. to be attached as a permanent improvement of the estate which he subsequently purchased. Fixtures attached to the realty after the execution of a mortgage upon it become a part of the mortgage security if they are attached for the permanent improvement of the estate, and not for a temporary purpose, or if they are such as are regarded as permanent in their nature, or if they are so fastened or attached to the realty as that the removal of them will be an injury to it.

8. B. was properly adjudged to have a first lien upon the rents, as neither of the other mortgages created a lien upon anything except the property mortgaged.

Helm & Bruce, H. R. Phillips and Wm. Lindsay for appellant.

Muir & Heyman and Dodd & Grubbs for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

September 14, 1883, by written contract between them, Mrs. V. H. Bullitt leased to George Spalding, for the term of five years, for an agreed rent, a lot of land situated in the city of Louisville, which contract contained a provision, the principal subject of controversy, and hereafter mentioned. September 22, 1883, Spalding made a contract with appellee Baumeister for the erection upon the lot of a warehouse, for which he was to pay $5,700 in ten semi-annual installments, appellee Olds agreeing to become surety therefor upon condition Spalding would indemnify him against loss, and October 1, 1883, a mortgage was executed for that purpose, Mrs. Bullitt being a party thereto. In that mortgage is the following recital:

"Whereas, by lease dated 14th day of September, 1883, Mrs. Bullitt leased to Spalding a tract of ground (describing it), said

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lease giving to said Spalding the option to purchase the leased premises at any time within five years for the sum of $5,000, to be paid cash in hand, to which lease reference is made for greater certainty, the same having been duly lodged for record in the Jefferson County Court clerk's office." Following the further recital that Olds had become surety in the notes to Baumiester in this clause: "Now, in consideration of the premises, the said Spalding does hereby sell, assign and transfer to said Henry G. Olds the said lease, together with all right, title and interest of said Spalding in and to said lease, and the premises therein described, and any improvement or building which may be placed upon said premises, together with the option to purchase said leased premises." On the part of Mrs. Bullitt is the following agreement and reservation: "The said Virginia H. Bullitt unites herein for the sole purpose of signifying her assent to the transfer of the said lease and option. It is distinctly agreed and understood that Spalding does not, by reason of this assignment, cease to be responsible to the fullest extent to Mrs. Bullitt for the fulfillment of said contract of lease between them."

October 6, 1884, Baumister having in the meantime erected the warehouse in compliance of his contract, Mrs. Bullitt conveyed the lot to Spalding for the price mentioned, but they so modified the original agreement that instead of the entire purchase money only $1,000 of it was then paid, a lien being retained in the deed for the residue, made payable September 14, 1888, the day when the lease would have ended. January 26, 1885, Spalding mortgaged the lot, the warehouse being then on it, to appellant, the Bank of Louisville, to secure certain debts he owed it, and June 13, 1885, he executed a mortgage on the lot "with all the rents, issues and profits thereof," to secure payment of a note of that date for $3,500, and in that mortgage "it was agreed that if said note shall not be paid at its maturity then said second party may immediately enter upon and take possession of said real estate, and collect the rents and apply the same to the satisfaction of the debt."

This action was instituted June 16, 1886, by Baumeister, Spalding, Mrs. Bullitt, Olds and the Bank of Louisville being defendants, and in his petition prayed judgment for his debt and application of proceeds of sale of the lot, and rents accrued and accruing during the pendency of the action to satisfy it. The defendants, creditors of Spalding, respectively asked judgment for their debts and enforcement of their liens, and Spalding having consented that each of the debts against him might be treated as due, personal judgments therefor were rendered, and the priority of liens fixed and proceeds of the sale directed to be applied in the following order: First, to Mrs. Bullitt for the balance of purchase money unpaid; second, to Baumeister & Olds to the extent of the judgment of the former against the latter; third, to the Bank of Louisville, balance unpaid of its mortgage debts; fourth, to Baumeister his debt secured by the mortgage of June 13, 1885. It was further adjudged that Baumeister had a prior lien for the rents secured by the mortgage last named. From that judgment, except as it affects Mrs. Bullitt, the Bank of Louisville appeals.

It is contended in argument that the judgment ought to be reversed to the extent it gives Olds priority in the proceeds of sale for the reasons: First, that the option of Spalding to purchase was not a subject of mortgage because no interest in the lot, legal or equitable, existed in virtue of it; second, that the mortgage did not in any event operate upon or affect the freehold;

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third, that it was void as to improvements subsequently put upon the lot.

By section 6, chapter 63, General Statutes, it is provided that "any interest in or claim to real estate may be disposed of by deed or will in writing," and that the right to dispose of such interest or claim was intended to include the right to mortgage as well as to sell absolutely is unquestionable. For it is well settled that every kind of interest in real estate may be mortgaged if it be subject to sale and assignment. (Jones on Mortgages, section 136.)

The simple inquiry then is whether the option to purchase the lot at the agreed price within the specified period was such an interest in or claim to the lot as could be sold or assigned by Spalding, and the answer to it depends upon whether the contract or the option was or not enforcible.

It is true as argued "a contract must be mutual, and one party cannot be bound without the other," but that does not mean that any one or more acts to be done by one of the parties must necessarily be simultaneous with the consideration paid or agreed to be paid by the other. The conveyance of the lot upon demand and tender of the agreed price by Spalding was obligatory on Mrs. Bullitt, if at all, because it was part of the contract of lease which, being founded upon a valuable consideration, was valid and enforcible as an entirety, a naked agreement on her part to convey the lot for the stipulated price at the option of Spalding without any value received or to be received by her or expense to be incurred orloss sustained by him on the faith of it would not have been binding, but if Spalding agreed to lease and pay rent for the vacant lot and incur the expense of putting a warehouse upon it in order to make it remunerative upon the faith of her agreement, he should have the option to purchase at any time during the term of his lease, she was, it seems to us, unquestionably bound.

It is not unusual or unfair, on the contrary often of advantage, to both buyer and seller of merchandise and farm products, to give to the one the option to receive, or to the other to deliver at an agreed price a greater quantity or number than is or perhaps can be conveniently specified and fixed at the time of the contract. "Sales on trial" or "approval" and "sale and return" are terms of common use in the transfer of personal property, and indicate transactions that apparently lack mutuality, but they are not necessarily without consideration or disadvantage to either buyer or seller.

We perceive no reason why the owner of unproductive real estate may not, as part of a contract of lease, and in consideration of rent to be paid by his lessee or expense to be incurred in making it productive, as seems to be this case, bind himself to sell it within a prescribed period at a stipulatd price at the option of the lessee, but it is useless to argue this question further, for Mrs. Bullitt, the only person having any right to deny the validity of that part of the contract, irrevocably bound herself to convey the lot to Spalding upon the agreed terms by making herself a party to the mortgage and "signifying her assent to the transfer of said lease and option." Having thus by her own voluntary act caused Olds to become the surety of Spalding in the note given to Baumeister for erecting the warehouse upon the faith she would convey the lot upon payment of the price by Spalding, she was thereafter estopped to deny being bound by the contract to do so. Moreover, the question of her obligation to convey, if it had been an open one, was closed by her actually

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making a deed for the lot to Spalding before it was mortgaged by him to the bank of Louisville. It is true that instead of paying the whole of the purchase money when the deed was made in accordance with the original contract he paid only $1,000 thereof, which was accepted by her, but that change, made, as he alleges, without his consent, did not in any way impair the rights of Olds as mortgagee, for although his security became of less value than if the lot had been fully paid for, leaving no encumbrance on it for unpaid purchase money, he could, as was done, waive his right to insist upon a literal compliance with the first contract and still retain his mortgage lien upon whatever interest Spalding acquired under the deed, and that interest is precisely the same as if the lot had been conveyed to him in pursuance of a title bond. For the contract, even before it was supplemented by the mortgage, bound Mrs. Bullitt as effectually to convey the lot with a good title, upon the terms specified in it, as she would have been by a covenant to convey executed in due form. We are, therefore, unable to see upon what ground it can be contended the mortgage to Olds did not operate upon and affect the freehold after it was acquired by Spalding. The subject of the mortgage was the interest of Spalding in the lot secured by his contract with Mrs. Bullitt, and that interest he impliedly, if not in the express terms of the mortgage, agreed to make equivalent to a complete ownership of the lot by paying the purchase price in full, but independent of an agreement Olds was entitled to the benefit of whatever he did pay, for upon the discharge of a prior encumbrance, whether it be a mortgage or vendor's lien, the mortgage interest has the full benefit of the discharge. (Jones on Mortgages, sections 138 and 139.)

We think whatever was the extent and value of Spalding's interest in the lot the lien of Olds thereon was subordinate only to that of Mrs. Bullitt.

The rule by which to determine whether the warehouse is to be regarded embraced by the mortgage of Olds is "that fixtures attached to the realty after the execution of a mortgage of it becomes a part of the mortgage security if they are attached for the permanent improvement of the estate and not for a temporary purpose, or if they are such as are regarded as permanent in their nature, or if they are so fastened or attached to the realty as that the removal of them would be an injury to it," although Spalding, at the time he commenced the erection of the warehouse, was not the owner of the lot nor had in fact openly made his election to purchase it, yet, considering the character and cost of the building, the option to purchase the lot which he had secured by his contract with Mrs. Bullitt, and the special mention of the warehouse in the mortgage to Olds, it is evident it was intended by him to be attached as a permanent improvement of the estate which he subsequently purchased, and as the liability of Olds was incurred to enable him to erect the building, and upon the faith it, as part of the realty, would constitute a security against loss, we think it is properly adjudged subject to his mortgage.

Though excepted to at the time, counsel do not in argument insist upon a reversal upon the ground Baumeister was adjudged to have a prior lien upon the rents, nor do we think there was error on that account, for neither of the other mortgages in terms operated upon or related to the rents, as was the case of the mortgage to Baumeister, and consequently neither of them created a lien upon anything besides the property mortgaged.

The judgment is affirmed.

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TENNELLY v. TENNELLY.

(Filed February 25, 1888—Not to be reported.)

1. Contracts—Fraud—A contract made by a widow with her stepchildren whereby she agreed to take a child's share of her deceased husband's estate, only about one fourth of what she was entitled to as widow, is set aside, upon the ground that it was obtained by undue influence.

2. Settlement of executor's account—The action by the widow to set aside the contract and recover her distributable share being in the circuit court, that court had jurisdiction to settle the executor's accounts.

Nat. W. Halstead and John W. Lewis for appellant.

Wm. Johnson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

It is apparent, from the testimony in this case, that the appellants obtained an advantage over the appellee by entering into a contract with her, in the absence of her counsel, that deprived her of nearly all her interest in the husband's estate. The husband of the appellee had been twice married, and had by his first wife many children. It is shown that the intestate desired his wife to take a child's part of the estate, which would have given her the one-eleventh of the whole, valued at $595; that he left at his death a will that had been executed in the life time of his first wife. This will was admitted to probate, the parties being under the impresson that it was a valid instrument. Under these circumstances the children of the intestate made a contract with the widow by which she agreed to take a child's part of the estate and relinquish all other rights as widow. Having become dissatisfied with the arrangement the widow employed counsel to advise her, and the result was an action to cancel the contract. and an appeal taken from the order of the county court probating the will. While this action was pending the personal representative of the intestate obtaind from the widow another relinquishment by a contract entered into between them similar to the one that had been assailed by her in the action then pending. He paid her the value of an eleventh interest in the estate, which was about one-fourth of what she was entitled to, and then by counsel moved to have the action pending dismissed. Her counsel resisted the motion, and the court adjudged that the contracts formed no obstacle to the recovery by the widow of her distributable share of the estate. The brother of the appellee was present when the last contract was entered into, and says his sister understood it, and still understands it. He shows, however, that his sister had become alarmed about having to attend court, having been told by some of the heirs of the intestate that she would have to be present. She remarked that she would sooner die than to have to attend in person, and was evidently laboring under an impression that she would necessarily undergo some severe ordeal if her presence was required. Her counsel had not been consulted as to this settlement, and it is manifest that something more than a mere suspicion of wrong exists in this case, although it is difficult to seize upon the facts sustaining it. It is, however, remarkable that after consulting

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with counsel and having her action instituted, with no obstacle in the way of recovery, that this old woman, without consulting her lawyer, should have made in effect the same contract that she was endeavoring to rescind, and then impose on her adversary without notice to counsel the duty of having her suit dismissed. It is also doubtful from the proof whether either the personal representative or the brother of the appellee knew the nature of the contract, but assuming that they did, and were capable of informing the appellee of her rights, it further appears that this personal representative was directly interested in the result of the controversy, being himself one of the heirs, and this fact, in connection with the peculiar circumstances attending the transaction, induced the chancellor to disregard this last agreement.

If the appellee, when she gets this property, is inclined to execute her husband's wishes, there is nothing to prevent the exercise of such a right, but as the case is now presented the judgment giving to her the property she is entilted to as widow must be affirmed.

We perceive no objection to a settlement with the executor of his accounts in the circuit court, as that court has now jurisdiction of the case. We do not understand that the commissioner is directed to allot dower or to take any step in reference to the land, in which case it would be necessary to make all the heirs parties.

Judgment affirmed on original and cross-appeal.

Response by Chief Justice Pryor to petition for rehearing, filed April 3, 1888:

We have again reviewed the testimony in this case and it plainly appears that those directly interested in the settlement and distribution of Tennelly's estate were instrumental in obtaining from the appellee her distributable share of the husband's estate, and under such circumstances as rendered the settlement with the appellee a nullity. We are satisfied that counsel for the appellant, who prepared the writing, as well as resident counsel originally employed, acted in good faith, and we find nothing in the record to question their integrity of purpose in advising the arrangement.

In alluding to well founded suspicions in the opinion the idea intended to be conveyed was that family influence over the widow, and probably the appeals made to her by those in interest to execute the wishes of her deceased husband, influenced the settlement, with no intention to involve either counsel in any way, and not even their clients to any greater extent than resulted from their influence over the appellee.

As the appellee had been paid moneys in the settlement made, it was necessary to make her account for it, and the appellant being the personal representative, we perceive no error in directing a settlement of his accounts with a view of ascertaining her distributable share.

The petition is overruled.

BLEVINS v. BLANKENSHIP.

(Filed February 18, 1888—Not to be reported.)

1. Vendor's lien—As between vendor and vendee the vendor is entitled to a lien for unpaid purchase money, although the conveyance gives no notice that any part of the purchase money remains unpaid.

2. Same—Although a conveyance recited the payment in full of the purchase money, yet as it was alleged and not denied that the recital was a

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mistake, the vendor is entitled to enforce his lien for the purchase money remaining unpaid, as it does not appear from the record that the rights of bona fide creditors or purchasers are involved.

E. B. Wilhoit for appellant.

Jas. D. Jones for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Holt.

This is an action upon a note executed by the appellant, John C. C. Blevins, to Joseph Davison for the last payment upon a tract of land, and assigned by the latter to the appellee, A. J. Blankenship. Judgment, both in personam and in rem, was rendered by default after due service of summons. The deed from Davison to Blevins, made when the note was given, recites the payment in full of the purchase money. It was made an exhibit by the petition, which avers, however, that the statement as to the purchase money is not true. Unless this is to be regarded as an averment of mistake in the making of the deed there is none. Assuming that it is not, the appellant claims that the judgment was unauthorized.

The Revised statutes provided: "When any real estate shall be hereafter conveyed, and the purchase money or any part thereof shall remain unpaid at the time of the conveyance, the grantor shall not thereby have a lien for the same, unless it be expressly stated in the deed what part of the consideration remains unpaid." (Volume 2, Revised Statutes, chapter 80, section 26.) The statute now in force says, in express words, however, that this lien shall not exist "against bona fide crditors and purchasers unless it is stated in the deed what part of the consideration remains unpaid." (General Statutes, chapter 63, section 24.)

Unless this be done the vendor waives his lien as to bona fide creditors and purchasers. They are protected, since the conveyance gives them no notice that any of the purchase money remains unpaid. The immediate vendee knows, however, whether it has been paid or not, and if not the lien upon equitable principles exists in favor of the vendor, although the deed fails to state that any or how much of it is unpaid. The statute only provides that the equitable lien given to the vendor shall not exist as against "bona fide creditors and purchasers" if the land be conveyed without stating in the deed what portion of the price is unpaid. (Ross v. Adams, 13 Bush, 370; Tate v. Hawkins, &c., 81 Ky. 582.)

The appellant, Blevins, was the immediate vendee and is yet in possession of the land. So far as the record shows the rights of no bona fide creditor or purchaser are involved.

The averment in the petition that the recital of payment in full in the deed is not true must be taken as pro confesso by the failure of the appellant to anwser, and it amounts in substance to one of mistake.

Judgment affirmed.

SPALDING, TAX COLLECTOR v. HILL.

(Filed February 11, 1888.)

Constitutional law—State board of equalization—There is no constitutional objection to the act approved May 10, 1884, creating the State Board of Equalization and defining its powers. Equality and uniformity are essential to

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the constitutionality of taxation, and the State board of equalization is designed to accomplish this end as nearly as may be, while the powers conferred upon the board are clearly adapted to the accomplishment of the end designed. It is no objection to the act that it does not provide for notice to the taxpayers of the meeting of the board. The act requires that the board shall meet at a specified time and place, of which meeting the property holders must take notice.

S. T. Spalding for appellant.

Rives & Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

The State board of equalization, at its regular session as fixed by law, increasd the value of land of Marion county as fixed by the assessor of that county thirteen per cent. The said board also increased the value of personal property as fixed by the assessor thirty per cent.

The appellee instituted this action in the Marion Circuit Court to enjoin the appellant, as collector of the State taxes in Marion county, from collecting the State taxes on her real and persoal property in said county in excess of the values fixed thereon by the county assessor. The chancellor upon hearing perpetually enjoined the appellant from collecting this tax. He has appealed to this court.

It is conceded that the State board of equalization proceeded strictly in accordance with its powers under the act approved May the 10th, 1884, creating the board and defining its powers, but the appellee constends that this act is unconstitutional, and the lower court sustained that contention. Under the law for assessing real and personal property in this State for taxation the owner is required to list it under oath with the assessor of his county. The assessor, upon his own knowledge and other evidence—usually the oath of the owner being all that is required—fixes a valuation upon it. The county board of supervisors, consisting of three citizens and taxpayers of the county, and appointed by the county court, revise the assessment roll as returned by the assessor. It is the duty of this board to correct any error of the assesor in relation to the valuation he has placed upon the property of the citizen, and when his property has not been correctly assessed to fix a proper value upon it. The act of the 19th of May, 1884, provides for the election of a board of equalization. This board consists of a member elected from each congressional district of the State. The members are required to meet in the city of Frankfort at stated times. At their meeting they are required to examine the assessment rolls of each county of the State, and to classify the assessed property of the State into three classes: First, personal property; second, lands; third, town and city lots. They are then to ascertain the value of each class of property in each county, and to equalize the value of the same. This is done by increasing the value of any or all of said classes in any county where such classes have been assessed too low, and by decreasing the assessed value of any or all of these classes in any county where such classes have been taxed too high, but they have not the power to increase or decrease the total valuation in the State. Their power is limited to equalizing the value of said classes of property among the sev-

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eral counties of the State so as to arrive, as nearly as may be, at the true value of each class of property in each county of the State in order that it may bear its just proportion of the burden of taxation.

The Constitution of the State requires that a county assessor shall be elected every four years, but his duties are not prescribed by that instrument. His duties were wisely left to be pescribed by law. It is conceded that "in all cases of taxes by valuation an assessment is indispensable and primary. It lies at the foundation of the proceeding," but the action of the assessor in making the assessment is not necessarily final. His action is ex parte. It is true that the law authorizing the assessment may make his action final, but it is not necessarily final by virtue of his office. From the earliest history of the State assessors have been employed for the purpose of making the primary valuation of the property in the several counties of the State, but at no period in the history of the State has the action of the assessors been regarded by the law making power as necessarily final, for laws have been passed time and again creating county boards of supervisors, with the power to increase or decrease the value placed upon the citizen's property by the assessor.

It is the settled doctrine of this State that, for the purpose of taxation property must be assessed according to its true vaule; that each citizen must contribute to the support of the State government according to the value of his property; that equality of burden is essential to the correct administration of the government, but it is a fact known by all that for years past the greatest inequalities have existed in the value fixed upon all kinds of property by the county assessors, and that the county boards of supervisors have failed to correct the evil. In some counties it is said that assessors secure their election by pledges made to assess the property in the county, or certain kinds of it, at a low value. In creating the State board of equalization the object was to correct this evil, and to have the assessment of taxes in the several counties equalized according to the value of the property therein, so that the State government might be supported by just and equal taxation. As before stated, the value fixed upon the property in the county by the assessor is not final. It is primary merely. The county supervisors are appointed to revise and correct the assessment rolls as returned by the county assessors.

So the State board of equalization is yet a higher and final authority, whose duty it is to examine into the assessment of the several counties, and in case the assessment of one or more counties is found to be relatively higher or lower than other counties, and to equalize the taxes among the several counties according to the value of the property therein. This board is simply a higher and final power selected by the people for the purpose of revising and correcting the errors of the county assessors, whether consisting in filing the county assessments relatively too high or too low, in order that the property in the State may be taxed according to its value. Equality and uniformity are essential to the constitutionlity of taxation, and as the State board of equalization is designed to accomplish this object, as nearly as may be, by distributing the burden of taxation among the several counties of the State according to the value of the property therein, and as the powers conferred upon the board are clearly adapted to this purpose, we see no constitutional objection to the act. (Saving and Loan Society v. Austin, 46 Cal., 473; Cin., N. O. & Texas Pacific R. R. Co. v. The Commonwealth, 81 Ky., 493.)

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The objection urged that the act requires no notice to be given to the people of the several counties that the board will pass upon the question of increasing or decreasing the assessed value of their property, is answered in the case last cited. It may have added that the board operates upon the counties and not directly upon the individual citizen, and the act requires that the board shall meet at a specified time and place, of which meeting the property holders must take notice.

The judgment of the lower court is reversed, with directions for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

MARSHALL, &c. v. SANFORD, &c.

(Filed February 29, 1888.)

1. Revivor of judgments—A trustee in whose favor a judgment was rendered having died after the rendition of judgment, the appointment of another trustee was not necessary in order to revive the judgment against the heirs of the judgment defendant, who had also died. A revivor in the name of the cestuis que trust was sufficient, the purpose for the trust having been served, and the necessity for a trustee being at an end.

2. Same—A proceeding by rule to revive a judgment against the heirs of the judgment defendant was not the commencement of a new action, and, therefore, no demand or affidavit was necessary before commencing the proceeding; although before making the order reviving the judgment it was necessary to make the affidavit, which was done.

3. Same—As the proceeding to revive was not against the heirs and personal representatives jointly, but against the heirs alone, the limitation of seven years provided by section 7, article 4, chapter 71, of the General Statutes, does not apply.

4. Same—An action against the heir is never barred at any time within which it might have been brought against the decedent.

As the proceeding to revive the judgment was commenced within fifteen years after the judgment was rendered, it was not barred.

5. Same—As the demand, accompanied with the required affidavit, was not made of the personal representatives of the judgment defendant within one year after his appointment, the judgment of revivor was erroneous in allowing interest accruing after the death of the judgment defendant.

6. Same—It was error to revive the judgment in the names of only a part of those who were entitled to its benefits.

W. H. Mckoy for appellants.

Hallam & Myers for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barbour.

This is a proceeding by rule to revive a personal judgment against the heirs of the judgment defendant, and is the second time that the case has been in this court upon the appeal of the heirs. The ground upon which the first judgment of revivor was reversed was that it was rendered before a defense to the proceeding had been made for the infant defendants. Upon the return

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of the case to the lower court the adult heirs and the infant heirs, who were represented by their statutory guardian, appeared and resisted the rule. Their motion to dismiss the rule having been overruled, and their response having been adjudged insufficient, they have prosecuted this appeal.

The first objection urged to the proceeding that we will notice is that the original judgment was in favor of the trustee, who had died after its rendition, and the cestui que trusts, who are the appellees, not being parties to the judgment, the motion to revive and the order of revivor should have been made in the name of the successor to the trustee, i. e., in the name of some one who had been duly appointed in his stead, or in the name of the heir or personal representative of the trustee, and not in the names of the appellees who were the cestui que trusts. No trustee was appointed in the place of the dead trustee. However, with out conceding that the heir or administrator of the trustee could have had any right to control the judgment, we will state that the record shows that the order of revivor was made in the name of the heir of the trustee as well as in the name of the appellees, but independent of this the appellees were the parties plaintiff in the action in which the judgment was renderd, and it is also shown that the purpose of the trust had been served, and the necessity for a trustee was at an end. Therefore, there was no necessity for having a nominal trustee appointed. The revivor could be properly made in the name of those who were beneficially interested in the judgment.

The second objection urged is that there was no demand made of the personal representative of the judgment defendant, accompanied with the proper affidavit, before the proceeding to revive was begun. This was not necessary. The proceeding to revive the judgment by rule was not the commencement of a new action but was the mere continuation of the original action, as was held by this court in the opinion upon the former appeal. No demand or affidavit was necessary to be made before commencing the proceeding by rule, although before making the order reviving the judgment against the heirs it was proper and necessary for the appellees to make the affidavit. This was done. (Apperson v. Hazelrigg, 2 Ky. Law Rep., 64.)

The third objection was that the judgment was barred by the statute of limitaton. The proceeding was not against the heirs and personal representative jointly, but was simply against the heirs, and, therefore, the General Statutes, chapter 71, article 4, section 7, does not apply. The judgment was rendered in 1869, and the proceeding to revive was begun in 1883. The fifteen years provided in the statute had not elapsed. The judgment would not have been barred as against the defendant in the judgment had he not died until in July, 1884, and an action against the heir is never barred at any time within which it might have been brought against the decedent. (Pilcher v. McCowan, 8 Ky. Law Rep., 786.)

The fourth objection is that the demand, accompanied with the required affidavit, was not made of the personal representative of the judgment defendant within one year after his appointment, and that, therefore, the judgment of revivor is erroneous in allowing interest accruing after the death of the judgment defendant. Section 53, article 2, chapter 39 of the General Statutes, provides that "no interest accruing after his death shall be allowed or paid on any claim against a decedent's estate unless the claim be verified and authenticated as required by law and demanded of the executor, administrator or curator, within one year after his appointment." The appellants' response to the

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rule states that John Marshall died intestate prior to May 12, 1875, and that John L. Sanford was appointed his administrator May 12, 1875, by the Kenton County Court. To this extent we are of opinion that the response was good and the court should not have allowed interest after the death of John Marshall, the judgment defendant.

We are also of opinion that the judgment of revivor is erroneous for another reason. The judgment against John Marshall was a part of the estate which was held in trust for the sole use and benefit of Mary Ann Marshall during her life, with remainder in fee simple to the descendants of said Mary Ann Marshall and her husband, James B. Marshall. Before the judgment of revivor which is appealed from was rendered Mary Ann Marshall had died, and the necessity for a trustee being at an end, we have held that it was proper to revive the judgment in the name of those who were entitled to its benefits, but the appellees are not entitled to the benefit of the whole judgment. The appellees, Kate M. Sanford and Julia S. Breckinridge, are but two of the children and descendants of Mary Ann and James B. Marshall. John Marshall, the judgment defendant, was a child, and he having died his children stand in his place. Louis J. Marshall was also a child—whether he is living or dead is not shown by the record. As it now appears the appellee, Kate M. Sanford, and her husband and the appellee, Julia S. Breckinridge, and her husband, have a right to enforce the judgment against the appellants for only one-half the amount of the judgment with interest up to the time of the death of John Marshall.

The judgment is, for the reason given, reversed, and the cause remanded for further proceedings consistent with this opinion.

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SUPERIOR COURT ABSTRACTS.

JOLLY v. MOORE, &c.

Filed February 8, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Ward, dismissing as to one appellee and reversing as to others.

1. Appellate jurisdiction—Where two judgments are in favor of separate parties and on separate demands, they must be considered as separate judgments, although against the same defendant and embraced in the same order, and if either judgment is for less than $100 this court has no jurisdiction of an appeal from that judgment.

2. Official bonds—The county court has no jurisdiction or authority to take a constable's bond until some person is elected or appointed to that office. It is, therefore, not sufficient, in an action upon such a bond, to allege that the principal in the bond "was duly qualified as constable." The facts should be alleged, showing that he was elected, or that there was a vacancy and that he was appointed as required by law.

3. Same—The execution of a constable's bond and its approval by the court must appear by an ordrer of the court upon its records, and that there is such an order must appear by proper averments in an action upon such a bond.

G. W. Williams for appellant; J. Z. Moore for appellees.

THORNBERRY v. FARMERS BANK OF KENTUCKY.

Filed Feburary 8, 1888. Appeal from Scott Court of Common Pleas. Opinion of the court by Presiding Judge Ward, affirming.

Assignments by operation of law—Where an act done by an insolvent debtor necessarily prefers one creditor to the exclusion of others, it operates as an assignment of his property for the benefit of all his creditors, whether the result was brought about directly and by one transaction, or whether by indirection and several connected transactions.

H. & Son, an insolvent firm, sold their stock of goods to M., to be paid for in cash when invoiced. T., to whom the firm was indebted, proposed to M. to transfer to him the notes of H. & Son which he, T., held, and to take therefor M.'s notes. M. agreed to take the notes if H. & Sons would agree to accept them as so much cash in payment for the stock of goods. To this H. & Son agreed, and thereupon the proposed transfer was made and the notes of T. accepted by H. & Son as agreed. The creditors of H. & Son attack this transaction as within the act of 1856 (article 2 of chapter 44, General Statutes), and seek to have the assets of the insolvent firm distributed as provided by the statute. Held—That the plaintiffs are entitled to the relief sought. The legal consequences which follow from a contract must have the same effect as if those consequences had been provided for by express stipulation.

Owens & Finnell for appellant; V. F. Bradley for appellee.

JONES v. MITCHELL'S ADM'R, &c.

Filed February 8, 1888. Appeal from Crittenden Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Executors and administrators—Limitation—It is only where the time within which an action may be brought expires after the death of the debtor and before the expiration of one year after the qualification of his administrator, or, if there be no administrator, before the expiration of two years after the death, that there is any extension of the period of limitation by virtue of section 5 of article 4 of chapter 71 of the General Statutes.

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In this case, the period of limitation not having expired until more than one year after the qualification of the administrator, the time for bringing the action was not extended beyond the time elapsing between the death and the expiration of one year after the appointment of the administrator.

2. Same—An action can be maintained upon a new promise made by an administrator or executor.

3. Same—An administrator or executor has no authority to bind the heirs or devisees by his acknowledgment of a demand against the decedent and promise in writing to pay it, and in an action to subject estate devised or descended to the payment of the demand, such a promise will not prevent the heirs or devisee from relying upon the plea of limitation, although it might have been effectual for the purpose of preventing the administrator from relying upon such a plea in an action against him to recover a judgment to be levied of assets in his hands.

J. W. Blue for appellant.

LEBANON AND PERRYVILLE T. P. R. CO. v. COMMONWEALTH.

Filed February 8, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, reversing.

The Commonwealth can not maintain an action against a turnpike company to enjoin the company from collecting tolls from persons from whom it is not authorized to make such collections. If the rights of an individual or any number of individuals are affected by the acts of others, those injured may find redress by a civil action which they alone can maintain. The fact that the petition filed by the Commonwealth in this case charges that the acts complained of amount to the usurpation of a franchise, does not authorize the action, as the facts alleged do not warrant such a legal conclusion.

Thompson & McChord and Harrison & Belden for appellant; Rives & Spalding for appellee.

McGRAW v. FALMOUTH AND CHIPMAN HALL TURNPIKE CO.

Filed February 8, 1888. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, reversing.

Turnpikes—Subscriptions—Appellee instituted this action to recover of appellant a subscription which it avers he made to its capital stock prior to the incorporation of the company. The company was authorized by its charter to build a turnpike from two miles west of Falmouth to Chipman Hall. The appellant claimed that the only subscription he made was to build a turnpike from Falmouth to Williamstown, and the testimony tended to sustain his defense. The court instructed the jury to find for the plaintiff, if they believed from the evidence that defendant subscribed for the purpose of building a road "from Falmouth or two miles west of Falmouth to Chipman Hall or Williamstown." Held—That this was error. If the defendant subscribed to build a road from Falmouth to Williamstown, he ought not to be made to pay for a road to be built between other points.

J. T. Simon for appellant; L. T. Applegate for appellee.

CINCINNATI, NEW ORLEANS & T. P. R. R. CO. v. PEMBERTON, &c.

Filed February 8, 1888. Appeal from Scott Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Appeals—Res judicata—A judgment upon the same cause of action upon which the judgment now appealed from was rendered having been reversed upon a former appeal, upon the return of the case to the lower court the appellee abandoned his original action and instituted another action for the same injury, alleging the same facts in the same language, to which the defendant made identically the same defense which he made to the original action. Held—That this case must be regarded as the same case which was considered upon the former appeal, and the judgment then rendered must be regarded as conclusive upon all questions then before the court.

2. Grounds for new trial—"Error of law occurring at the trial and excepted to by the defendant," is too general as a ground for a new trial to require the court to review its action in any particular.

3. Excessive verdict—In this action by a boy to recover damages for an in-

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jury caused by having one of his legs run over and crushed by a car, the evidence shows that the boy's leg was badly crushed; that he suffered great agony and pain and that his leg is permanently injured and its usefulness greatly impaired. The jury found a verdict for plaintiff for $2,500, which is the second verdict for same amount. Held—That the court can not say, in view of these facts, that the verdict is excessive.

Simrall & Mack and J. E. Cantrill for appellant; Owens & Finnell for appellee.

KENTUCKY CENTRAL R. R. CO. v. McGINTY.

Filed February 8, 1888. Appeal from Clark Circuit Court. Opinion of the court by Judge Bowden, withdrawing former opinion and reversing.

1. Willful neglect—Right of parent to sue—Under section 3 of chapter 57 of the General Statutes, a father can not maintain an action, as heir, to recover damages for the death of his infant son by the willful neglect of another. The word "heir," as used in that section, means "child," and does not apply to any other description of person.

2. Same—Pleading—While such an action was not maintainable, the misapprehension that it was, can not render nugatory such allegations as state a cause of action. Therefore, as the plaintiff alleged that the child was so injured by the willful neglect of the defendant that it died six days after having received the injury, and that the plaintiff had been put to expense for a physician, and had been put to trouble in care, etc., he is entitled to recover compensation therefor; and to entitle the father to such compensation it is not necessary that the negligence should have been willful. (9 Bush, 455).

3. Verdicts—As the real and only cause of action stated in the petition was tried and a verdict relating to it was found, there is no reason why a judgment should not be rendered on that verdict merely because the court entertained another issue that was irrelevant. Therefore, judgment should be rendered for the plaintiff upon so much of the verdict as found compensation.

Breckinridge & Shelby for appellant; J. F. Winn and George B. Nelson for appellee.

HYATT v. KENNEDY, &c.

Filed February 8, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Bowden, reversing.

Settlement of partnership—If partners desire the courts to settle their partnership affairs they must come in while the truth is yet capable of being at least proximately ascertained; otherwise they must settle their differences themselves. Litigants can not justly require courts to guess.

In this case a petition seeking a settlement of partnership affairs, after the lapse of many years, is directed to be dismissed, as it is not possible to ascertain how the account truly stands.

Hargis & Eastin and John Williams for appellant; Harrison & McGrain and Thomas B. Fairleigh for appellees.

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KENTUCKY COURT OF APPEALS.

RANKIN, &c. v. CITY OF HENDERSON.

(Filed February 18, 1888—Not to be reported.)

1. Municipal taxation—The legislature has the right to classify and impose a license tax on trades, and such a tax, when imposed, is not required to apply to all kinds of business pursuits. All that is required is that those pursuing like occupations shall be taxed in the same manner.

2. Constitutional law—The provision of the Constitution requiring "bills for raising revenue" to originate in the house can not be applied to a bill imposing a tax upon the people of a town or county, merely for a local purpose. This provision applies alone to the revenue that properly goes into the State treasury.

Brown & Merritt for appellants.

John L. Dorsey for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Pryor.

The common council of the city of Henderson was authorized to impose a license tax upon certain employments in business conducted within that city.

That the legislature has the right to classify and impose a license tax on trades is well settled, and that such a tax, when imposed, is not required to apply to all kinds of business pursuits is equally certain. Those pursuing like occupations must be taxed in the same manner or in proportion to the amount of business conducted We perceive, therefore, no valid objection to this legislation, as it applies alike to all of the classes to be taxed.

Nor is the act unconstitutional, because the bill conferring the power had its origin in the Senate. The object of the bill, it is true, was to raise revenue for the local government, but the provision of the Constitution requiring "bills for raising revenue" to originate in the House, can not be applied to a license tax, or to any tax imposed merely for the maintenance of a municipal corporation. The provision of the Constitution in question applies alone to the State, or the revenue that goes into or properly be-

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longs to the State Treasury. That tax is applied alone to municipal purposes and no part of it belongs to or can find its way into the treasury of the State. In taxing the people of a town or county for a local purpose the money collected is not to be considered revenue for the State or for State purposes, although the corporation, to the extent of the power conferred, is but the agent of the State to regulate and control, subjcet to constitutional restriction, those who live within its jurisdiction. An act bringing into existence the local government with the power to enforce a tax for municipal purposes, together with all the machinery necessary to run it, being local in its nature and in aid of local interests, may originate in either house, and in cases where the object of taxation is purely local and in aid of local purposes, it is not the legitimate subject of inquiry whether the act conferring the power originated in the one house or the other. (Bullitt v. City of Paducah, 8 Ky. Law Rep., 870; Commonwealth v. Bailey, 81 Ky., 395 [4 Ky. Law Rep., 384]; Kniper v. City of Louisville, 7 Bush, 599.)

Judgment affirmed.

EDELEN v. HAGAN'S ADM'R, &c.

(Filed Feburary 21, 1888—Not to be reported.)

Set off—Partnership—Uncle and nephew were partners in feeding and selling mules. The uncle sold the mules, took the notes for the purchase money payable to himself alone, and managed the entire business as if the nephew had no interest in it. The uncle held two notes against his nephew, amounting to several hundred dollars, and upon the death of the uncle, these notes came into the hands of his administrator and heirs, who brought this action to subject the nephew's interest in the estate of the decedent to the payment of those notes, the nephew being one of the heirs. The nephew alleges that his interest in the profits of the mule business amounted to as much, if not more, than the notes sued on, and that he is entitled to have this interest set off against the claim sued on. It is evident that the decedent converted the partnership funds to his own use, intending to make himself individually liable to his nephew, and expecting to discharge that liability by surrendering to his nephew the notes sued on. Held—That the petition should be dismissed.

J. S. Kelly for appellant.

Wm. Johnson and C. T. Atkinson for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

The evidence in this case conduces to show that the appellee's intestate was a man of considerable estate, real and personal, and in the control of that part of the estate in which his nephew, the appellant, had an interest; that the latter had but little voice, if any, in regard to their joint adventures, either in the sale of the stock or the application and disposal of the proceeds. They were partners, or had been, in feeding two lots of mules, the nephew giving them his personal attention, besides raising and furnishing much of the feed required to prepare them for the southern market. The uncle sold the mules, took the purchase money notes in his own name, and managed the entire business as if the nephew had no interest in it. The appellant lived

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on the farm of his uncle at the death of the latter, and was looking, no doubt, to him for aid in his attempt to rid himself of his pecuniary troubles. He was indebted to his uncle in two notes amounting to $600 or $700, and these notes, coming into the possession of the administrator and heirs, they sought to subject the interest of the appellant in the personal and real estate left by the decedent to the payment of these debts. The appellant, being one of the heirs, the property was subjected to their payment by the chancellor, and of this the appellant complains. He says, by way of defense to the notes, that he was a full partner with his uncle in the purchase and sale of these mules, and entitled to one-half the profits; that the profits equaled and perhaps exceeded the amount of the notes; that his uncle agreed with him, a few days before his death, that he would surrender to him the notes, in full of his interest in the mule adventure, but dying suddenly of appoplexy, failed to do so. He insists, however, that his interest should be set off against the claim made by the administrator. It is evident that profits were made from the purchase and sale of the mules in an amount sufficient to extinguish these notes, and equally apparent that his uncle, the intestate, had taken all the notes payable to himself, and recognized his individual liability to his nephew, expecting to discharge it by surrendering the notes he held upon him. It is shown by some one or more of the heirs of the intestate that the latter remarked more than once that he would be safe from loss on account of these notes due him by the appellant if he collected the mule money. He had in fact converted the partnership effects or funds to his own use, and doubtless then contemplated that his nephew should look to a final settlement by him with those who had executed their individual notes in payment for the mules, in order to ascertain their solvency or insolvency.

The notes were not only made payable to the uncle, but a mortgage has been taken to secure this indebtedness, omitting the name of the nephew and ignoring entirely any interest that he ever had in the partnership. The conversion of the partnership funds was complete and with the express purpose, on the part of the uncle, of paying to his nephew his interest in these notes.

The judgment is reversed and cause remanded, with directions to dismiss the petition.

HALL v. RUDD, &c.

(Filed February 21, 1888—Not to be reported.)

Landlord and tenant—Lease construed—H. and R. entered into a written contract by which R. leased to H. a vacant city lot for five years, H. agreeing to pay an annual rent of $300 for the lot. H. was to erect on the lot, within the five years, a brick building of a certain description, and R. reserved the right to terminate the lease at the end of the five years by purchasing the building at a price to be fixed upon by appraisers selected by the parties, who were to be bound by the appraisement. In the event R. elected not to purchase the building, H. was to have the building appraised in the same manner and was to have the right to hold possession of the building and lot until the rent, at the rate of $300 per year, would pay for the building at the appraised value. At the end of the five years R. elected to purchase the building, and with that view the building was appraised. Held—That R. having purchased the building at the end of five years, the right of H. to hold the possession of the lot and building at a rental of $300 per year

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was at an end, and for the length of time he thereafter held possession, he is liable for its reasonable rent, to be applied as a credit on the purchase price of the building, and, for the payment of any balance, he should be allowed to retain possession of the property at a reasonable rent, which the lower court fixed at $1,400.

Wm. Lindsay and G. W. Jolly for appellant.

G. W. Williams & Son for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

On the 28th day of August, 1876, the appellant and the appellees, James C. Rudd and wife, entered into a written contract, by which the appellees leased to the appellant a vacant lot of ground situated in the city of Owensboro, for the term of five years, commencing on the 1st day of January, 1877, and ending on the 1st day of January, 1882. The appellant agreed to pay $300 per year for this lot of ground. The payments were to be made monthly at the rate of $25 per month. The appellees were to pay the taxes on the lot of ground. The appellant was to erect on said lot, within five years, a substantial brick building, which was to be one or two stories high, at appellant's option, which building he was to apportion into three store-rooms before his term of lease expired. The appellant was to pay all taxes on this building. At the end of five years from the 1st of January, 1877, the appellees reserved the right to terminate the lease by purchasing the building at a price to be fixed upon it by two appraisers, the appellees to select one and the appellant to select the other, and in case the appraisers disagreed as to the value of the building, they were to select an umpire. Appellant and appellees were to be bound by the valuation thus put upon the building. In case the appellees failed to purchase said building at the end of the five years, the appellant was to have the building appraised in the same manner that it was to be done in case the appellees had purchased it. The appellant was then to have the right to hold the possession of the house and lot until the rent, at the rate of $300 per year, would pay for the building at said appraised value, which rental the appellant was to apply to said payment. At the end of five years the appellees concluded to purchase the building, and with that view the building was appraised in the manner designated in the lease, which appraisement was reduced to writing and signed by the appraisers at the sum of $6,004. The appellant and appellees, in a writing signed by them, after reciting the return of the appraisement to them, say: "They agree to abide the same, and agree that the said Rudd and wife are indebted to the said Hall in said sum, and that said sum is a lien upon said property." This agreement was signed and acknowledged on the 2d of January, 1882, and the same, together with the appraisement, was recorded on the 4th day of January, 1882. The appellees did not pay the $6,004, and the appellant continued in the possession of the house and lot. The appellant contends that because the appellees failed to pay him the appraised value of the building he has the right to keep the lot and building at the rate of $300 per year until the rent, at that rate, will pay said sum. The appellees contend that the appellant should pay a reasonable rent for the use of the lot and building, to be credited on said sum.

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By the terms of the lease the appellant's right to retain the possession of the house and lot at the rate of $300 per year, and to apply the same to the payment of the appraised value of the building, until the same should be discharged, depended upon the condition that the appellees, at the end of the five years, failed to purchase the building, and the further condition that the appellant had it appraised in the same manner that it would have to be appraised in case the appellees concluded to purchase it. The object of the appraisement was to fix a standard of value at which the appellees had the absolute right to purchase, and in case they failed to purchase, the appellant was to have the appraisement made for the purpose of fixing the standard of value, in order that the same might be discharged at a rental of $300 per year. The precedent condition of appraisement was, therefore, material, and the appellant had no right to hold the possession of the house and lot after expiration of five years at a rental of $300 per year, unless the appellees, at the expiration of the five years, failed to purchase the building, and unless he had the same appraised in the manner designatd in the lease. In case the appellees concluded, at the end of the five years, to purchase the building, the lease is silent as to the terms of payment. But a separate and distinct clause of the lease provides in substance that, notwithstanding appellees failed to purchase said building at the end of the five years, they should have the right, at any time thereafter to purchase the building by paying for it its appraised value, deducting from the price the rents that have accrued and have not been paid. This clause speaks for itself. It was not intended to control the preceding clause in reference to the terms of payment, in the event the appellees concluded to purchase the building at the end of the five years. In that case the lease certainly left the terms of payment open. It was the right of the appellant to require the cash in hand or to give time for its payment.

The written agreement of the 2d of January, 1882, clearly shows: First, that the appellees had agreed to purcahse the building at its appraised value; second, that the building was appraised with that view; third, that the appellant and appellee agree to abide by the appraisement; fourth, that the appellees promised to pay the appellant the appraised value of the building; fifth, that appellant retained a lien upon the whole property as a security for the payment of the sum. This agreement was equally binding upon the appellant and appellees. By this agreement the building became the property of the appellees, and the appellant had a lien upon it for the payment of the purchase price. The purchase price, as there was no time fixed for its payment, bceame due immediately, but from the fact that a lien, the evidence of which was formally recorded, was retained on the property for its payment, the conclusion is strong that the immediate payment of the money was not required as a precedent condition of the appellees' right to the building. Therefore, the appellees having purchased the building at the end of the five years, the appellant's right to hold the possession of the lot and building at a rental of $300 per year was at an end. And for the length of time that he thereafter held the possession of the property he was liable for its reasonable rent, which, after deducting any taxes or insurance that he may have paid, and the costs of any necessary repairs, should be applied as a credit on the purchase price of the building and interest thereon. And for the payment of any balance of the purchase price and interest, he should be allowed to retain the possession of the house

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and lot at a reasonable rent, which the lower court fixed at $1,400 per year, first deducting from this sum the taxes, insurance and the costs of necessary repairs.

The judgment of the lower court being in accordance with the foregoing views, it is affirmed.

TURNER v. SHORT, &c.

(Filed February 21, 1888—Not to be reported.)

An ante-nuptial agreement that the wife shall keep, own and control as her separate estate what then belongs to her, though verbal, should be upheld, at least to the extent of securing the wife a homestead that she has acquired with her own means. Under such an agreement the wife purchased, with her own means, a lot, and had a dwelling house erected upon it, the husband contributing nothing except his labor as a carpenter, in value about $40.

Held—That the house and lot can not be subjected to the payment of the husband's debts—not even to the extent of the value of the husband's labor, as his wages, to that extent, would be exempt, even if the services had been rendered for a stranger.

Hazelrigg & O'Rear for appellants.

W. W. McGuire for appellees.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Lewis.

Appellants instituted this action to subject a small lot of land upon which a dwelling-house and other necessary buildings of little value were situated, the title being in the wife, to the payment of the husband's debt. It appears in evidence that on the eve of their marriage, the wife being a widow, owning a small estate, consisting of money and personalty, the husband nothing, it was agreed between them she should keep, own and control as her separate estate what then belonged to her; that before the acquisition of the lot in controversy she had purchased, with her own means, two other lots of land which were afterwards sold, and the proceeds thereof were used in the purchase of the present lot and lumber with which to erect the building upon it.

It does not appear that the husband contributed anything at all in the purchse of either the lot or lumber used in the buildings. And all that he did contribute in the erection of the building was his labor and services as a carpenter, in value about $40, the wife having paid for services of others employed in putting up the improvements. The evidence shows that not only did the wife, under the antenuptial agreement, claim and control, as her separate estate, the property and money owned by her at the date of the marriage, but her right to do so was recognized by the husband, who never claimed or attempted to reduce it to his possession.

It seems to us that such a contract, though verbal, should be upheld at least to the extent of securing to the wife a homestead that she has acquired with her own means, except as before stated, and the title to which has been in good faith invested in her.

The only thing which we think, under the circumstances of this case, the creditor could in equity subject to his debts, is the wages of the husband for his labor in building the house, or

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aiding in building it. And under section 5, article 13, chapter 38, General Statutes, he could not subject them, even if the services had been rendered for a stranger.

We are of the opinion the lot in question is not liable, nor should be subjected to payment of the husband's debts, and the judgment of the lower court is affirmed.

MAY v. MARRS.

(Filed February 21, 1888—Not to be reported.)

Vendor and vendee—Interest—This action was instituted by a vendor to enforce a lien upon land which the vendee had held for ten years under a verbal contract, or to rescind the contract. The defendant answered that since the institution of the action a contract had been made by which the plaintiff agreed, as a settlement of the entire matter, to accept the original purchase price without interest, and to make him a deed, and that pursuant to this contract a deed had been made to him, reciting the payment of the purchase money. It appears that the deed was made and accepted after the action was instituted, and at the time it was made nothing was said about interest, but the plaintiff proceeded at once to file an amended pleading, in which he sought to enforce a lien for the interest that had accrued under the parol contract made over ten years prior to the institution of the action and the execution of the deed. Held—That the interest was too large a sum to be overlooked by the parties when the deed was executed, and as nothing was said about it at that time, the chancellor will not now go back to the parol agreement to make the vendee pay eleven years' interest

James E. Stewart and James Goble for appellant.

Alex. Lackey for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Chief Justice Pryor.

The recitals in the deed by which the payment of the purchase money is acknowledged, will not estop the grantor from showing that the purchase money has not in fact been paid, but in this case it appears that the original contract was by parol, and, therefore, void as between the parties to it. The appellee had been in possession under his verbal contract for more than ten years when this suit was filed to enforce the lien. It is then averred in the answer that a subsequent contract was made, by which the appellant agreed, as a settlement of the entire matter, to accept the original sum without interest, and make to the appellee a deed; that this contract was made after the suit was filed to enforce the original parol agreement, or rescind it, and a conveyance made to the appellee reciting the payment of the purchase money, and delivered to him. It does appear that the deed was made and accepted after the action was instituted, and at the time it was made nothing whatever was said about interest, but the appellant proceeded at once to file an amended pleading, in which he sought to enforce the interest by way of lien that had accrued under the parol contract made over ten years prior to the execution of the deed. The consideration agreed to be paid under that verabl agreement is not denied, but what the consideration was when the deed was executed does not appear. No note or evidence of any indebtedness was taken by the vendor from the vendee, but a deed accepted by the one and delivered

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by the other in full execution of the contract. It is now proposed to go back to the parol agreement, that was not only voidable but void, to enforce the lien for the interest. It does not appear that any agreement was made to pay interest. No demand of the money price or interest was made during this long interval. The productiveness or rental value of the property is not shown, and it may be that if the contract had been rescinded that no rent would have been allowed the appellant in lieu of his interest on the amount agreed to be paid, but whether so or not the chancellor will not seize on the terms of the parol contract in order to make the appellee pay eleven years' interest on the sum mentioned as the purchase price in the absence of some agreement to pay the interest when this deed was executed. This is too large a sum for the parties to have failed to notice when the deed was executed, and as the appellant admits that nothing was said about it at the time, that fact conduces strongly to show that the entire matter was then finally adjusted.

Judgment affirmed.

PAGE v. WEBB.

(Filed February 23, 1888—Not to be reported.)

Purchase by agent of principal's property—Appellant, as agent for appellee, a nonresident, listed the latter's property for taxation, and for several years paid the taxes out of his own pocket, but failing thereafter to pay the taxes for several years, during which time he had continued, however, as agent to list the property, it was sold for the unpaid taxes, and purchased by the sheriff, who assigned his bid to appellant. The latter having obtained a deed from the sheriff, this action was brought by appellee to cancel that deed, appellee tendering the full amount paid. Held—That appellant, as agent, acquired the title to protect the appellee, his principal, and he can not, in a court of conscience, be deemed to have purchased the land for any other purpose.

H. C. Baker for appellant.

Montgomery & Jones for appellee.

Appeal from Adair Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, Webb, living in Memphis, Tenn., and owning a large tract of land in Adair county, in this State, employed the appellant, Page, to take charge of his land, list it for taxation and pay the taxes as they became due. The agent paid the taxes for three years prior to the year 1874, but declined to pay them for the years 1874, 1875, 1876 and 1877. The land was sold to pay the taxes for those years, and purchased by the sheriff, who assigned his bid to Page, appellee's agent, and the latter obtained a deed therefor.

This action is to cancel that deed and compel the appellant to surrender his claim, the appellee tendering the full amount paid. That the appellee was derelict in his duty in failing to furnish the appellant with money to pay the taxes is established, and this agent was left to pay them out of his own pocket, which he did up to 1873. The land was listed for the years during which the taxes were unpaid by the appellant, as the agent of the appellee, and when sold was purchasd by the appellant. The latter

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states that he does not recollect whether he listed the property in that way or not, still the assessor's books show that it was listed in that manner. The agent of the principal was purchasing the principal's property, and must be regarded as holding it for his principal. He purchased the 1,000 acres of land for $32, and looking to the relation of the parties at the time with reference to the subject matter of controversy, the chancellor properly held that the agent acquired the title to protect the claim of the appellee, and he can not, in a court of conscience, be deemed to have purchased the land for any other purpose.

Judgment affirmed.

JAMES, &c. v. ZIGLER, &c.

(Filed February 23, 1888—Not to be reported.)

1. Assignments by operation of law—Although an act of preference by an insolvent debtor was done at the instance of the preferred creditors, who were struggling to secure their claims, it operated as an assignment under the statute.

2. Same—Although a debt was created upon the faith of the debtor's promise to transfer a certain claim to the creditor, yet, as this promise could not have been specifically enforced, a compliance with it after the debt was created was an act of preference, and operated as an assignment for the benefit of all the creditors, the debtor being hopelessly insolvent.

Hill & Alcorn and Welch & Saufley for appellants.

R. P. Jacobs for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Pryor.

The testimony in this case conduces to show that Zigler's failing condition in business made his creditors suspicious as to his conduct, and caused them to make efforts, by legal process and otherwise, to secure their debts. The debtor had made an assignment for the benefit of creditors, with one of the appellees, the assignee, but that assignment, for some reason, was never perfected or delivered. So one of the principal creditors knew of the insolvent condition of the debtor and obtained an attachment to secure Zigler's liability to him. It is not by any means certain that the two combined to defeat the assignment, so that James might obtain a preference by resorting to his legal remedies, but, on the contrary, the testimony conduces to show that such was the state of feeling between them, that no such amicable arrangement would likely have been entered into.

The transfers and conveyance by the debtor to the bank and to Chadwick brought the case within the act of 1856, now a part of the General Statutes, and operated to transfer the estate of the debtor to his creditors. The conveyance in April, 1884, to Chadwick was made to secure the latter in the indebtedness of Zigler to him, and while Chadwick's memory is treacherous, to say the least of it, as to the consideration for this conveyance, neither himself or Zigler deny an indebtedness at the time, and it was within the power of each to have made a full disclosure of the entire transaction, and, failing to do so, the testimony of Chad-

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wick, conducing to show that an indebtedness did exist, the chancellor should have assumed, as he did, that the parties were guilty of constructive and not actual fraud. The transfer of the notes and the claim of the railroad company to the bank was also an act operating to place the estate of the debtor in the hands of creditors. The debtor may have promised to transfer the claim on the railroad and deliver the notes in consideration that the bank would give him credit or accept his checks, yet this promise was not complied with until after the debt was created, and, like any other promise to pay, it was no such contract as could have been specifically enforced, leaving the debtor violating his promise with his creditor, like all other creditors, unsecured. Zigler's promise to pledge the claim on the railroad passed to the bank no right or title to it, and its subsequent delivery gave to the bank no preference over other creditors, and the attempt to prefer operated as an assignment for the benefit of all. It is apparent from this entire record that these creditors were struggling to secure their claims from a debtor hopelessly insolvent. No actual fraud was perpetrated by any of them, but the attempt to prefer by the debtor in contemplation of insolvency was in violation of the statutes prohibiting such preferences and inured to the benefit of all. The creditors here were obtaining the preference at their own instance, and both debtor and creditor concurred in an act that resulted, under the statute, as a transfer of all the debtor's estate to creditors. Such was the condition of the debtor that one of the creditors or his clerk purchased of Zigler a considerable portion of his stock of goods and removed them from Zigler's store-house to his own, all such acts indicating the efforts of creditors to secure as much as possible in this financial wreck. It is true that James had the goods returned and did nothing more than a vigilant creditor should have done, yet the acts of other creditors, prior to his attachment, had placed all creditors on terms of equality, and such must be the distribution made of the debtor's estate.

MERCER, &c. v. MERCER'S ADM'R, &c.

(Filed February 23, 1888.)

1. A new trial should not be granted upon the ground of newly-discovered evidence, unless the new evidence be of a decisive character. If it be doubtful whether it would have any preponderating influence upon another trial, then a new trial will not be granted. Especially should this rule apply where newly-discovered evidence is parol and relates to a point litigated upon the former trial.

2. Lost wills—Where a will which was last seen in the custody of the testator can not, after due search, be found, the law presumes that the testator, in some way, with the intention of revoking the will, destroyed it, and if its absence is not accounted for, this presumption will prevail.

W. B. Harrison and Belden & Shuck for appellants.

Wm. Lindsay and Russell & Avritt for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

Persons claiming to be the devisees under an alleged holograph

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will of Felix Mercer, and also claiming that the original had been stolen and fraudulently suppressed by one of his heirs. offered a writing purporting to be the substance of it, for probate. After being rejected by the county court it was established by the circuit court, but upon an appeal to this court the judgment was reversed, with directions to affirm the judgment of the first-named court. The opinion will be found in 14 Bush, page 434.

The only evidence offered to show the execution or existence or contents of the alleged will consisted of the declarations of Mercer, and as the testimony failed to show its suppression or loss, and there was, therefore, no competent evidence of its execution or contents to be corroborated by his instruments, this court ended the case as above indicated. The propounders had hitherto failed to produce any witness to testify that he had ever seen such a will. When, however, the time within which a petition for a new trial may be filed upon the ground of newly discovered evidence was drawing to a close, this action was brought for such purpose, based upon the ground, as the petition avers, that a certain party would testify that Mercer had shown him such a will; that he knew it was in Mercer's handwriting; that he had told him it was his will, and that he (Mercer) had written and signed it; that he the (witness) read it, and that the paper offered for probate conformed in substance to it. When he came to testify, however, he failed to prove that the writing, which he says he saw, was in the handwriting of Mercer, either as to body or signature. He did not know his writing. He does not expressly say that Mercer told him he had himself signed his name to it, but he does testify that Mercer, when speaking of the paper, said that it was his will, and that he had written it. This, by fair intepretation, must be regarded as referring to both the body of the writing and the signature, and as evidence that it was altogether in the handwriting of Mercer. It had been proven upon the former trial, however, that Mercer said that he had written his own will. Indeed, all that the newly discovered witness states was then testified to by other witnesses, save no one had seen the alleged paper. There is some other new testimony in this suit beside that of the witness just named, but it is merely cumulative, as is indeed all of it, unless we except the statement of the one witness as to seeing the paper, but as to the execution of which he knew nothing, save from the declarations of Mercer. Two reasons, however, render it unnecessary to consider whether, in the absence of the paper, the evidence of this witness, who was unacquainted with Mercer's handwriting, was, under our statute relating to the proof of wills, proper or sufficient evidence of its due execution:

1st. It is well settled that a new trial should not be granted upon the ground of newly discovered evidence, unless it be of a decisive character. If it be doubtful whether it would have any preponderating influence upon another trial, then it will not avail to obtain it. (Allen v. Perry, 6 Bush, 85.) Especially should this rule apply where the newly discovered evidence is parol and relates to a point litigated upon the former trial. If the converse of the rule were adopted it would protract litigation indefinitely, and often lead to subornation and perjury. In this instance the witness, whose evidence is mainly relied upon to obtain a new trial, is of doubtful character, and this very fact forcibly illustrates the wisdom of the rule just alluded to, and furnishes one reason for adhering to it. The evidence shows that his credibility is at least questionable, while the testimony of the other new witnesses is not only merely cumulative, but,

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either contradicted by other evidence in the record, or was known to the appellants at the time of the former trial. It is unnecessary to review it in detail, but sufficient to say that all of the newly discovered testimony is of such a doubtful and uncertain character, either by reason of the character of the witness or contradiction, that we do not feel authorized to disturb the conclusion reached by the lower court.

In the second place there is now no additional testimony as to the suppression or theft of the alleged will. This court, upon the appeal of the main case, was of the opinion that there was no sufficient evidence of its fraudulent suppression. After an examination of the record we see no reason to think otherwise. The only witness whose evidence tends to show it—and that but slightly—is not only an interested party but of bad character, while the devisee, who is charged with the wrong, testifies to his innocence, which is to be presumed, and he is sustained by various circumstances. Admitting, therefore, the existence at one time of a will porperly executed, yet it was last seen in the custody of the testator and can not now, after due search, be found. Under these circumstances the law presumes that he, in some way, animo revocandi, destroyed it, and there is no evidence in this record sufficient to rebut this presumption. (1 Jarman on Wills, page 161.) When not produced its loss must be shown or absence accounted for, or this presumption will prevail.

The judgment is affirmed.

WOOD v. COMMONWEALTH.

(Filed February 25, 1888—Not to be reported.)

1. Involuntary manslaughter—Instruction—When, under an indictment for murder or voluntary manslaughter, there is evidence, however slight, from which a jury might find the existence of facts constituting involuntary manslaughter, it is the duty of the court to instruct them as to this offense.

2. Same—One must be held to intend the reasonable and usual consequence of an act. Therefore, where one makes an assault with a weapon, reasonably calculated to endanger the life of the person assaulted, and death results, he can not be heard to say that it was an involuntary homicide. In this case it appears that the accused stabbed the deceased with a knife—first in the arm and then in the side. He testifies that his intention was simply to disable the deceased, who was engaged in a fight with the brother of the accused. Held—That the court did not err in failing to instruct the jury as to involuntary manslaughter.

3. Degrees of offense—Under an indictment for murder the defendant can not be convicted of the statutory offense of willfully stabbing or shooting another not designing thereby to produce or cause his death, this offense not being a lower degree of the offense charged, or included in it.

W. F. Browder, Richard Lyles, John S. Rhea, S. A. Bass and S. R. Crewdson for appellant.

N. A. Porter and P. W. Hardin for ppellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Holt.

The principal ground of complaint in this case is that the lower court failed to give the whole law applicable to it by not instruct-

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ing the jury as to involuntary manslaughter. A brief statement of the circumstances connected with the homicide is necessary to the consideration of this question.

Brewer Wood, who is a brother of the appellant, Harrison Wood, and the deceased, Morgan Procter, were differing as to the right to the possession of a breast pin. They agreed to submit the matter to one H. L. Eades, and accompanied by John Walton and Sarah Procter, the mother of the deceased, they proceeded to the office of the proposed arbitrator where, just outside the door, they stated the matter to him, Brewer Wood claiming that he rightfully held the pin in pledge for a debt the deceased owed him, while the latter asserted that it had been obtained from him by force. Eades said to them that accepting the statement of one he was right, but if that of the other were true then he was entitled to it.

Thereupon the deceased repeated his version of it when Wood called him a liar and began striking and kicking him, while the latter, as he retreated backward, was endeavoring, with his open hands, to protect his person from violence. Just at this time the appellant, Harrison Wood, came up and joined in the attack upon the deceased, who, as he continued to back, was still endeavoring, with his open hands, to ward off the blows and kicks of his two assailants. Finally he reached a place where there was a downward step to the level with the bottom of a cellar window, and there he either stumbled or was knocked or kicked down, and his assailants then left him. During the time, however, the accused had stabbed him with a knife twice —once in the right arm and then in the side. He got up, walked a few steps and fell dead. He was unarmed.

Besides the actors in the tragedy but four persons witnessed it or any part of it. One of them, Walton, was not introduced as a witness. He was not at the trial. One of the remaining three was the mother of the deceased, while the other two were, so far as this record discloses, disinterested and in no way related to the parties. The accused testified that the deceased struck his brother and was endeavoring to draw a pistol; that he only intended to disable him, and, therefore, stabbed him first in the arm, but finding that he had not succeeded in his purpose he then stabbed him in the side. The testimony of the brother supports this statement, but the jury did not accept it as true, and the evidence of the two disinterested witnesses, supported, as it is, by the testimony of the mother of the deceased, shows that they were right in rejecting it. The circumstances of the transaction as above detailed are, in our opinion, fully shown by the testimony. Did they authorize the submission to the jury of the question of involuntary manslaughter? If at all, however slightly, then it was the duty of the trial court to present it to them by proper instructions for their determination. It is noticeable that the accused, although represented by distinguished counsel, asked no instruction upon the subject. This omission, however, did not render it less the duty of the court to submit the question to the jury, if, upon the facts of the case, it was proper to do so. Blackstone has defined involuntary manslaughter as the killing of another in doing some unlawful act without any hoimcidal intention, whether the act be directed against the person killed or another. Lord Hale says that "involuntary homicide is the death or hurt of the person of a man, against or beside the will of him that kills him." Thus if A strikes B with a small stick, not intending to kill him, and it is not reasonably calculated to do so or at all probable that it will have such effect, this, if death results, would be involuntary manslaughter. One

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must, however, be held to intend the reasonable and usual consequences of an act. If it be reasonably calculated to endanger human life, and death results, the doer can not be heard to say that it was an involuntary homicide. If so, this would be the common excuse, and the law, instead of protecting the innocent, would afford a shelter to the lawless. It is urged, however, that the testimony of the accused and that of his brother required that the jury should have been so instructed.

It is true that when there is evidence, however slight, from which a jury might find the existence of facts constituting involuntary manslaughter, it is the duty of the court to instruct them as to the law of this offense. (Bush v. Commonwealth, 78 Ky., 268.) In this instance, however, the accused intentionally used a deadly weapon. Its use was reasonably calculated and likely to produce death. He knew it, and knowing this, he stabbed the deceased and killed him. Under these circumstances he will not be allowed to now shield himself under the plea that he did not intend to kill the deceased. Tested by his own evidence it was not a case of involuntary homicide.

Section 2, article 4, chapter 29 of the General Statutes, provides:

"Any person who shall willfully strike, stab, thrust or shoot another, not designing thereby to produce or cause his death and which is not done in self-defense, or in an attempt to keep and preserve the peaec, or in the lawful arrest or attempt to arrest a person charged with felony or misdemeanor, or in doing any other legal act, so that the person struck, stabbed, thrust or shot shall die thereof witihn six months next thereafter, shall be confined in the penitentiary not less than one nor more than six years."

This is an indictment for murder. In such a case the accused, if not guilty of murder or voluntary manslaughter, may, if the facts authorize it, be convicted of involuntary manslaughter, but he can not, under such an indictment, be convicted of the offense created by the statute. In such a case the trial must proceed as if the statutory offense had not been created. (Conner v. Commonwealth, 13 Bush, 714; (Buckner v. Commonwealth, 14 Bush, 601.) It is not a degree of the offense charged in the indictment, nor is it included in it, and section 262 of the Criminal Code only authorizes a conviction for a lower degree than the one charged, or of an offense included in the charge contained in the indictment.

The statute created a new offense, and an indictment thereunder must describe the offense in the language of the statute or by words of like import. It must state circumstances which, under the act, make up the offense, and where, as in this case, the enacting clause contains exceptions, the indictment must negative them. It follows that the jury should not have been instructed as to the offese created by statute. Even if the indictment had embraced the statutory offense, or if, as defined by the statute, it were equivalent to the common law offense of involuntary homicide, yet, as we have already seen, the evidence would not have authorized any instruction upon the subject. We fail to see that the court, in its instructions, intimated in any way or to any extent to the jury that, in its opinion, the accused, if not guilty of murder, should, at least, be convicted of manslaughter. No such inference can fairly be drawn from them, and they were as favorable to the accused as he had a right to demand or expect.

Judgment affirmed.

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JEFFRIES v. COMMONWEALTH.

(Filed February 25, 1888—Not to be reported.)

1. Reversible errors—The correctness of an instruction not objected or excepted to in the lower court can not be considered on appeal.
2. Same—There can be no reversal for an error in overruling a motion for a new trial.

J. C. Johnson for appellant.

P. W. Hardin for appellee.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Lewis.

No bill of exceptions or bill of evidence is filed as part of the record in this case, and even if the instruction complained of by appellant's counsel was properly before us, we could not consider it, as has been repeatedly held, because it was not objected or excepted to in the lower court.

The only exception which the transcript before us shows was taken to any ruling by the lower court, is one to the decision overruling the motion for a new trial, which section 281 of the Criminal Code expressly provides shall not be subject to exception.

As the only alleged error of the lower court was not then excepted to, nor is properly presented to us for revision, we have no right to consider it, and the judgment must consequently be affirmed.

WADE, &c. v. BRYANT, &c.

(Filed February 25, 1888—Not to be reported.)

1. Nunc pro tunc judgment—Although neither the minutes nor the order book showed that a certain judgment had been rendered at a previous term of the court, yet as the defendants had filed both an assignment of errors and a supersedeas bond reciting the rendition of such a judgment, these were admissions of record that the judgment had been rendered, and were sufficient to authorize the court to enter the judgment nunc pro tunc.
2. Bills of exceptions—As no bill of exceptions was tendered at the term at which judgment was rendered, and leave was not obtained to present the bill at the succeeding term, the court properly refused to sign a bill tendered at the succeeding term.

Tisdale & Gray for appellants.

Collins & Fenley for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bennett.

In an action which was brought by the appellees in the Kenton Circuit Court against the appellants for the purpose of having the estate of the late Francis Loamine between the appellees and the appellants as devisees, the court appointed three proper persons as commissioners to partition the real estate among said parties. The commissioners thus appointed made to the court a

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written report of partition. To this report the appellants filed exceptions upon the ground that the partition was unfair and unequal. The exceptions were set for hearing on the 17th day of June, 1882, but it does not appear, either from the minutes, orders or judgment of the court at that term, that the exceptions were passed upon at said term of court. But it does appear that on the 3d of July, 1882, the appellants filed their assignment of errors, in which they recite the judgment of partition, and complain of the court's overruling all their exceptions to the commissioner's report of partition, and of the court's confirming the same. It also appears that on the 3d of July, 1882, the appellants executed a supersedeas bond, in which it is recited that a judgment was rendered confirming the report of partition. It also appears that on the 27th day of September, 1882, the supersedeas bond was again referred to in one of the orders of court. The case was appealed to this court, and the appeal was dismissed in 1884. At the May term, 1884, of the circuit court, the court fixed the 5th day of said term for the hearing of the exceptions to the report of partition, but the exceptions were not heard on that day. On May the 29th, 1884, the mandate of this court was filed dismissing the appeal. Thereupon the appellants filed additional exceptions to the report of partition, but these exceptions having been lost or misplaced, they are not copied in the record. They, therefore, can not be considered. On the same day the exceptions were heard in part, and continued for further hearing until the 12th day of the term. On that day the appellees moved the court to enter judgment as of September the 17th, 1882, nunc pro tunc, overruling the exceptions theretofore filed to the report of partition and confirming the same.

The court, on the 11th of September, 1884, adjudged that it had rendered a judgment in writing on the 17th day of June, 1882, overruling the exceptions to the report, and confirming the same, which judgment, by oversight, was never entered on the order book. It was adjudged that the appellants' exceptions to the report of partition "be now overruled and said report confirmed," and that the judgment "be entered of record as of date, June 17th, 1882, nunc pro tunc." It was also adjudged that the appellants' exceptions filed since the filing of the mandate of the Court of Appeals "be overruled." The appellants have appealed from this judgment.

It is contended that as neither the minutes or order book showed that a judgment was rendered on the 17th day of June, 1882, the court had no power to render a judgment nunc pro tunc. The record shows that the appellants on the 3d of July, 1882, filed their assignment of errors, in which they state that the court overruled all their exceptions to the report of partition, and rendered judgment confirming the same. The record also shows that on the 3d of July, 1882, the appellants filed a supersedeas bond, in which it is stated that the court had rendered a judgment overruling their exceptions to the report of partition, and confirming the same, from which judgment they have prayed an appeal to the Court of Appeals. These writings, while they were not entered upon the order book as orders of court, constitute a part of the record of the case. They are the solemn written declarations of the appellants, which they filed in the case, to be made a part of the record, and upon the truth of which they intended the court to rely. If, at the time the motion was made to have the judgment rendered nunc pro tunc, the appellants had filed a response, admitting that a judgment was rendered on the 17th day of June, 1882, overruling all their exceptions to the report of partition, and confirming the same, doubtless it would

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not be contended that upon such admission the court would not have had the power to render a judgment nunc pro tunc. The written orders—the acts of the appellants—contain the same solemn admissions. They were before the court at the time the nunc pro tunc judgment was rendered, which judgment contains, so far as it sets forth the previous action of the court, precisely what these orders contain. It is clear, therefore, that there was record evidence, the verity of which was avouched by the appellants, by which the judgment, nunc pro tunc, could be rendered, and that the court did not err in so doing.

The appellants did not, during the term of court at which the nunc pro tunc judgment was rendered, present to the court a bill of exceptions containing the evidence offered to sustain their exceptions to the report of partition, nor did they obtain leave to present it at the following term. But at the following term they presented to the court the bill of exceptions, which the court refused to sign. In this, as has been repeatedly decided by this court, the court did right. Therefore, as we can not consider the bill of exceptions, and as the report of partition on its face seems to be fair and equitable, the judgment is, therefore, affirmed.

CUPP v. COMMONWEALTH.

(Filed February 28, 1888.)

1. Indictment—Aiders and abettors—The actual doer of a criminal act and one present aiding and abetting may be jointly indicted, both being guilty of the same offense, the one as principal and the other as accessory, and it makes no difference that under the statute the actual doer may be guilty of a felony, while the one present aiding and abetting is guilty of a misdemeanor.

2. Verdict—Appellant and B. were jointly indicted for willfully and maliciously cutting another with intent to kill. The indictment contains three counts. In the first, both are charged with the cutting. In the second, B. is charged therewith, and appellant with being present, counseling, aiding or abetting. In the third, appellant is charged as principal and B. as aider or abettor. By the verdict appellant was found guilty "as charged in the indictment," and his punishment fixed at confinement in the penitentiary, and B. was found guilty of aiding and abetting, as charged in the indictment, and his punishment fixed at $50. Held—That the verdict is sufficiently definite and certain.

3. Evidence—Whether the prosecutor did or did not use certain profane and insulting language, which both the defendants, in contradiction of him, swore he did use, had an important bearing upon the defense, and it was, therefore, error to the prejudice of appellant to permit the statement of another witness that he knew the moral character of the prosecutor, which had not been attacked by the defense, and that he had never heard him use any profane language, as such testimony was calculated in an illegal manner to support the testimony of the prosecution, and discredit the testimony and defense of the accused.

4. The Commonwealth's attorney, as he began his argument to the jury, called the prosecutor in front of the jury and said to them, putting his hand on the prosecutor's face, "Gentlemen, look at that scar on his face; is that worth only $50?" The defendants objected. Held—That the Criminal Code prescribes the mode and order in which testimony may be given to the jury

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and courts can not afford to permit a departure therefrom, when the object or effect is to give either party an undue advantage of the other.

5. The Commonwealth's attorney proposing, in the course of his argument, to talk about the instruction as to self-defense, the court, addressing him in presence of the jury, said, "Never mind. I withdraw that instruction." The defendants objecting, the court said, again addressing the attorney in presence of the jury, "The defendants object, let the instruction go for what it is worth." Held—That if the court had failed or refused to give that instruction, it would have been a reversible error, but it would have been far better for the defendants for the court to have withheld it than to accompany it with the comments made. It is clear, therefore, that the defendants did not have a fair and impartial trial.

Robertson & Smith for appellant.

P. W. Hardin for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, Charles Cupp, was jointly with Bob Cupp indicted for the offense of willfully and maliciously cutting with a knife Morrow Kitts, with intention to kill him, of which he did not die. The indictment contains three counts. In the first, both of them are charged with the cutting; in the second Bob Cupp is charged therewith, and appellant with being present counseling, aiding or abetting; and in the third appellant is charged as principal and Bob Cupp as aider or abettor. By the verdict appellant was found guilty, as charged in the indictment, and his punishment fixed at confinement in the penitenitary, and Bob Cupp guilty of aiding and abetting, as charged in the indictment, and his punishment fixed at $50.

It was made ground of demurrer, and is contended in argument that the indictment is defective, because what is called the principal offense and the offense of aiding or abetting can not, because not authorized by section 127, Criminal Code, be charged in one indictment. The fallacy of that position consists in the assumption that there are two, when in fact but one offense is charged in the indictment. Section 2, article 5, chapter 29, General Statutes, under which the indictment was found, provides that if any person shall willfully and maliciously cut another with a knife or other deadly weapon, with intention to kill, if the person cut die not thereby, shall be confined in the penitentiary, and any one who shall counsel, aid or abet in the commission of the offense, shall be fined or confined in jail, or both in the discretion of the jury. "By the common law all persons present giving aid and comfort to another committing an offense, even a felony, are regarded as principals, that is, as in legal contemplation doing the deed. Therefore, if a statute makes the doing of a thing criminal, it includes with the actual doer persons who are present lending their countenace and aid." (Bishop on Statutory Crimes, section 135.)

It does not make any difference that, while the actual cutting is made by the statute felony, the one present aiding and abetting is guilty only of a misdemeanor. For both are guilty of the same offense, the one as principal and the other as accessory. And to require two distinct indictments and two trials, when the circumstances of the offense would have to be stated in each indictment and proved at each trial, would be needless, and certainly is not required by the Code. In the case of the Common-

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wealth v. Patrick, 80 Ky., 605, referred to by counsel, the indictment was held bad, not because both the principal and accessory were charged in it, but for the reason that the offense, being a single act of shooting, could not be done by both, but that one being the principal, and the other accessory or aider and abettor, they should have been so respectively charged. But in the indictment in this case the defendants are charged alternatively as principal and as aider or abettor, which may be properly done under the Code.

It seems to us the jury could not have used language more definite and certan than was used in this verdict, for no one could be misled or in doubt as to their meaning.

It appears that on the occasion of the cutting, which was done after night, the defendants, Bob, about eighteen, and Charles, about sixteen years of age, and several other boys were, without objection, sitting around the stove in the back part of a grocery store of which Kitts, the person injured, had temporary charge.

A person present, in narrating a previous occurrence in which a small brother of the defendants was an actor, called him a little devil, at which Bob took offense, when, in the language of the witness, Kitts, the person giving the offense, "began to explain and apologize, they kept talking and hissing," whereupon he (Kitts) told them, addressing the Cupp boys, they must go out of the house, to which they paid no attention, and he then told them if they did not go he would call the police. And then Charles said to him, if he did not like it to come out the door and they would do him up. The witness stated he then started to the front door to call the police, when Bob caught him, but he pulled loose, and Bob went before him, and when he poked his head out to look for police, Bob struck him with a stick on the head. He then took hold of the stick and Bob's arm, and they scuffled off the pavement, and while engaged, Charles Cupp ran up behind and cut him across the head with a knife. Four other witnesses, including the two defendants, the other two introduced by the Commonwealth, testified as to the occurrence, and they all contradict Kitts in two important particulars. They all state he did not repeat his order for them to leave the store, for they got up and started out immediately after being told. They all likwise say he did not threaten to call the police, there being, according to their account, no necessity for it. They all agree that Charles said, if you come out we will do you up. But the statement of the defendants is that he was following them at the time. The two defendants also testified that he came to the door and t reatened to kick them all over the street, calling them "damn little devils." It was further proved that Kitts was larger than either of the defendants, and he knew Bob was just recovering from a spell of sickness. If the evidence of the other four witnesses be true, it is not true, as stated by Kitts, he either threatened to call the police or went to the door for that purpose. But, on the contrary, the jury might have reasonably believed his purpose was a hostile one. And that theory is supported by the fact Bob attempted to hold him, by his threatening and profane language at the door, if he in fact used it, and by his going outside the door when there was no real necessity for his doing so. For there had been no hostile demonstration towards him in the house, nor, if the four witnesses are to be believed, was there any hesitation on the part of the defendants to go out when told to do so, although the order was manifestly given in no very polite or conciliatory way.

The circumstances of this case, as shown by the record before us, are such as might have justified the jury in concluding that

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when Charles Cupp cut Kitts with the knife he believed, and had reasonable grounds to believe, his brother was in danger of losing his life or suffering great bodily harm at the hands of Kitts. Or if not, they might and would have been fully authorized in finding that the cutting was done in sudden heat and passion. The question then arises whether appellant was, by reason of errors of law occurring, denied a fair presentation of either of these issues to the jury. Whether Kitts did or did not use the profane and insulting language at the door, which both the defendants, in contradiction of him, swear he did, had an important bearing both upon the question of self-defense and whether the cutting was done maliciously or in sudden heat and passion. And it was, therefore, an error of the court, to the prejudice of appellant, to permit the statement of another witness that he knew the moral character of Kitts, which had not been attacked by the defense, and that he never heard him curse or use any profane language. Such testimony was calculated, in an illegal and improper manner, to support the witness Kitts and discredit the testimony and defense of the accused parties.

It appears that after the argument to the jury in behalf of the defendants had closed, and just as the attorney for the Commonwealth began his argument, he, standing in front of the jury, told Kitts, the prosecutor, to come around where he was, and when he had done so the attorney put his hands on the face of Kitts, and said to the jury: "Gentlemen, look at that scar on his face. Is that worth only $50?" That conduct on the part of the attorney appears to have been tolerated by the court, notwithstanding the objection of the defendants.

It is not the interest, nor is it presumed to be the intention, of the Commonwealth to procure the conviction of persons accused of crime by illegal means. The Criminal Code, in order to procure fair trials, prescribes the mode and order in which testimony may be given to the jury, and courts can not afford to permit a departure therefrom when the object and effect is to give to either party an undue advantage of the other.

The Commonwealth's Attorney, in the course of his argument, stated to the jury he desired to talk about the instruction on self-defense, when the court said, addressing him, in presence of the jury, "never mind; I withdraw that instruction." And the defendants then objecting, the court said, in presence and hearing of the jury, again addressing him, "the defendants object; let the instruction go for what it is worth." If the court had failed or refused to give that instruction, it would have been a reversible error. But it would have been far better for the defendants for the court to have withheld it than to accompany it with the comments made in reference to it.

Although we do not believe the court intended to do any wrong to the defendants, still they did not, nor could, in the meaning of the law, have a fair and impartial trial under the circumstances shown by the bill of exceptions to have occurred upon the trial of appellant, and the judgment is reversed for a new trial.

CHEEK v. COMMONWEALTH.

(Filed February 28, 1888.)

1. Criminal law—Bribery—Section 19 of article 12, chapter 33 of the General Statutes, having been repealed, one may be convicted of being bribed

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upon the testimony of a single witness, even though that witness be the briber.

2. Same—Practice—While it was not the province of the jury to declare that the defendant should be deprived of his right of suffrage and to hold office, yet the fact that the jury did so declare is not a reversible error, the court having entered judgment depriving the defendant of his right of suffrage and to hold office, as the statute makes it mandatory upon the court to do upon the return of a verdict of guilty.

3. Appellate jurisdiction—When the judgment convicts the defendant of an infamous offense and deprives him of the right to vote and hold office, he is entitled to an appeal, although the fine imposed does not exceed $50.

Ewell & Smith for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was convicted in the Laurel Circuit Court of the offense of receiving a bribe of $5 to vote at the August election, 1886, from certain persons, who were candidates for the county offices of said county. The circuit court having overruled his motion for a new trial, he has appealed to this court.

It was proven by the only witness for the Commonwealth on the trial that he gave the appellant $5 to vote for certain county candidates at the election. It was also proven that the appellant did vote for these candidates. The appellant swore that Jones did not give him $5 or any other sum or thing, nor promise the same, to vote for these candidates, nor was he influenced to vote for them by the hope or promise of reward; that he voted for them as a matter of choice, they agreeing with him in politics. But the jury disregarded his testimony and found him guilty of the offense charged, and fixed his punishment at a fine of $50 and excluded him from the right of suffrage and office.

Section 11, article 12, chapter 33 of the General Statutes, provides:

"Any person guilty of receiving a bribe for his vote at an election, or for his services or influence in procuring a vote or votes at an election, shall be fined from $50 to $500, and excluded from office and suffrage."

1st. "Bribe or bribery" means any reward, benefit or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit or advantage."

3d. "Whoever shall receive money or other thing of value, to be used for the purpose of procuring or influencing a vote or votes, shall be deemed to have been bribed."

Section 12 provides: "Whoever shall bribe another shall, on conviction, be fined from $50 to $100, and imprisoned from ten to ninety days, or both so fined and imprisoned, and be excluded from office and suffrage for five years." Section 19 of said chapter and article provided: "But the shall never convict any one under the provisions of this ch upon the testimony of a single witness, unless sustained by strong corroborating circumstances."

The legislature, by an act approved May 7th, 1886, repealed this provision.

The offense of bribing persons to vote is always committed in secret. The briber and the bribed contend that the transaction

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shall be a secret between themselves. They seek such places to negotiate as preclude the possibility of detection. This they can easily do. If others were on the alert to detect them their best efforts would prove a failure in ninety-nine cases out of a hundred. Also it would be almost impossible to convict the parties upon circumstantial evidence alone. Therefore, the legislature, seeing that the offense would be rarely, if ever, committed in the presence of third parties, and the impossibility of obtaining evidence in nearly every instance from that source, and the almost impossibility of convicting the offenders by circumstantial evience alone, repealed the section supra, so as to allow a conviction to be had upon the testimony of a single witness. And for the reasons above indicated we conclude that the legislature intended that either the bribed or briber might be convicted on the testimony of the other. There is no doubt about the fact that the conduct of the briber is as reprehensible in the eye of the law as that of the bribed. Both are, in the eye of the law, guilty of an infamous offense, the one having bartered away his birthright, having sold his manhood, having destroyed the trusts of his government. The other having furnished the corrupting wherewith, it is but proper that either should be convicted upon the testimony of the other.

If the jury in their verdict declared that the appellant should be deprived of his right of suffrage and to hold office, while this was not within the province of the jury, as it was made the duty of the court to so declare upon their verdict of guilty, yet the court entered judgment, depriving the appellant of his right of suffrage and to hold office. This duty was mandatory upon the court, and the mere fact that the jury so declared in their verdict is not a reversible error.

It is contended that in view of section 347 of the Criminal Code, which limits appeals to cases of fines for over $50, or to imprisonment for over thirty days, this court has no jurisdiction of this appeal. The statute in this case makes the offense of bribery or being bribed to vote at an election infamous. In this respect it stands upon the same footing of other infamous crimes. And while the pecuniary fine of $50 only was imposed upon the appellant, yet judgment was also rendered against him, depriving him of his right to vote and to hold office. This is a penalty attached to all infamous crimes or offenses, which is not only a badge of disgrace and infamy, but deprives the party of a most sacred right. It seems clear, therefore, that he has the right of appeal.

The judgment is affirmed.

FURNISH, &c. v. AUSTIN, &c.

(Filed February 28, 1888—Not to be reported.)

1. Sale of infant's real estate—Under chapter 86 of the Revised Statutes, it was not necessary to make t[illegible]nts parties to a proceeding by their statutory guardian to sell their rea[illegible]state.

2. Same—Void judgment—The fact that the commissioners appointed by the court in such an action reported that they believed a sale of the land would redound to the benefit of the infants, instead of stating positively that the interest of the infants required the sale to be made as required by the statutes, was a reversible error, but did not render the judgment void.

3. A judgment can not be attacked in a collateral proceeding unless it is void.

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J. Irvine Blanton for appellants.

C. H. Lee for appellees.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Bennett.

James Moore, as the statutory guardian of the appellees, Mary Ann Wells, now Austin, and John H. Wells, filed his petition to the May term, 1866, of the Harrison Circuit Court, for the purpose of having their undivided interest of one-third each in a tract of land containing thirty-one acres sold. It was alleged in the petition that said infants had no estate whatever except their interest in this tract of land, and that a sale thereof would redound to their benefit. The petitioner executed the bond that was required by chapter 86 of the Revised Statutes, then in force. Thereupon the court appointed three commissioners to report the net value of the infant's real and personal estate, and the annual profits thereof, and whether the interest of the infants required the sale to be made. The commissioners thus appointed reported, under oath, at the same term, that the infants owned no estate except their interest in said tract of land, the net value of which was $214, and that the annual value thereof was $12, and that they "believed a sale of said tract would redound to the benefit of said infants." Thereupon the court rendered judgment for the sale of two undivided thirds of said land. At the commissioner's sale thereof J. H. Garnett, who owned one undivided third of said tract, and who was made a party to the action, purchased the same at the price of $160. He executed bond for the purchase money, and at the next term of the court the sale was confirmed. In the fall of 1866, after the confirmation, Garnett sold the tract of land, the possession of which has been ever since held adversely by Garnett's vendees and those claiming under them. At the time of the commissioner's sale the appellee, Mrs. Austin, was, according to the entry in the family Bible, which she makes an exhibit in this case, about eighteen years old, and the appellee, John H. Wells, was about twenty years old. The appellee, Mrs. Austin, and her present husband were married in 1868, she being still a minor. In 1883 the appellees brought this action, by which they sought a division of said tract of land and the allotment of their third each to them. The appellants, who claimed the whole of the land by virtue of said decretal sale, relied upon the same as a bar to the appellees' right to recover. The lower court adjudged in favor of the appellees, and the appellants have appealed to this court.

At the time Moore filed his petition for the sale of the land he was the statutory guardian of the appellees.

The appellees were not formally made parties to that action. But it has been repeatedly decided by this court that, under chapter 86 of the Revised Statutes, it was not necessary to make the infants parties to a proceeding by their statutory guardian to sell their real estate. The record shows that the bond required by that chapter was duly and properly executed. It also appears that the three commissioners required by that chapter to be appointed were duly and properly appointed, and that they, under oath, made their report to court, which complied with the requirements of the statute, except in one particular, to wit: They stated that they "believed a sale of the land would redound to the benefit of the infants," whereas the statute required that they should state positively whether the interest of the infants

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required the sale to be made. While the distinction between the two forms of expression may, for practical purposes, be regarded as shadowy, yet this court has heretofore held, in a number of cases, that the latter form of expression, or its equivalent, must be used, and that the former was defective. But it has never been held by this court that this defect rendered the sale void. On the contrary, it has been expressly held in several cases that the defect was a mere irregularity, which did not render the sale void, but only constituted a reversible error on a direct appeal by the purchaser or infants.

It has been held time and again by this court that a judgment can not be attacked in a collateral proceeding unless the judgment is void; that if the irregularities do not render the judgment void, but merely constitute reversible errors, the party aggrieved thereby must appeal from the judgment to have the same corrected. The appellee never appealed from the judgment ordering a sale of their land. The same stands in full force and is binding upon them. More than fifteen years after a sale of the land under the decree, they having, years before, arrived at twenty-one years of age, they instituted suit to have the land divided, and to the plea of said judgment and sale in bar of their right to the land, they, for the first time, attack the judgment upon the ground that it is void. The judgment not being void they can not thus attack it, even if the fifteen years adverse possession of the land did bar their right.

The judgment of the lower court is reversed and cause is remanded, with directions to dismiss the appellees' petition.

MERCER, &c. v. MERCER'S ADM'R.

(Filed February 28, 1 88.)

1. Promise of putative father to support bastard child—The natural affection of a putative father for his child, and the moral obligation and duty resting upon him to support and provide for it, do not constitute a sufficient consideration to impart a legal obligation to a verbal promise by the father to support or provide for the child.

2. Practice—This being really an action at law brought and heard without objection upon the equity side of the docket, if there were no other obstacles, the court is not authorized to reverse the chancellor's finding upon the facts, as it is not flagrantly against the evidence.

Harrison & Belden for appellants.

Wm. Lindsay and Russell & Averitt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The appellants, who are bastards, sue in assumpsit by their mother as their next friend to recover upon an alleged parol promise made to her for their benefit by their deceased putative father, Felix Mercer. The petition avers that he, in consideration of his relationship and the natural and moral duty resting upon him to support and educate them, promised to give and secure to them therefore his entire estate, less $10,000, to be given to another illegitimate child. No other consideration is stated.

At common law the father was not bound to support his bastard

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child. He was said to be filius nullius, and while, in the absence of a statue, the father is under no legal obliagtion to support him, and it can be enforced only through the remedy thus provided, yet a just sympathy for the innocent and helpless and a proper recognition of right has led to some advance of legal right and remedy in his favor. Thus the weight of English authority now is that a promise by the putative father to pay the mother a certain sum in consideration that she will support and maintain their child, is enforcible. (Jennings v. Brown, 9 M. & W., 496; Hicks v. Gregory, 8 C. B., 378.) Also if his promise be in consideration that the mother will abstain from affiliation or bastardy proceedings against him, and, in consequene thereof, she suffers the time within which they may be had to expire, it will be binding upon him. (Linnegar v. Hood, 5 C. B., 437.)

In this State it was held by this court in the early case of Burgen v. Straughan, 7 J. J. M., 583, that a contract by the putative father to pay the mother a certain sum for the support of their child, provided she would not proceed against him under the bastardy act, was not immoral or inconsistent with the policy of the law, but binding and enforcible. She has a right to compel him to assist in supporting the child. It is a civil right, supported by a civil remedy. If to save both from exposure and disgrace, and to induce her to waive her right to compel him to do right, he promises to contribute for the support of their innocent and helpless offspring, there is no compounding of offense or other violation of the rights of society. In such a case she waives a right, and it is a sufficient consideration to support the contract. Indeed such a course is likley to redound often to the public benefit. The mother will often prefer to suffer in poverty and permit her child to do so rather than expose her shame to the gaze of the public eye by a court trial. And then the child, in the absence of a contract by the father to support it, based upon the waiver of legal proceedings by the mother for that purpose, and which is a detriment to her, and, therefore, a valuable consideration, will, as a pauper, become a charge upon the community. The same doctrine was announced in the later case of Clark v. McFarland's Executors, 5 Dana, 45, where such a contract, made when the mother was about to institute bastardy proceedings, was upheld. The court, however, in substance, said that the natural affection of a putative father for his child, and the moral obligation and duty resting upon him to support and provide for it, did not constitute a sufficient consideration to impart a legal obligation to a verbal promise. They are insufficient in themselves to such an end. A mere moral duty is insufficient of itself as a consideration for such a contract.

In this instance, nothing else was either pleaded or proven as a consideration for the alleged promise.

The action is against both the heirs and personal representative. Doubtless the only reason why it was instituted upon the equity side of the docket was that the personal estate of the decedent was insufficient to pay the claim, and it was asked that the real estate in the hands of the heirs be subjected to its payment. It is not an action against the heirs alone to obtain a lien upon the real estate descended to them, but one to enforce a legal right for which a legal remedy exists. (Hagan, &c. v. Patterson, 10 Bush, 441.) It is really an action at law, brought and heard without objection upon the equity side of the docket. The mother is really the only witness in support of the alleged promise or promises. She is not only materially contradicted but is shown to be of bad character. The chancellor, acting in the place of jury, passed upon the facts, and if there was no

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other obstacle in the way we would not be authorized, upon the evidence, to reverse his findings as flagrantly against it.

The mother lived with the decedent for many years as his concubine. The unlawful relation began prior to the birth of any of the appellants, and continued until his death. The mother, no doubt, expected that he would provide for her and her children by will. There is no evidence that she ever threatened or proposed to institute any proceedings against him looking to the support of the children. They were all living under the same roof. Under such circumstances, it would be exceedingly dangerous to the rights of legitimate heirs—even legitimate children—and destructive of home, family and social relations if, upon questionable testimony and mere natural affection and moral duty only, the parol promise of the putative father were to be held valid, and his estate subjected to its payment.

The statute has provided a remedy for the mother and illegitimate children, and the law, through mercy and for the protection of the weak and helpless from the imposition of designing men, and to guard against the waiver or loss of their legal rights by a reliance upon promises, has so far expanded, by the aid of the courts, as to permit the enforcement of a promise, such as we have been considering, if based upon a sufficient consideration, and not resting upon a mere moral or natural duty.

Judgment affirmed.

FERGUSON v. BUSH, &c.

(Filed February 28, 1888—Not to be reported.)

Satisfaction of devise—F. delivered to J., his son, a large portion of his land, greatly exceeding in value the estate devised to his other children. To M., a daughter, he devised only a very insignificant sum. After making his will the testator sold and conveyed to W. a portion of the land devised to J. The remainder of the land devised to J. the testator afterwards conveyed to him, charging the land thus conveyed with the support of himself and wife. It was also provided in the deed that if the proceeds of the land sold to W. failed to pay a certain debt the testator owed, J. was to pay the remainder of the debt, and a lien was retained upon the land therefor. J accepted the deed and had it recorded. Subsequently W., having failed to pay the purchase price of the land sold to him, reconveyed it to F., the testator, who died the owner thereof. M., by her petition in equity, seeks to have this land set apart to her to make her equal with the other children, claiming that as to this land, her father died intestate. J. claims that he is entitled to this land under the devise to him. It appears that the testator said repeatedly that he intended this land, which W. had reconveyed to him, for his daughter M. Held—That it is clear that the testator intended that the land conveyed to J. should be in full satisfaction of the previous devise to him. Therefore, M. is entitled to the relief sought.

York, Connally & Cline for appellant.

A. J. Auxier and J. Lee Ferguson for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

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In 1877 James Ferguson, the father of the appellant and appellee, made his will, by which he devised to the appellant for and during his life, with remainder to his children, about one-half of his land. The land thus devised was designated by metes and bounds. James Ferguson also devised to his daughters, Jane Ratliffe, Malinda Williams and Alice Motley, equal portions of his remaining land. To the appellee, his daughter, he devised nothing, save a very insignificant sum. In 1878, about a year after making his will, James Ferguson sold to O. B. Wright a portion of the land that he had devised to the appellant. This sale was made by deed, and the consideration agreed to be paid for the land was $600. In 1879, about a year after the sale to O. B. Wright, James Ferguson conveyed, by deed duly acknowledged and recorded, to the appellant, for and during his life, with remainder to his children, the remaining portion of the land previously devised to him. In this deed to the appellant, James Ferguson charged the land thus conveyed with the support of himself and wife during the lives of each of them. It was also provided in the deed that if the proceeds of the land above mentioned, sold to O. B. Wright, failed to pay the debt that James Ferguson owed to James D. Bush, the appellant was to pay the remainder of said debt, and a lien was retained upon the land thus conveyed to secure the payment of said debt. The appellant accepted said deed and had the same recorded. In 1880, about a year after this deed was made, accepted and recorded, O. B. Wright, having failed to pay the purchase price of the land that he bought from James Ferguson, he, by deed, conveyed the same back to James Ferguson. James Ferguson died in 1884, the owner of this land. After his death his will was put to record. The appellee, by his petition in equity, sought to have this land set apart to her upon the ground that as to said land James Ferguson died intestate, and that the same would be required to make her equal with the appellant and her sisters. The appellant contested her right upon the ground that the land being a portion of the land devised to him, and James Ferguson having died the owner of it, and his will not having been revoked by the sale of it, it belonged to him. The chancellor having adjudged that James Ferguson died intestate as to this land, and that the appellee was entitled to it to make her equal with the appellant, he has appealed to this court.

Section 17, chapter 113, General Statutes, provides: "A provision for or advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person contained in a previous will, if it would be so deemed in case the devissee or legatee were the child of the testator, and whether he is a child or not it shall be so deemed in all cases in which it shall appear from parol or other evidence to have been so intended." A devise was made to the appellant of a specified quantity of land. It is evident that the testator, at the time he made his will, intended that the appellant should have no more of his land. After the making of his will, he sold a portion of this land, evidently for the purpose of raising money with which to pay the debt that he owed to James D. Bush. After this he deeded the remaining portion of this land to the appellant. In this deed he charged said portion of the land with the support of himself and wife during the life of each. He also required the appellant to pay whatever portion of the Bush debt that might remain unpaid after applying the purchase price of the land sold to Wright, for the payment of which he created a lien upon the land, which land was largely in excess of the estate devised to

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any of his other children. Also he said to the attorney to whom he applied to draw up the deed to the appellant that he intended the land for him as his portion. Also he said time and again that he regretted that he had not given the appellant anything, and that he intended the land which Wright had reconveyed to him for her. It, therefore, seems clear that the testator intended that the land conveyed to the appellant should be in full satisfaction of the previous devise to him in respect to the land.

The judgment of the lower court is affirmed.

ROBERTS v. COMMONWEALTH.

(Filed February 28, 1888—Not to be reported.)

1. Criminal law—Confession out of court—Upon the trial of appellant, charged with murdering B., there was proof of a confession by appellant out of court that he did the killing. In addition, there was proof that B. was killed, and the appellant admitted in his testimony that he did the killing. Held—That the court properly refused to instruct the jury, that "a confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

2 Reversible error—While the testimony, as it appears in the record, would have justified the jury in acquitting the appellant, yet this court can not reverse on that ground, as the jury were the sole judges of the facts.

J. E. Hays for appellant.

R. C. Warren and Wm. Herndon for appellee.

Appeal from Casey Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was convicted in the Casey Circuit Court of the crime of murdering G. W. Baker. The lower court having overruled his motion for a new trial, he has appealed to this court. The principal ground of complaint is that the lower court failed to instruct the jury, according to section 240, Criminal Code, that "a confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." G. W. Baker was found dead in the appellant's lot, having been killed by a pistol shot wound. The Commonwealth introduced a witness who swore that the appellant, at the coroner's inquest, swore that he killed Baker. The appellant was introduced as a witness in his own behalf. He swore that he killed Baker. So it was shown outside of the appellant's statements that Baker was killed, and he in his evidence in open court admitted that he killed Baker. The lower court did right, therefore, in refusing the instruction. Upon the subject of murder, manslaughter and self-defense the court's instructions were full and correct. The instructions asked for by the appellant, and which were refused by the court, were but a repetition of the law as given by the court. The court, therefore, did right in refusing to give them.

It seems to us that if the record sets out all that occurred before the jury, the appellant made out a case that would have justified the jury in acquitting him, but they were the sole judges of the facts, and as we can not reverse the finding of the jury on

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questions of fact, and as we find no reversible error in the record, the judgment must be affirmed.

KENTUCKY SUPERIOR COURT.

SEARCY v. GARDNER.

(Filed February 15, 1888.)

1. Assignment—Failure of consideration—Each assignor of assignable paper, whether he be the first or subsequent assignor, by his indorsement of it, guarantees to his immediate assignee that the paper is just what it purports to be, and, therefore, impliedly undertakes that he will restore the consideration received from the assignment, if the assignee, without laches on his part, fails to recover upon it.

2. Same—Diligence—Whether or not it is necessary for an assignee, in order to preserve his right of recourse on his assignor, to exercise the same legal diligence to test the liability of the obligors that it is to test their solvency, he must exercise at least reasonable diligence; and whether he has done so or not, the facts being admitted, is a question of law.

In this case the assignee did not institute suit against the maker for more than seven years after the note matured, and he then so acted that a judgment obtained by him against the defendant was set aside because procured by fraud. His suit was finally dismissed, because the land for which the note was executed was taken to satisfy a lien upon it created by the vendor. Held—Taht the facts show a want of diligence, and that the assignor of the note is released from liability.

Geo. C. Drane and Masterson & Gaunt for appllant.

Winslow & Winslow for appellee.

Appeal from Caroll Circuit Court.

Opinion of the court by Presiding Judge Ward.

August 30, 1870, L. S. Gardner sold to Richard Roberts, by an executory contract in writing, forty and one-half acres of land. The consideration, evidenced by notes of Roberts, was $1,500, divided into three annual payments, the first one of which matured March 1, 1871. The second note was assigned by L. S. Gardner to T. J. Gardner, who assigned it, before maturity, to appellant Searcy. At the time Gardner sold the land it was encumbered by a lien in favor of his vendor. In 1878 a suit was instituted to enforce this lien, and a judgment and order of sale entered. In February, 1879, the land was sold for $727.32, the amount of the purchase money and interest and costs. It is claimed that Roberts, by said sale, lost the land, and was released from paying the notes to L. S. Gardner. In May, 1879, Searcy, for the first time, institutd suit upon the note which had been assigned to him, making Roberts the obligor, and L. S. and T. J. Gardner, the assignors, defendants. In that suit he made no reference to the fact that the land had been sold to satisfy prior liens. He asked for a personal judgment against Roberts, and that the Gardners be compelled to make a deed, as L. S. Gardner had ageed to do. T. J. Gardner demurred to the petition, and it was dismissed as to him on the ground that the plaintiff had "no cause of action against T. J. Gardner by rea-

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son of his assignment." Personal judgment was rendered against Roberts, but there was no disposition of the case as to L. S. Gardner. In 1880 Roberts instituted suit against Searcy to enjoin the execution, which had been issued upon this judgment, claiming, first, that the judgment had been procured by fraud, and second, that the consideration of the note upon which it was based had failed, because of the sale of the land, for the reason stated above. On hearing he was adjudged the relief he asked. In 1882 this suit was instituted by Searcy against T. J. Gardner to recover the amount paid for the assignment of the note, upon the ground that the note, not being a valid or enforceable demand, he is entitled to have the consideration paid for the assignment restored to him.

The principle is elementary that if a party pays for an article, and the thing or consideration for which he pays fails, so that he gets nothing by his purchase, he is entilted to have his money refunded. We see no reason why this rule should not apply as well to the sale of a note as any other property, nor why not as well when the assignor sought to be charged, is himself the assignee of some other assignor, as when he is both payee and assignor.

Each assignor of assignable paper, whether he be the first or subsequent assignor, by his endorsement of it guarantees to his immediate assignee that the paper is just what it purports to be, and, therefore, impliedly undertakes that he will restore the consideration received for the assignment, if the assignee, without laches on his part, fails to recover upon it. This principle is fully maintained, as we think, by the cases of Hunt v. Armstrong's Adm'r, &c., 5 Ben. Mon., 399; Emmerson v. Claywell, 14 Ben. Mon., 15; Winstell v. Hehl, 6 Bush, 58. In all of these cases the effort was to recover of an assignor who was not payee or obligee, but who was the assignee of some other assignor, and in the second-named case Claywell recoverd from Emmerson, his assignor, because Free Billy, the immediate or remote assignor of Emmerson, had no title to the paper, and that case is distinguished from the line of cases on which counsel for appellee relies in this case to show that such a recovery is not allowed. So it follows that appellant may recover if he is not barred by his laches or by the statute of limitations relied upon by appellee, and whether he is or not so barred are questions of considerable difficulty.

In Wynn v. Poynter, 3 Bush, 55, the Court of Appeals, through Judge Robertson, said: "The sale of the note implied a guarantee of its genuineness as to all apparent parties to it, but the holder was under an implied obligation to try, by due diligence, the liability, as well as the solvency, of the ostensible obligors." The same distinguished jurist, in response to an earnest petition for rehearing by another distinguished jurist, Judge Simpson, after laying down the principle that a judgment of a court discharging one of the apparent obligors, because he did not execute the paper, was indispensable to show that the paper was not what it purported to be, assigned as a reason for the discharge of the assignor, because of a want of diligence by the assignee, these remote possibilities as applicable to that case: "Had the proper suit been brought in proper time on the bond, we may presume from the record that the debt might have been made out of the principal, who has since become insolvent, and perhaps out of the surety, who might then not have resisted a joint judgment." Whether that case decides that it is necessary for an assignee, in order to preserve his right of recourse on his assignor, to exercise the same legal diligence to test the liability of the obligors that it is to test their solvency, we need not now de-

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termine. But it must be admitted that it is an authority for the proposition that the assignee must exercise reasonable diligence, and failing therein, he will lose his recourse. The rule thus stated would certainly be supported by reason and the analogies of the law.

One who takes paper merely as collateral security for another debt is bound to exercise ordinary care and vigilance to preserve the value of the paper held by him. (Banta v. Curry, 3 Bush, 678.) And whether he does so or not, the facts being admitted, is a question of law.

The sale and transfer of a note differs in many essential particulars from the sale of tangible property. The one is an entity, having intrinsic value, and capable of immediate possession and enjoyment. The other has no intrinsic value, can not be enjoyed, but as the representative of value may be, by importunity or legal coercion, converted into something of actual value. As to one, the vendee owes the vendor no duty, except to defend the possession. The other is a right of action. It is the purchase of an opportunity, and if the opportunity is neglected, the law can not say that loss would have resulted if there had been no culpable neglect.

It has been held in a number of cases that the judgment of a court establishing the fact that the assignee can not recover from the real or apparent obligor, because of failure of consideration, non est factum, or of payment before notice of the assignment, is necessary, in order to enable him to recover from the assignor on the implied contract arising from the assignment. (Wynn v. Poynter, 3 Bush, 54; Hurst v. Chamber, 12 Bush, 155.) The only qualification to the rule is, when the assignor was guilty of fraud in the assignment, then the assignee has an immediate cause of action, and need not wait to pursue his remedies on the assigned paper. It, therefore, follows that as the law devolves the duty of a suit upon the assignee in order that he may have a right of action against the assignor, it will withhold or deny this right of action in case the duty, upon which it rests, is not performed within a reasonable time. We, therefore, think that in order for the appellant to recover in this case he must show that he instituted suit against Roberts to ascertain his liability, and that he did so within a reasonable time, and prosecuted the same with diligence and fidelity. The reasons for this, it seems to us, are much more apparent than those assigned in Wynn v. Poynter, supra, and much more aptly illustrate the necessity and wisdom of the rule which requires the assignee to act with at least reasonable diligence. The lien upon the land, with interest for eight years and costs, only amounted to $727.32. It is, therefore, obvious that the principle sum was less than $500. Now it is alleged that Roberts was to pay L. S. Gardner for the land, $1,500, and there is no allegation that he paid either of the other notes. It is alleged in the answer that Roberts owed L. S. Gardner more than was necessary to discharge the lien, and this allegation is not denied. It is, therefore, evident, these things being so, that it was to the interest of Roberts to be relieved of this contract with Gardner, and have the land bought in for his wife, at a much less sum than he owed for it, and it is also apparent, from these facts, that by a suit, instituted at the proper time, these equities might have been so adjusted as to have saved the title to Roberts, and yet have made him liable on his notes to Gardner, at least in a sum greater than the note due to appellant. Again, there is no allegation that L. S. Gardner was insolvent when he has signed the notes, or that he is now solvent. If he was then solvent and now insolvent, T. J. Gardner, if made responsible, will be without

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remedy, and because of appellant's neglect. Appellant not only owed it to his immediate assignor to act with diligence for his protection, but to his own self-preservation, for he not only had the right to look to T. J. Gardner for protection, but through T. J. Gardner to L. S. Gardner.

Whether appellant acted with due diligence or within a reasonable time, is a question of law, the facts being admitted. (Johnson v. Lewis, 1 Dana, 182.)

The facts are, that he did not enter suit against Roberts for seven years, two months and two days after his note matured, and when he did enter suit he so acted as that the judgment obtained against Roberts, which judgment was, of course, a bar to any right of action against appellee, was set aside, because procured by fraud. We think these facts show a want of diligence.

If it should be claimed and could be maintained, upon the authority of Emmerson v. Claywell, 14 Ben. Mon., 15, that appellant was under no obligation to sue Roberts in order to ascertain whether Roberts was or not bound on the note, or if so, to what extent, then it would follow that there was an immediate cause of action in the contract of assignment against appellee, because the note was not what it purported to be, to wit: A valid obligation against Roberts. But in that event, as appellant did not sue appellee for more than ten years after the contract of assignment, his action would be barred. (Flynn v. Allen, 57 Penn., 485; Waits, Actions and Defenses, volume 1, page 367.) So in either event it seems he has manifested no right to recover, and it having been so determined by the judgment of which he complains, it must be and is affirmed.

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SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. LOGAN.

Filed February 15, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Right of conductor to eject passengers for disorder—It is not only the right but the duty of the officers and employes of a railroad train to preserve order and decorum, and to that end to eject all drunken, riotous and disorderly persons. A drunken passesnger, with an open knife in his hand, abused the conductor in a loud and angry tone, so as to frighten other passengers, and, upon being taken out of the ladies car and locked out, pulled the bell rope, thus causing the train to be stopped in answer to the ringing of the bell. He then took a seat in the car and feigned to be asleep. The conductor went to him and asked him why he had rung the bell, in response to which he denied that he had done so. The conductor then returned to him his fare, and, with the aid of a brakeman, put him off the train, which had not yet been put in motion, and he was afterwards killed by another passing train. It was a warm, bright night. In this action by his widow against the company, alleging that his death was caused by its wilful neglect. Held—That if in view of the peril existing from the presence of the drunken man on the train it was necessary to put him off, and in doing this no more force was used than was necessary, and he was then placed beyond danger, the company can not be held liable if he afterwards went upon the track and was run over by another train, unless the employes on such train saw his danger in time to have avoided injuring him and failed to use the means at their command to prevent it. As there was no testimony tending to show that the defendant's employes had any knowledge that the drunken man was physically or mentally incapable of taking care of himself, and that to put him off the train would necessarily expose him to danger from being run over by passing trains, it was error to instruct the jury that they must find for plaintiff, if they believed from the evidence that such facts existed.

2. Instructions telling the jury that they must find for plaintiff if they believed the life of the plaintiffs' husband was lost by the willful neglect of the defendant's employes, and defining willful neglect, were abstract and misleading.

W. J. Lisle and Wm. Lindsay for appellant; Harrison & Belden for appellee.

CALDWELL & CO., &c. v. JAMES, &c.

Filed February 15, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Garnishment—A garnishee proceeded against by a notice which is defective, by reason of its failure to specify the debt attached, may waive the defect and perfect the defective proceeding of the attaching creditor, provided he does so before other attaching creditors acquire a lien on the funds in his hands. In this case the garnishee, being indebted to the defendant in a greater sum than the amount of the attaching creditor's claim, refused to settle with the defendant until the latter had secured the claim sued on, which he did by placing in the hands of his attorneys a sum equal to the debt and costs of the plaintiff, and thereupon the garnishee paid him the full amount of his claim. Other creditors thereafter attached the fund in

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the hands of the attorneys, and claim priority because the notice served upon the garnishee in the action of the first attaching creditor was defective. The lower court rendered a personal judgment in favor of the first attaching creditor, and adjudged that he was entitled to the fund set apart for his benefit and paid into court by the attorneys. Held—That the first attaching creditor is entitled to priority as adjudged, as the action of the debtor and the garnishee perfected his lien before the other attachments were issued, and even though his petition does not show a good cause of action, nor a ground of attachment, he would, under the circumstances, have had the right to amend his pleadings so as to perfect his cause of action, and his claim to the fund deposited for his benefit, and as there is no pretense that he could not have done this, and the debtor is not complaining, there is no reason for disturbing the judgment and remanding the case that the same end may be accomplished.

S. B. and R. D. Vance for appellants.

LOUISVILLE & NASHVILLE R. R. CO. v. BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

Filed February 15, 1888. Appeal from Franklin Circuit Court. Opinion of the court by Judge Bowden, affirming.

Railroads—Taxation—The board of trustees of a town by resolution granted to a railroad company the right of way to locate its road through any of the streets of the town "to the full extent that may be necessary to construct said road," the resolution providing that "the same when located by said company for the purpose aforesaid shall forever be and remain in perpetuity of said president and managers and their successors in office, without any tax, charge, duty, let or hindrance, upon the part of the trustees or their successors in office." The company, or its vendee, claims that its property is exempt from taxation by the town by reason of this resolution. Held—That the word "same" refers to the right of way and not to the completed road, and that the company's property is not exempt from taxation.

Ira Julian for appellant; W. C. Herndon for appellee.

SHELLMAN v. FRYMIRE.

Filed February 15, 1888. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Seduction—Evidence—In an action by a father to recover damages for the seduction of his daughter, the daughter can not be required to answer, even on cross-examination, whether or not she had had intercourse with other men than the defendant, nor can witnesses be compelled to testify that they had had intercourse with her.

2. Same—While prior unchastity may be proved by the defendant in such an action in mitigation, it is not matter of defense.

3. Same—Technical seduction, which must be proved in a criminal prosecution, need not be shown in order that the father may recover for loss of services. It is not necessary in this action to show reluctance overcome by artful practices.

4. Same—The common law remedy for loss of service is not displaced by our statute. The statute is cumulative, giving an action for the seduction itself without regard to the consequences.

5. Same—Instructions which precluded a recovery except on the hypothesis that the defendant used persuasions or threats were prejudicial to the plaintiff and not the defendant.

J. A. Murray for appellant; Morris Eskridge for appellee.

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RHODES v. COX.

Filed February 15, 1888. Appeal from Madison Court of Common Pleas. Opinion of the court by Judge Bowden, reversing.

1. Attachment—Shares of stock in a corporation are properly attached by a service of the order on its chief officer.

2. Contracts—Painting was not necessary to the completion of a mill according to the contract which bound the miller merely to put it "up and in running order."

3. Principal and agent—An agent to superintend the building of a mill had no right to reject material offered by others and furnish it himself at a higher price. His duty to his principal forbade it.

John Bennett for appellant; Smith & Mason for appellee.

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KENTUCKY COURT OF APPEALS.

McELVAIN v. PORTER, c&.

(Filed February 23, 1888—Not to be reported.)

Construction of devise—Election—Estoppel—Pleading—Limitation—A testator devised all his estate to his wife for life, and at her death a certain portion of his real estate to a married daughter "and her children." The will provided, that should the daughter, during the minority of her children, desire to dispose of the land "in order to remove to some other part of the country," she should be permitted to do so, the sale to be valid, provided the money be re invested in land for her benefit and that of her children. The testator then appointed his executor as trustee "should my daughter desire to sell as above provided for, to see that this provision of my will is faithfully executed." It appears that the wife owned, by inheritance from her father, the greater part of the lands which the testator attempted to devise, but she accepted the provisions of the will, and thereafter executed a deed, conveying to the other devises all her right to the lands she had as widow under the will and also all she inherited from her father, except the life estate given to her by the will, to be held by them in accordance with the provisions of the will, it being recited as a consideration for the conveyance that it was made in order to prevent litigation arising in regard to the validity of the devise of the lands. The testator's daughter, together with her husband and her mother, the testator's widow, thereafter sold and conveyed to appellant a part of the land devised to her, and she and her husband, after the death of her mother, together with an adult son, conveyed to appellant another part of the land. Both the daughter of the testator and her husband being dead, this action was instituted by their surviving children against appellant to recover the land conveyed to him, and for rent. Held—

1. The testator's widow having elected to accept the provisions of the will, she and those claiming under her are now estopped to assert title in opposition to that passed by the will. But even if this had not been the case, she divested herself of title to everything except a life estate, by the deed to the other devisees.

2. The testator's daughter took only a life estate, the remainder interest being in her children.

3. She and her husband had no power to convey anything except her life estate, and, therefore, their deed did not pass title to the remainder. It was intended by the testator that his executor, as trustee, should sell, convey and re-invest.

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4. The cause of action did not accrue to the plaintiffs until the death of their mother, the life tenant, and, therefore, their action is not barred by limitation.

5. It was error to give judgment for rents accruing before the death of the life tenant.

6. The prayer of the petition for general relief did not authorize a judgment for damages for waste, especially when the issue in relation thereto is properly triable before a jury.

W. J. Hendrick and W. G. Dearing for appellant.

John P. McCartney for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Lewis.

Samuel Strahn died in 1866 testate, leaving a widow, Jane, and two married daughters his only children, Polly A. Money and Eliza Jane Leforge.

By his will, probated May 28, he devised all his real and personal estate to his wife, during her life, and at her death "to Polly A. Money and her children 125 acres of land, including the Morrow tract of 100 acres; to Eliza Jane Leforge and her children," 150 acres of his home place, and to his two grandchildren, Mary J. Todd and Milton Leforge, fifty acres.

Following the appointment of Thomas Butler as executor is this clause: "I add this further, that should my daughters, at any time during the minority of their children, desire to dispose of the lands bequeathed to them and their children in order to remove to some other part of the country, they shall be permitted to do so, and such sale shall be valid, provided all the money for these lands be reinvested in land for their benefit and that of their children, and I hereby appoint my executor, Thomas Butler, trustee, should my daughters desire to sell, as above provided for, to see that this provision of my will is faithfully executed."

September 26, 1866, Jane Strahn, the widow, made a deed, by which she conveyed to the devisees mentioned all the right and title to the lands she had as widow under the will, and also all she inherited from her father, except the life estate given to her by the will, to be held by them in accordance with the provisions, and subject to the conditions therein contained, the several parcels so conveyed being designated and described in a survey and division, which had been previously, by agreement between the devisees, made and filed in the clerk's office for record and referred to in the deed.

It was recited, as consideration for the conveyance, that it was made in order to prevent litigation rising in regard to the vlidity of the devise of the land, and to promote good feeling between her children and grandchildren.

According to the survey and division mentioned, the lot devised to Eliza Jane Leforge and her children contained 160 instead of 150 acres, and Feburary 15, 1872, she, together with her husband, Wm. C. Leforge, and Jane Strahn, the widow, for the recited consideration of $300, conveyed by deed 16 acres of the lot to appellant, McIlvain, who has held possession of it ever since.

July 31, 1876, Wm. C. and Eliza Jane Leforge and their son, Orville, then of full age, Jane Strahn being then dead, conveyed to one Robertson for the recited consideration of $546.47, about

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47 acres of the same lot. But subsequently Robertson, for the recited consideration of $470, reconveyed it to Eliza Jane and Wm. C. Leforge, the deed containing a clause of special warranty only. And March 28, 1879, two days thereafter, they conveyed it to appellant, McIlvain, for the consideration of $750.

This action was instituted in 1884 by the four surviving children of Eliza Jane Leforge who, as well as Orville Leforge, was then dead, to recover of McIlvain the two tracts, 16 and 47 acres, and rents, and judgment having been rendered in their favor for five-sixths of the tract of 16 and four-sixths of the one of 47 acres, and for damages on account of waste, as well as for the value of rents, he appeals.

It appears the testator, Samuel Strahn, did not in fact own any of the lands he attempted to devise, except one-half the Mason tract, the whole, including the other half of that tract, belonging at the time to his wife.

But it is, we think, correctly contended for appellees, and the judgment was rendered upon the assumption that she, having elected to accept the provisions of her husband's will, was thereby, and also by her deed to the other devisees, divested of all title and interest in the lands except the life estate therein devised to her.

The intention of the testator to dispose, by his will, of all the estate therein mentioned, to be held by his devisees, including his widow, according to, and upon condition of, the acceptance by them of all its provisions clearly appears.

It is also shown that the widow elected to accept the provisions of the will and to hold and enjoy the estate devised to her, with full knowledge of her title to the lands devised. For not only does an intelligent witness testify he apprised her of her rights, but that fact, as well as a deliberate election to accept and abide by the will, appears from the recitals in her deed to the other heirs, which was made long after the will was probated.

We think, therefore, her election was made under all the existing conditions necessary to estop herself, and those claiming under her, asserting title in opposition to that passed by the will. (Dawson v. Hays, 1 Met., 460.) But even if this had not been the case she divested herself of title to everything except a life estate by the deed to the other devisees.

It is also clear, and seems to be conceded by counsel for appellant, that under the will Eliza Jane Leforge had only a life estate in the 160 acres of land, the remainder interest being in her children. (Estill v. Carr, &c., 16 B. M., 306.) But it is argued that as the certificate of acknowledgment to the deed from Jane Strahn to the devisees, which was executed in due form and recorded, was signed only by a deputy clerk, the purchasers of the two tracts in controversy did not have constructive notice thereof, and consequently are not affected thereby.

If such rule was applicable at all, it could only affect the purchase of the tract of 16 acres, made in 1872. For Jane Strahn was not a party to the deed of 1876. But we think there is enough in this case to show that the purchaser had actual notice Eliza Jane Leforge had merely a life estate in the two tracts she attempted to convey, or at least to put a prudent person on inquiry.

The principal question is as to the construction to be given to the clause of the will we have italicized, and the rights and duties of appellant, as purchaser, in respect to it. For if Eliza Jane Leforge had any right to sell more than her own life estate in the 160 acres, or any part of it, it existed under that clause of the will.

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No power was given thereby to any person to sell during the minority of her children, except in case she desired to dispose of the land in order to remove to some other part of the country, and even in that event the validity of the sale was to depend upon a reinvestment of the proceeds in other land for the benefit of herself and children.

Though it was provided a sale might be made as a consequence of her determination to remove, which no one else was expected to control, the language used does not necessarily import that such sale was to be made by her in person. On the contrary, it is a fair inference that the testator, considering her condition as a married woman, did not intend to invest her with the power to sell, convey and reinvest, but that Butler, his executor, should, as trustee, do so. For if he was not to have that power, it is impossible to see for what purpose he was appointed. It is not a reasonable supposition the testator intended his married daughters, under the dominion of their husbands, should be invested with power to sell, pass the title, collect and reinvest the purchase money, instead of the person specially appointed trustee to see his wishes faithfully executed in regard to such sale and reinvestment. It seems to us, if such had been his intention, the language giving them such unusual power would have been too plain to be misunderstood, and no other person would have been appointed trustee, because there would have been no necessity for it.

In our opinion Eliza Jane Leforge had no power to sell and convey any other interest than her life estate in the two tracts in dispute, and no title to the remaider interest passed by either of the two deeds executed by her.

The statute of limitation has no application to this case, for the cause of action did not accrue to the plaintiffs until the death of their mother in 1884.

Nor do we see in what way the principle of substitution can avail appellant, except to the extent of the interest inherited from her deceased son, Orville, and passed by descent to the plaintiffs, her children. For it seems that her husband, Wm. C. Leforge, who was bound as well as she by the warranty in the two deeds, died before his son, Orville, did. And on the part of the latter there was only a special warranty. But we think the court erred in rendering judgment either for rents accruing before the death of Eliza Jane Leforge or for damages for waste.

By the deed of 1872, in which both the mother and grandmother of appellees united, the life estate of both in the 16 acre tract, and the latter being dead in 1876, when the second deed was made, the life estate of the former, in the tract of 47 acres, passed to the purchaser.

There was no prayer in the petition of the plainitiff for damages for waste, nor issue in regard thereto properly made, and we think it would be extending the operation and effect of a prayer for general relief further than is authorized by the Civil Code to render a judgment upon it alone for damages, especially when the issue in relation thereto is properly triable before a jury.

The judgment must, therefore, be reversed and cause remanded for further proceedings consistent with this opinion.

In response to a petition therefor, Judge Lewis delivered the following extension of the opinion:

The opinion heretofore rendered in this case is extended for the purpose of indicating the quantity of land for which appellees

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should have judgment, about which counsel suggest there may be some question.

Deducting from the original tract of 160 acres 47 acres, one-fifth of which belongs to appellant, there remains 113 acres, one-fifth of which, being 22 3-5 acres, belonged to Orville Leforge, and one-half thereof, being 11 3-10 acres, passed at his death to his mother, Eliza Jane Leforge, now dead, and is claimed by inheritance by appellees, her four surviving children. But as she bound herself for a good title to the 47 and 16 acre tracts, which appellees seek to recover, there should be deducted from those two tracts, and adjudged to belong to appellant, 11 3-10 acres, in addition to the one-fifth of the 47 acres to which appellant is entitled in virtue of Orville Leforge's conveyance to him.

CRAIG v. WALKER, &c.

(Filed March 1, 1888—Not to be reported.)

Deeds—Possession—Appellant accepted a deed to land in satisfaction of his vendor's title bond, with the knowledge that the deed did not include the land in controversy, which was excluded because it was covered by a patent from the Commonwealth to another than the vendor. The appellant now claims that after he accepted the deed he found that this land belonged to him by virtue of his title bond, and that he, from that time forward, claimed it as his own, and that he has acquired title by possession. Held - That the deed merged the title bond, and the fact that appellant held the actual possession of the land within the boundary of the deed, did not extend either an actual or constructive possession beyond that boundary.

E. F. Dulin and Jas. D. Jones for appellant.

R. D. Davis for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Bennett.

The appellant instituted an action of trespass against the appellees for cutting timber on a piece of woodland which the appellant claimed to be the owner of and in the actual possession of.

From the appellant's evidence it appears that he, in 1866, purchased by title bond a tract of land from the heirs of —— Maddix; that the latter, many years before, purchased said land, by title bond, from —— Dawson; that Maddix had held the possession of said land ever since his purchase from Dawson until his death, and his heirs continued to hold the possession until they sold the land to appellant; that the appellant then took the possession of said land and has held it ever since; that he instituted legal proceedings against the said heirs to get a deed to the land. The result of the proceedings was that the court ordered its commissioner to make to the appellant a deed to the land. For that purpose the land was surveyed, and the appellant attended the survey. The piece of land upon which the timber was cut by the appellees was excluded from the survey for the reason that the same was covered by a patent from the Comomnwealth to Miller in 1860. Said Miller and the appellant were partners in the survey and entry of said land, but, for some reason unexplained, the patent was issued to Miller alone. The court's commissioner made a deed to the appellant which, in accordance

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with the survey, excluded the land in controversy. He received the deed and held and claimed only the land conveyed by it, for some time, with a knowledge of the fact that the survey and deed excluded the land in controversy, and that the land in controversy was covered by the said patent. The appellant claims, however, that some time after he accepted the deed he found out that the land in controversy belonged to him by virtue of his title bond from Maddix's heirs, and he, from that time forward, claimed the same as his own, and evinced his ownership by occasionally cutting and removing timber from the land. But he never took any legal steps to correct the mistake, if any there was, in the deed. The deed has remained all the time in full force, with the appellant claiming under it. The deed merged the title bond, and the appellant's right of property is limited within the boundary of the deed, and that the fact that the appellant held the actual possession of the land within the boundary of the deed would not extend either an actual or constructive possession beyond the deed boundary. In order, therefore, for the appellant to acquire a possessory title to the land in controversy, he must have held the actual adverse possession of it for at least fifteen years. This he did not do. Besides, the record fails to show that the land in controversy, prior to 1860, had been "entered, surveyed or patented." So far as appears from the record said land was vacant land at the time Miller obtained a patent for it. The appellant in 1860 thought so, and he was of the same opinion at the time he received the commissioner's deed, and the facts, as presented in the record, accord with his view. We think that the lower court did right in instructing the jury to find for the appellees.

The judgment is affirmed.

CAUDILL v. CAUDILL.

(Filed March 1, 1888—Not to be reported.)

Acquiescence in informal partition—Commissioners professing to act under the order of the proper county court, made an allotment of a testator's lands among the devisees. The devisees at once took possession under the division, and have quietly remained in possession ever since, a period of ten years. Appellee, one of the devisees, seeks by this action to obtain a deed to the land allotted to him. To this all the devisees consent, except the appellant, who denies that there ever was any order appointing commissioners to make the allotment, or that it was ever reported or confirmed, the records of the county court having been lost or destroyed. Held—That however irregular and informal the division may have been as a court proceeding, yet the parties, by their silence and conduct, must be held to have sanctified and adopted it, and will not now be allowed to question it in a court of conscience.

P. A. Cline and Jas. M. York for appellant.

Tinsley & Marrs for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Holt.

John Caudill died testate in 1873, leaving a widow and eleven children, of whom the appellant and appellee are two, surviving him.

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His will shows an intention to equalize his children. To each of several of them he devisd land worth $500. That of several of them, however, was valued by the testator at but $400 each, and he, therefore, provided that each of them should be paid $100 in addition out of his estate. As to two of them to wit, his daughter, Polly, and the appellee, W. G. Caudill, the will provides that they were each to have "$500 in land out of my home farm, where I now live, in order to make them equal with my other children."

Shortly after the probate of the will three commissioners, professing to act under the order of the proper county court, allotted the widow's dower in the home farm, the interest of Polly and also that of the appellee therein, save that instead of giving him $500 they allotted him $600 worth of land. This probably arose from its being impracticable to do otherwise, but they required him, by way of accounting for the excess, to pay $100 to one of the devisees who was, by the will, to receive that much by way of equalization. This he did.

This action was brought by the appellee againt all the other children and the widow for a deed to the land thus allotted him. All of them, save the appellant, S. J. Caudill, by answer, consented to it.

It is admitted that the records of the county court have been lost or destroyed, but it is denied that there ever was any order appointing commissioners to make the allotment in question, or that it was ever reported or confirmed.

But three witnesses testify in the case, to wit: The appellee, one of the commissioners, and a brother of the parties to this appeal. The appellee is the county clerk. It is proven that no record of the division can be found, but that the commissioners were appointed by, acted and reported to the county court.

It does not appear whether the report was ever confirmed or not, but no deeds were ever made to any of the parties.

This occurred shortly after the death of the testator. The appellant was one of the executors of his father, and although in response to the charge contained in the reply he denies that he consented to or took any part in the division, but, upon the contrary, objected to it, yet he fails to testify, and all the circumstances compel the conclusion that he knew all about it, and if not an adviser and participant at least acquiesced in it.

The parties at once took possession under the division, and have so remained quietly ever since.

A portion of the land so allotted to the appellee was subject to the widow's dower, and they have lived upon the land ever since the division, claiming respectively by virtue of it. It has thus been acquiesced in and recognized by all the devisees for some ten or twelve years. It is not proven that any complaint whatever has ever been made as to it by the appellant or any of the devisees until this suit was brought in 1885. The appellee has been in possession of the land so allotted him ever since the division, unless it be the portion conveyed by the widow's dower right, and has improved it. Aside from the improvements, the value of it has changed somewhat, and to now disregard the division so long acquiesced in would not only be unjust, but it would tend to destroy the equality of the division of his property, which the testator designed. There is no evidence tending to show that the allotment was not a just and fair one. It was the work of three impartial persons, and presumption favors its correctness. It has been acted upon, acquiesced in and recog-

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nized for too long a period to be now disturbed. However irregular and informal the division may have been as a court proceeding, yet the parties, by their silence and conduct, must be held to have sanctified and adopted it, and will not now be allowed to question it in court of conscience. (Parker's Heirs v. Anderson's Heirs, &c., 5 Mon., 445.)

The circumstances attending it are of such a character that, if the court's action be altogether disregarded or rejected as invalid, yet it would be inequitable, in view of the appellant's silence and conduct, to now disturb it. The parties must be considered as having made the action of the commissioners their own, and must be upheld.

Judgment affirmed.

DITTO v. WOODFELL'S ADM'R, &c.

(Filed March 1, 1888—Not to be reported.)

Execution sales—An execution against appellant and others was levied on two town lots as the property of appellant. In this action by the purchasers at execution sale to recover the property of appellant, it is alleged by the plaintiffs that while the property was levied on as two lots, it was in fact only one lot, and was sold by the sheriff as one lot, and a deed made to the whole as one lot. Appellant alleges that there were two lots, and that only one of them was sold, which he is willing to surrender. The sheriff's report of sale was not recorded by the clerk, as the execution was taken from the clerks' office by appellant after its return, and has never since been seen. It appears that the property was inclosed by one fence, and was really but one lot. Held—That the evidence, which is recited in the opinion, fails to sustain the defense.

Geo. C. Diane for appellant.

Carroll & Barbour for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Bennett.

The Deposit Bank of Eminence caused two executions, Nos. 1766 and 1767, to be issued upon judgments from the Henry Circuit Clerk's office against the appellant and others, which executions were placed in the hands of the sheriff of Henry county. After these executions had been returned to the circuit clerk's office they were taken therefrom by the appellant. They were never returned by him, nor have they been since.

The clerk of the circuit court did not copy the sheriff's return on both of these executions, but he copied the return on only one of them. This copy of the return shows that the sheriff levied the execution on two town lots in the town of Bethlehem as the property of the appellant, one occupied by Winfred Jesse, and the other by Abe Ditto Ridgeway.

The appellees instituted an action against the appellant, in which they alleged that the sheriff, under and by virtue of these two executions, sold these two lots, and that John W. Sewell became the purchaser; that he assigned his bid to the appellee's ancestor, and that the sheriff made to him a deed to the property. They also allege that while the said property was levied on as two lots, yet the property was in fact only one, and that the same was sold by the sheriff as one lot, and that a deed was

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made to the whole property as one lot. They sought to recover the possession of the lot. The appellant denied that the property was only one lot, alleging that there were two adjoining lots, only one of which was sold by the sheriff, which he was willing to surrender, but that he was not willing to surrender the other because the same was not sold by the sheriff.

The proof is clear that there was no fence dividing this piece of ground into lots, but the same was enclosed by one fence, and was really but one lot. Several witnesses swear that they were present at the sale, and that the entire lot was sold as one lot. The sheriff and the purchaser are among the witnesses who thus suffer. Some of them swear positively that the whole property was sold as one lot, the others give it as their best recollection that such was the case. Not a witness contradicts these witnesses. The appellant was present at the sale, and he does not contradict them. The proof is conclusive, therefore, that the whole property was sold as one lot. Besides, the deed conveys all of the property as one lot.

But it appears that the sale of this property lacked $15 or $20 of satisfying the debts, and a venditioni exponas was directed to the sheriff, commanding him to sell one lot of ground in the town of Bethlehem to satisfy said sum. It is contended that this lot is the one that remained unsold at the sale under the execution, and that it is conclusive therefore, of that fact. But the sheriff says that the lot referred to in the venditioni exponas is not one of the lots in controversy; that it is a lot on the opposite side of the lane which he had levied on, and which he sold, and one Peyton became the purchaser of it.

A careful examination of the record convinces us that the appellant has wholly failed to make out a case.

The judgment is affirmed.

UNDERWOOOD v. PARKER.

(Filed March 1, 1888—Not to be reported.)

Vendor and vendee—In this action to recover the purchase money of land, as the plaintiff avers an ability and willingness to convey the land according to the title bond, and the defendant is in possession, it was error to dismiss the petition, no proof being taken to sustain the allegations of the answer, which were denied.

T. D. Theobald for appellant.

Z. T. Young for appellee.

Appeal from Rowan Circuit Court.

Opinion of the court by Judge Lewis.

The effect of the judgment in this case is to not only deny the plaintiff, vendor, recovery on the notes given for the purchase money, but to leave the defendant, vendee, in possession and enjoyment of the land, though unpaid for. As neither the purchase of the land nor execution of the notes therefor was denied in the answer, we are at a loss to see the ground for dismissing the petition. Although it is alleged in the answer the title bond was intended to contain an undertaking by the plaintiff to con-

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vey the land upon payment of the purchase money with a clause of general warranty in the deed, instead of binding him, as by its terms was done, to convey with a special warranty merely, no proof was taken to sustain that allegation, though it was denied.

An ability and willingness to convey the land according to the title bond being averred, and the defendant being in possession of the land, the judgment dismissing the action was erroneous and is reversed, and cause remanded for further proceedings consistent with this opinion.

TALBOTT'S ASS'EE v. EWALT, &c.

(Filed March 1, 1888—Not to be reported.)

Debtor and creditor—Unlawful preference—While the design to prefer will be inferred from a payment to a creditor by an insolvent debtor, the circumstances attending the transaction may show plainly that there was no motive or thought of giving an advantage or preference, and then the presumption is repelled.

In this case the debtor's estate was valued at $10,000 or $12,000. The debtor had recently traded with a neighbor and owed him $58, the payment of which is attacked as a preference. He was under no obligation to this creditor, while there were other creditors to whom he was under obligation for assistance. A few days after this payment was made the debtor made an assignment for the benefit of all his creditors. Held—That the presumption of a design to prefer is repelled, and that the court erred in disturbing the assignment.

Geo. C. Lockhart for appellant.

E. W. Hines for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Pryor.

This court, in a recent case from the Bourbon Circuit Court, Grimes v. Grimes [ante, page 694], held that the design to prefer will be inferred from a payment to a creditor by an insolvent debtor, but the circumstances attending the transaction may show plainly that there was no motive or thought of giving an advantage or preferene, and then the presumption is repelled. The facts before us present a case where we are satisfied the debtor, although insolvent, had no intention to prefer. Talbott was indebted near $20,000, and owned an estate valued at $10,000 or $12,000. He had been struggling against financial embarrassment for years with the hope of being able to finally satisfy his creditors. He had friends and relatives who had aided him in his pecuniary troubles by loaning him money and endorsing his paper for considerable sums. His obligations to such friends and the extent of their liabilities for him would have suggested to him that if his purpose was to make a preference it should be made to them and not to those who had no other claims upon him than the payment to them of small debts, necessarily contracted by a man of appellant's business habits in neighborhood transactions. Appellant was a trader in stock; had traded with his neighbor and owed him about $58. A few days after this payment was made he made the assignment, based on the fact that

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some one for whom he was liable as surety had failed, and it may be for the additional reason that total bankruptcy would soon follow his then insolvent condition. He swears that he had no intention to prefer Morris, and in such a small transaction, with an estate worth $10,000 and trading as an every day business in his neighborhood, it is not to be presumed that he would have selected Morris, who had never aided or assisted him in any manner, above all of his creditors, as the man he should prefer when contemplating making this assignment for the benefit of all alike.

The transaction between Morris and Talbott was a recent one—an ordinary neighborhood transaction—involving but a small sum of money, and neither party, we are satisfied, supposed that a preference was being given in contemplation of insolvency. The inducement to prefer the friends of the debtor certainly existed, but his purpose doubtless was to treat all alike, and, having done so, we perceive no reason for disturbing his act of assignment, although the payment to Morris may result in giving him a preference. The circumstances of the transaction usually determine the purpose and intent of the parties. A chancellor would presume the intent to prefer by the payment of money in the one case when he would not in the other. The pecuniary condition of the debtor, although insolvent; the character of the transaction resulting in the payment; the relation between the parties, and other circumstances will be considered to show at least that no preference was intended. Although payment has been made when such circumstances exist as negative the idea of an intention to prefer, aided by the oath of the debtor, the statute does not require the estate of the debtor to be seized or thrown into bankruptcy by the chancellor, and in this case the court below erred in disturbing the assignment made by the appellant.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

COUNTS v. KITCHEN.

(Filed March 1, 1888.)

1. Occupying claimants—Improvements—Injunctions—Under the statute, in relation to "occupying claimants," which provides that any person believing himself to be the owner by reason of a claim, the foundation of which is of public record, shall "seat and improve" any land, which, upon judicial investigation, shall be decided to belong to another, the value of his improvements shall be paid to him by the successful party before the court shall cause the possession to be delivered, and further provides for the empaneling of a jury to assess the value of the improvements, the occupant can not stand by and see a judgment rendered upon which a writ can issue without regard to the value of his improvements, and then obtain an injunction to prevent the execution of the writ upon no other equitable ground than the failure of the successful party to pay the value of the improvements. He may, however, at a subsequent term, by motion or petition, have a jury empaneled, as provided by the statute, to assess the value of the improvements, and make the successful claimant liable therefor, as the statute does not limit the application for a jury to the term at which the land is adjudged to belong to another.

In this case the appellant, the occupant, by a petition in equity, sought to enjoin the execution of the writ of possession upon the ground that the successful claimant had not paid him the value of his improvements, and asked that a jury be empaneled to assess their value. Held—That the court prop-

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erly dissolved the injunction, but erred in dismissing the petition, as a jury should have been empaneled as requested.

2. Costs of appeal—Both parties being in default, no judgment will be rendered for costs on the appeal.

E. B. Wilhoit, R. D. Davis and Thos. D. Theobald for appellant.

J. R. Botts for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Pryor.

Article 1 of the statute in relation to occupying claimants, provides that "if any person believing himself to be the owner by reason of a claim in law or equity, the foundation of which, being of public record, hath or shall hereafter peaceably seat and improve any land, but which land shall, upon judicial investigation, be decided to belong to another, the value of the improvements shall be paid by the successful party to the occupant, or the person under whom and for whom he entered and holds, before the court rendering judgment or decree of eviction shall cause the possession to be delivered to the successful party." Section 2 of the same act provides: "The court in which the judgment or decree of eviction shall be rendered, at the request of either party, shall direct the clerk of said court to issue venire facias to the sheriff of the county in which the land is situated, commanding him to summons a justice of the peace of his county, and also to empannel a jury of twelve discrete and impartial freeholders, not of kin to either party, to meet upon the premises recovered on a day to be named in the writ," etc.

The statute further provides that this jury shall assess the damages, if any, which may have been done the land by cultivation and unnecessary waste of timber after suit brought, the rents and profits which have accrued after final judgment, and the value of the improvements upon the land from which the occupant is to be evicted, to be estimated as of the time the jury is empanneled.

The ancestor of the appellees recovered, by his action in the Carter Circuit Court, a tract of land from the appellant, who had entered under a prior patent issued to his vendor, and obtained a judgment of eviction. A writ of possession issued upon the judgment, and was placed in the hands of the sheriff, when the appellant, who was still in the actual occupancy of the land, filed his petition in equity against the appellees, in which he claimed compensation for his improvements and obtained an injunction prohibiting them from executing the writ of habere facias. A general demurrer was sustained to the petition, and the appellant prosecutes this appeal.

All the facts necessary to entitle the occupant to pay for his improvements are plainly alleged in the petition, and the demurrer should have been overruled unless the failure to ask for a jury to determine the value of his improvements at and when the judgment was entered is a bar to the recovery.

The first section of the act referred to provides that the successful party shall pay to the occupant the value of his improvements before possession is required to be delivered under the judgment of eviction, and while this is the plain letter of the statute, if possession is ordered to be delivered without regard to the rights of the occupant, the judgment would be erroneous only and not void. So the question arises whether the occupant, at a subsequent term of the court, as was done in this case, can

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ask for a jury that the value of his improvements may be ascertained and the party recovering made liable therefor.

The second section of the act provides that the court in which the judgment is renderd shall, at the request of either party, have a jury empanneled, as provided by the act, to inquire of damages and fix the value of the improvements, and it is contended that this should be done when the judgment of eviction is entered or during the same term of the court. It certainly would be the proper practice under this statute, so as not to prolong the litigation and to prevent an independent action, to require the party desiring a jury to demand it at the time when the judgment is rendered or during the same term of the court. The statute is silent as to when this request for a jury is to be made, but when the occupant stands by and sees the judgment entered upon which a writ can issue and interposes no objection, the right to execute the judgment should not be prevented by an injunction upon no other equitable ground than the failure of the successful party to pay the value of the improvements made.

The statute afforded a plain remedy for preventing the execution of the writ, and as the appellant failed to adopt it the injunction should have been dissolved. Did the appellant, however, lose his right to the value of his improvements by failing to request the empanneling of a jury as provided by the second section of the act? We think not. His right to compensation is unquestioned, and he is endeavoring to proceed as the statute requires, by asking the court rendering the judgment to give him a jury to go upon the premises and say, by their finding, what sum, if any, he is entitled to from the appellees. It is not an ordinary action, although in the form of a petition in which the appellant is seeking to recover the amount due him, but he is asking the court to let him pursue the remedy the statute gives him and no other, and we see no reason why this might not have been done, by motion or by petition, at a subsequent term, as he is not limited in his application by the statute to the term at which the land was adjudged to belong to another.

Besides, under the act of 1819, where commissioners fixed the value of the improvements, the question was presented to this court in several cases as to the right of the occupant to move for the appointment of commissioners at a term of the court after that in which judgment was obtained, and it was held that the appointment of commissioners at a subsequent term was proper. (Craig v. Major, 1 Mar., 187; Smith v. Walton, 2 Mar., 26; Smith v. Hornback, 1 Lit., 272.) Here, the appellees having been summoned and before the court, the statutory remedy should have been granted the appellant, but his injunction should have been dissolved, the only ground for the injunction being that a writ of possession was in the hands of the sheriff. The appellee had no means of knowing that the appellant would assert a claim for improvements, and his failure to do so when the judgment was rendered, or during the term, can not now be asserted as the reason for appealing to the chancellor.

The judgment is reversed and remanded for proceedings consistent with this opinion, and as each party is in default no judgment will be rendered for the costs in this court by the one against the other.

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SIMS, &c. v. WALSHAM, &c.

(Filed Macrh 3, 1888—Not to be reported.)

Pension not exempt—Fraudulent conveyances—Pension money is not exempt, under section 4747 of the Revised Statutes of the United States, after it reaches the hands of the pensioner.

In this case money did not actually come to the hands of the pensioner, but a check therefor did, and that he transferred to another person with directions to cash it and deliver the money to his two sons, appellees, to be used by them in paying for the land in controversy. Held—That the appellees hold the land by what is, in the meaning of the statute, a voluntary conveyance from their father, and, therefore, the conveyance should be set aside and the lands subjected to a pre-existing debt of the father.

Carr & Rullock for appellants.

Boles & Basham for appellees.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Lewis.

In the case of Robinson v. Walker, 5 Ky. Law Rep., 799, it was held that under section 4747 of the Revised Statutes of the United States, the exemption therein provided "does not extend beyond the time the money reaches the hands of the pensioner," and the same construction has been given to the law of Congress by this court in the cases of Hudspeth v. Harrison, 6 Ky. Law Rep., 304, and Herreld v. Skillen's Ass'ees, 6 Ky. Law Rep., 666, and such seems to be the current of decisions of courts of other States.

The money did not, in this case, actually come to the hands of the pensioner, but a check therefor did, and that he transferred to another person with directions to cash it and deliver the money to his two sons, appellees, to be used by them in paying for the land in controversy. If the pensioner had applied the check or proceeds of it to the purchase of the land in his own name and for his own benefit, he could not, under the ruling of this court, have claimed a homestead exemption against the pre-existing debt of appellant. And no more can his two sons, who hold the land by what is, in the meaning of the statute, a voluntary conveyance, without valuable consideration from their father, prevent it being subjected to that debt.

Wherefore, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent with this opinion.

FARRIS, &c. v. ROGERS, GD'N, &c.

(Filed March 3, 1888—Not to be reported.)

1. Partial restraints upon alienation of land, when reasonable, have, in some cases, been held valid, even where a fee simple title was given, yet such a restriction should not be adjudged upon doubtful language.

A testator, after providing that the devisees should have a fee simple title to the land devised, added: "I wish for this land never to be sold outside of the family." Held—That the words quoted must be regarded as the expression of a hope merely, and not as mandatory.

2. Sale of infants' real estate—A statutory guardian seeks the sale of land devised, in which his ward owns a one-fourth interest, the share of each

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ward being worth less than $100. The petition alleges that the sale is necessary for the support and education of the wards, and that the land can not be divided. All the parties in interest were before the court, and all consented to the sale except appellant, who owns a one fourth interest. Besides, a creditor of the testator asks the sale of the land to pay his debt, there being no personal assets. Held—That it was not necessary that the guardian should execute a bond to render the order of sale valid.

3. Purchase from devisee—Where one of several devisees, for a valuable consideration, sells the land devised to him to one who has no notice of any indebtedness upon the part of the estate, the land is not liable, in the hands of the purchaser, to the creditors of the testator, the entire burden being thrown upon the land in the hands of the other devisees.

Chas. H. Rodes for appellants.

John W. Yerkes and Fox & Fox for appellees.

Appeal form Boyle Circuit Court.

Opinion of the court by Judge Holt.

The devisees of Patsy Cowan took an absolute fee under her will. It is true it says: "I wish for this land never to be sold outside of the family," but in view of all of its provisions this must be regarded as the expression of a hope merely, and not as mandatory. Otherwise it is repugnant to the estate granted. The will expressly says that the devisees are to have a fee simple title. Partial restraints upon alienation, when reasonable, have, in some cases, been held valid, even where a fee simple title was given. But as our law favors the existence of the power of alienation, a partial restriction should not be adjudged upon doubtful language. Here the word "never" is used, and unless our construction be correct, it savors of a perpetuity, forbidden by our statute. (General Statutes, chapter 63, article 1, section 27.)

The evidence shows that the undivided interest of each of the two defendant wards, for a sale of which their statutory guardian petitions, is worth less than $100; that its sale is necessary for their support and education, and that it can not be divided among the joint owners without material injury to its value.

The petition avers all this also, and all the parties in interest were before the court. The wards of the petitioner own one undivided interest; the appellee, Caldwell, two, by purchase, and the remaining one belongs to the female appellant.

Caldwell, in his answer and cross-petition, avers that the land is indivisible, and he also asks its sale. The owners of three-fourths of it are, therefore, seeking the same object.

In addition, a creditor of the testatrix, by an answer and cross-petition, asserts his debt, and asks that the land be sold for its payment, there being no personal assets. The appellants entered their appearance to this cross-petition; all the other parties in interest either did so or were duly summoned, and we, therefore, have a case where, not only the statutory guardian of infant joint owners and devisees, whose interests are worth less than one hundred dollars each, are asking the sale of land incapable of division, but a creditor of the testatrix, in the absence of personal assets, is asking its sale for the satisfaction of his debt.

No bond was required in such a case from the statutory guardian to render an order of sale valid, and upon the pleadings and evidence presented it was proper to so decree, as a sale was not forbidden by the will.

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One of the devisees died subsequent to the death of the testatrix, unmarired, and intestate. His interest in the land descended to the other devisees. His administrator filed an answer and cross-petition, asking its sale, and averring that his estate was indebted to the female appellant. This was denied, and there is no evidence to support it. The judgment gives him no part of the proceeds to arise from the sale, and he is now complaining. The judgment provides that the debt of the creditor of the testatrix is to be paid out of that portion of the proceeds of the sale that will be going to the female appellant and the two infants. In other words, this burden is thrown entirley upon them, or their one-half of the proceeds, and the purchaser, Caldwell, or his half, bears none of it. This hardship to them is, however, unavoidable. The will creates no charge upon the land for the payment of the debts of the testatrix.

Section 8, article 1, chapter 44 of our General Statutes, provides: "When the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest, from the time of alienation to the creditors of the decedent or testator, but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for valuable consideration."

Here Caldwell purchased and paid for his one-half of the property in the spring of 1885. He did so without notice of any indebtedness upon the part of the estate, and the creditor's claim was not asserted against it until the fall following.

It follows that the subjection of the purchaser's interest in the land, or the proceeds arising from its sale, is expressly forbidden by the statute.

Judgment affirmed.

DAVIS v. PRITCHARD.

(Filed March 3, 1888—Not to be reported.)

Homestead—Abandonment—A debtor being in bad health removed, with his family, from his farm, which he had occupied as a home for many years, intending to return as soon as his health improved. Finding that his health grew worse instead of better he sold his farm to appellant for less than $1,000. At the time of the sale there was an execution against the debtor in the hands of the sheriff which had been levied upon this property. Held—That the debtor had not abandoned his homestead, and that appellant, by his purchase, acquired a perfect title.

In this contest over the probate of a will upon the ground that the testator was of unsound mind, it is held that the testimony which is reviewed in the opinion, establishes the fact that the testator had sufficient mental capacity to execute the will in contest.

Jas. D. Jones and Wm. Bowling for appellant.

E. B. Wilhoit for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Jusitce Pryor.

If Kibby, who was the vendor of the appellant, was entitled to a homestead in the land at the date of appellant's purchase, it obviates the necessity of determining the other questions presented by counsel. The land was sold to the appellant when it is claimed the appellee held a lien upon it by reason of an execution against Kibby in favor of the appellant, Pritchard (the owner), then in the hands of the sheriff and levied. Kibby lived on the land and mortgaged it to one Regan, who assigned the

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benefit of the mortgage to White. To satisfy this mortgage the land was sold and purchased by Patton for the benefit of Kibby, and then Patton and Kirby conveyed the land to the appellant. Davis. The land failed to bring two-thirds of its value, and the equity of redemption had been levied on by Pritchard before the sale to Davis. If Kibby was entitled to a homestead, the land not being worth exceeding $700, Kibby had the right to sell and pass the title to the purchaser. It appears that Kibby was in very bad health, and had borrowed the money for which the mortgage was given to enable him to go to Texas temporarily with a view of benefitting his health; that he returned in a short time, deriving but little, if any, benefit from the trip, and concluded to remove a short distance from his farm to a small place belonging to his father-in-law. He rented his farm out and lived near enough to supervise it and utilize the rents, and, from the testimony, intended to move back upon the place as soon as his health improved. He grew worse, however, and in a short time died. The fact that he sold this land after his removal from it did not divest him of his right to a homestead, if the removal was temporary and the purpose to return existed. He was engaged in no business, and was evidenlty leaving his home for the time being in order to regain, if possible, his health, and with no intention to abandon his home. In this condition, when ascertaining that he was growing worse instead of better, he sold the land to Davis for its full value, and, we think, passed a perfect title to the extent, at least, of $1,000 in value of the land sold. Here the owner owned no other property for his support and maintenance. He had actually occupied the land for years as a homestead, and left with the intention of returning. In such a case the homestead is not abandoned. Where one purchases land upon which he has never lived, with the intention of going upon it, he acquires no right of homestead, and the question of intention can only apply where the owner has occupied the premises as a homestead and then removes. In such a case if the removal was merely temporary the homestead right exists. The question is, did the owner intend to abandon his home in this case? We think every fact and circumstance in it indicates clearly that he had no such intention, and in making the sale to Davis he must be treated as if in the actual occupancy of the land. The case of Hansford v. Holdam, 14 Bush, 210, is conclusive of this case. Any other construction of the statute would deprive the owner of his homestead in every case where he had left his premises with a tenant in possession, although his purpose not to abandon his homestead may be clearly shown.

The judgment below is reversed, and cause remanded, with directions to dismiss the petition.

HOSKINS, &c. v. HOSKINS, &c.

(Filed March 3, 1888—Not to be reported.)

In this contest over the probate of a will upon the ground that the testator was of unsound mind, it is held that the testimony which is reviewed in the opinion, establishes the fact that the testator had sufficient mental capacity to execute the will in contest.

J. M. Unthank for appellants.

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J. H. Tinsley for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Jusitce Pryor.

This case originated in the county court of Knox, where the will of Levi Hoskins was offered for probate. The instrument was properly proven in that court as the last will of the testator, and from the order of probate an appeal was prosecuted to the circuit court, and a trial by jury waived, resulting in a judgment against the validity of the paper.

The will was assailed for the want of mental capacity on the part of Levi Hoskins at the date of its execution, and the exercise of an improper influence over him by one of his sons. It was executed by the testator in October, 1863, and admitted to probate in the county court in 1876. How long he lived after its execution does not appear, but near thirteen years elapsed from its execution to the time of probate, and the presumption is that the testator lived many years after he executed the paper.

After a careful consideration of the record, we conclude there is an entire absence of evidence showing either a want of mind to execute the will, or an undue influence over the testator by his sons or others at the time it was executed. In fact we have seldom seen, in any record involving similar questions, a stronger case of mental capacity made out for a testator than appears from the testimony to have existed in this case with reference to the capacity of Levi Hoskins. Attesting witnesses who, from their statements in genearl and in detail, exhibit more than ordinary intelligence, and who had known the testator for many years, one of them writing his will, have no doubt as to his mental condition when he signed the paper, and that he fully comprehended the nature of the solemn act he was then executing.

Its contents, they both say, was the offspring of his own mind, and in furtherance of a purpose contemplated by him many years prior to its execution. He had spoken on two several occasions to the draftsman of the will of his intention to execute such a paper, and to some of his neighbors who lived near him, and were on intimate and friendly relations with him, he had detailed more than once the manner in which he intended to dispose of his estate.

The whole testimony in favor of the validity of the paper sustains the mental capacity of the testator to comprehend fully the character of his esatte and his obligations to his offsprings in making the distriubtion between them. The only point raised upon which a suspicion of mental imbecility could be based was the failure of the testator to provide for his wife, but we think it is apparent that he must have known that she would be entitled to her distributable share as widow, as well as her dower, or that his children would provide for her as long as she lived. The widow renounced the provisions of the will, and there is no contest over her rights in the premises.

The testimony against the will by one witness was to the effect that the aged devisor was in fear of the rebels; that they had camped with Indians near his home; that he was excited and crying, no doubt from fear of the Indians, or the still greater fear that they might deprive him of his property.

Another witness says that he was present when both the daughter of the testator and her husband were lying dead at the same time. There was some discussion as to the place of burial,

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and the old man being present seemed disturbed and flustrated. Still another witness said he was feeble in mind; talked strange. And another, that he purchased some goods and told the witness to take the change out of the money handed him without asking the price; that he handed back the change and nothing more was said. No act of the testator or conversation with him is detailed by a single witness evidencing even a feeble intellect, but a futile effert to destroy the validity of the paper, made by this testator upon testimony to the effect that he looked strange, was excited when the rebels came in, and was also seen talking privately with his two sons on one occasion. The testator was advanced in years, and we have no doubt his mental vigor was somewhat impaired, but that he was wanting in mental power to execute the paper in controversy is not established by any fact or circumstance in the entire record.

The judgment below reversing the order of probate is reversed, and the same remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

BELL v. WOOD, &c.

(Filed March 6, 1888.)

1. Weight given to judgment of lower court—Where the law and facts in an ordinary action are submitted to the court, its findings of facts are to be tested as the verdict of a properly-instructed jury and will not be disturbed unless palpably against the evidence.

2. Release of judgment—Effect on lien—Where a creditor of the plaintiff in a judgment has obtained a lien upon the judgment by attachment, an agreement by the plaintiff to release his judgment, entered into after the lien attached, will not be enforced as against the attaching creditor, there being no valid defense against the judgment at the time the lien was created.

3. Garnishment—Notice—In order to execute an attachment upon a debt it is not necessary that the notice served upon the garnishee should describe the debt sought to be attached; and this was true prior to the amendment of May 15, 1886, to section 203 of the Code. (Menderson v. Specker, &c., 79 Ky., —, overruled.)

Robert W. Slack and Richards & Hines for appellant.

W. N. Sweeney & Son and Weir, Weir & Walker for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

At the March term, 1882, of the Daviess Circuit Court, upon issues joined between J. B. Norris as plaintiff and the appellant as defendant, the jury rendered a verdict in favor of J. B. Norris for $196. The circuit court rendered judgment upon this verdict. The appellant superseded said judgment and appealed to the Superior Court.

The appellee, Wood, on the 11th day of September, 1882, filed his petition in equity in the Daviess Circuit Court against J. B. Norris and the appellant. The petition alleged that Norris was indebted to the appellee, Wood, on a note for $105; that Norris was a nonresident of the State; that the appellant was indebted to Norris in a sum more than sufficient to pay said debt. On this petition, the proper allegations having been made and bond executed, an order of general attachment was issued September the

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11th, 1882. Summons having been issued on the same day against the appellant, it was served on him the next day. The order of attachment having been issued on the 11th of September, 1882, a copy of it was served on the appellant as garnishee on the next day. The clerk of the Daviess Circuit Court endorsed on the back of the summons as follows:

"The object of this action is to subject to the payment of the plaintiff's, A. G. Wood, debt of $105, with interest from December 21st, 1880, and $30, the probable cost of this action, any money or property belonging to the defendant, J. B. Norris, or due him, and to especially subject any amount due him by the defendant, J. H. Bell, or any indebtedness from the said Bell to said Norris.

"Attest: F. F. CONWAY, Clerk."

When the appellees' petition was filed and the order of attachment and summons were issued and served on the appellant the appellant's appeal against Norris was pending in the Superior Court, where it remained undisposed of until March, 1884, when the same, without having been tried by the Superior Court, was dismissed settled. Afterwards, the appellant filed his answer to the appellees' petition and amended petition. A demurrer was sustained to the answer, and an amended answer was filed. The defense relied on in the answer and amended answer were, first, matters of set-off against Norris; second, a compromise between him and Norris of the judgment attached by the appellee, Wood.

The lower court, upon the hearing, by the request of the appellant, separated its conclusions of law from its finding of facts. In reference to the matters of set-off the court found that the jury, in the case of Norris against the appellant, considered these matters; also, that Norris and the appellant agreed that the amount due by Norris to the appellant for rent was $24, which sum, by agreement, was credited on the judgment for $196 in favor of Morirs against the appellant. The finding of fact by the lower court must be treated by this court as the verdict of a properly instructed jury, which we, as has been repeatedly decided, can not reverse, unless the finding is palpably against the weight of the evidence. We have repeated this proposition so often—both in published and manuscript opinions—that an attempt to induce us to change or relax the rule, in a case like this, is a work of superogation. We can not say that the finding of the lower court, in reference to these matters of set-off, is palpalby against the weight of the evidence.

On the 24th day of November, 1883, and while the case of the appellant against Norris was pending in the Superior Court, the appellant and Norris entered into a written agreement, by which Norris agreed to release his judgment against the appellant and to waive all claim for damages on the supersedeas bond executed by the appellant. In consideration of which the appellant agreed to dismiss his appeal in the Superior Court, and to save Lostutter harmless by reason of his being bound as the surety of Norris on a bond for cost executed by said Norris in the action as a non-resident plaintiff. Upon the execution of this agreement the appellant dismissed his appeal in the Superior Court. It is to be observed that this agreement was executed and the appeal was dismissed after the appellant was summoned as garnishee to answer the appellees' action in the Daviess Circuit Court. The question is, was this compromise agreement effectual as against the appellees' claim? That said agreement was binding as between the appellant and Norris is conceded. But the agreement, stripped of its verbiage, was to the effect that Norris, in consid-

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eration of the appellant's agreeing to save Lostutter harmless as the surety of Norris on his bond as a nonresident, was to release the appellant from the payment of said judgment. At the time the agreement was made the appellee, by the garnishment, had acquired a lien upon the judgment for the payment of his debt, which lien the appellant and Norris could not defeat by an agreement based upon the consideration set forth in the agreement. Of course any valid defense against the judmgment that the appellant might have had at the time summons to the answer as garnishee was placed in the sheriff's hands, would have been an available defense against the lien of the appellant upon the judgment, but the compromise agreement was based upon a consideration which could only arise by the terms of the agreement, without which the matters therein agreed upon could not have been used as a subsisting defense at the time the lien was created. It is also contended that as the service of the order of attachment upon the appellant to answer as garnishee was not accompanied with a notice specifying the debt that the appellee sought to garnishee, the service of the order was void, and, therefore, no lien was created on the debt.

By section 203 of the Civil Code, it is provided: "The order of attachment shall be executed by the sheriff in the following manner: First, upon real property, by leaving with the occupant thereof a copy of the order; second, upon personal property capable of manual delivery by taking it into his custody; third, upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it, or as to a debt or demand to the person owing it."

According to the language of the Code it is the sheriff's duty to give whatever notice is required by the third subsection. When it is the duty of the sheriff to levy upon personal property not capable of manual delivery, such property may be in the possession of a person other than the defendant, it would be important for such person to know what property is attached. It is, therefore, the duty of the sheriff to give him a notice specifying such property. Also, if such property is in the possession of the defendant, the sheriff must give him a notice specifying it. The reason of the requirement is plain. For instance, if the sheriff should levy upon one of several fields of corn, it would be the duty to notify the defendant, or other person in possession, which one of the fields of corn he levied on, in order that the defendant or other person in possession might not render himself liable for gathering or disposing of that particular corn. But no reason exists for giving notice specifying the particular debt or demand to the person owing it. Such requirement would render it impracticable, in a large majority of cases, to garnishee debts or demands, for the plaintiff would not know nor have the means of ascertaining the amount or nature of the debt that the garnishee owed the defendant. For instance, the defendant, as a merchant, might have unrendered accounts against hundreds of persons. In such a case it would probably be wholly impracticable for the plaintiff to ascertain and specify the amount of the indebtedness of such of these persons as he wished to garnishee. Also the relation between debtor and creditor is usually a private one, and correct information as to the amount or nature of the indebtedness can usually be obtained from only one or the other, and neither is under legal obligation to make the fact known to the plaintiff. Therefore, to require a notice to the garnishee, specifying the debt that he owed to the defendant, would usually defeat the speedy provisional remedy given to the plaintiff by the

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Code of Practice as a security for his debt. For these reasons we are of the opinion that the section of the Code supra does not require that notice shall be given to the garnishee specifying the debt or demand owing by him to the defendant. Besides, the grammatical construction of the section of the Code supra is in harmony with the foregoing views, for the expression, "with a notice specifying the property attached" is a parenthetical clause, which refers to and modifies the antecedent and not the subsequent clause in said subsection. Besides, by an act, approved May the 15th, 1886, the legislature interpreted said subsection by adding words showing that no notice was required to be given to the garnishee specifying the debt or demand owing by him to the defendant.

The case of Menderson v. Specker, &c., 79 Ky., 509, which the Superior Court followed in this case, is, in so far as it conflicts with this opinion, overruled.

We think that the judgment of the lower court, subjecting said judgment to the payment of the appellee's debt and allowing Norris' attorney prior lien on said judgent, is correct.

The judgment is affirmed.

HARGIS, &c. v. SEWELL'S ADM'R.

(Filed March 6, 1888.)

1. Limitation—Our statute of limitations applies to all actions, whether at law or in equity, and the chancellor can exercise no discretion on the subject, but must apply the statute when properly pleaded, although the jurisdiction over the subject matter belongs exclusively to a court of equity.
2. Same—Trusts—While it is expressly provided that the statute shall not apply "in the case of a continuing and subsisting trust," this exception applies only where one has the right to use or hold the estate as trustee for another, the latter occupying all the while the position of cestui que trust, and, therefore, does not apply to an administrator after he has settled his accounts, and the distributive share of the heir has been ascertained.
3. Same—Administrators—An action upon the bond of an administrator is barred after the lapse of fifteen years from the time the cause of action first accrued, the limitation of fifteen years applying to the obligor and that of five years to his surety; and the action upon the express undertaking for the faithful discharge of his duties being barred, there can be no liability by reason of an implied undertaking to perform similar duties.
4. Same—Husband and wife—The fact that an heir was a married woman at the time the administrator settled his accounts did not prevent the statute from running against her as soon as the settlement was made, as the husband in right of the wife, or in his own right, could have receipted for and collected his wife's distributable share at any time after the settlement.
5. Same—New promise—An acknowledgment of a debt, to take the case out of the statute of limitations, must be made, not to a mere stranger, but to the creditor, or some one acting for him.

Bronston & Kinkead and Hargis & Eastin for appellants.

Breckinridge & Shelby and Wm. Lindsay for appellee.

Appeal from Fayette Cicruit Court.

Opinion of the court by Chief Justice Pryor.

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William Sewell died in the county of Breathitt in the year 1855' leaving his widow, Emeline, surviving him, and several children. His father, Thomas Sewell, administered on his estate, as is alleged, made a final settlement of his accounts as such with the judge of the Breathitt County Court in June, 1859, showing a balance due the children and widow of $6,447, that was approved and confirmed. Some years after this settlement was made the records of the court were destroyed, and all evidence of the settlement rested in the recollection of those who aided in making it. Thomas Sewell, the administrator, lived in the same county for years, but prior to the present controversy had removed to the county of Fayette. He was a man of considerable means, and having a large estate to manage and being advanced in years made, in the year 1882, a deed of trust of all his estate to Wilgus, of Lexington, giving to the latter the control thereof, retaining an ample support for himself and wife during life, and at his death the trust to terminate, and his estate to pass, by descent, to his heirs, in the manner provided by the statute. He died in the year 1882, and the present appellee, who is his administrator, filed this petition in equity for a settlement of his estate, making his children defendants. After the death of Wm. Sewell, his widow, Emeline, married the appellant, John S. Hargis. The marriage took place prior to the year 1859, when the settlement was made by Thomas Sewell in the county of Breathitt of his son William's estate.

John S. Hargis and his wife (formerly the widow of Wm. Sewell), Emeline, and some of her children by her first husband, filed an answer in this suit by Thomas Sewell's administrator, alleging the settlement made in 1859, and claiming the balance due on that settlement of $6,447, with the interest, asking judgment for that amount against Thomas Sewell's administrator.

The making of the settlement was denied by the administrator, and also a denial of any indebtedness whatever, with the plea of the statute of limitationts interposed as a bar to the recovery.

The alleged settlement, made in the year 1859, having been destroyed, it appears, that after the institution of the present action in January, 1884, by proceedings in the county court, the lost or destroyed record was supplied by the appointment of a commissioner, who reported, from the evidence before him, that a settlement was made in the year 1859, showing a balance in the administrator's hands for distribution of $6,447 as of that date. Whether the administrator had notice of this motion to supply the record does not appear, but whether so or not, the county judge swears that the settlement was made, and the balance reported by the commissioner was the amount found due on the settlement made by him with Thomas Sewell as the administrator of his son. There is conflicting testimony as to the character and value of the estate passing into the hands of the administrator, and after the lapse of so many years it must necessarily be uncertain as to the value of the assets of Wm. Sewell's estate that passed to his administrator, or the amount for which he was properly chargeable. We will assume, however, for the purposes of this case, that such was the condition of the estate in the year 1859. Whilst this case was progressing in the court below the claim of several of the children or grandchildren was withdrawn, by a compromise effected between them, and the only question presented now arises as to the claim of the widow, the appellee insisting that her claim, if any existed, is barred by the statute. It is claimed, first, that this balance on the settlement of 1859 was a trust fund in the hands of the administrator, and for

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that reason the statute of limitation is not an available defense; secondly, that the widow, Emeline, having married John S. Hargis, who is now living, prior to the year 1859, she has been under the disability of coverture during the entire period, and, therefore, the statute does not run against her; and lastly, that the acknowledgment by Thomas Sewell of his indebtedness avoids the statutory bar.

Courts of equity in this State, prior to the adoption of the Revised Statutes, assumed the power, and properly, to apply the statute of limitations to cases of exclusively equitable cognizance, although the old statutes, by their terms, applied alone to actions at law, but now the statute of limitations applies to all actions, whether at law or in equity, and the chancellor can exercise no discretion on the subject, but must apply the statute, when properly pleaded, although the jurisdiction over the subject matter belongs exclusively to a court of equity.

There are cases where the statutory time can not operate as a bar, and an exception is found in the statute in relation to a continuing and subsisting trust. Section 20 of article 4, chapter 71, entitled "Limitation of Actions," provides: "The provisions of this chapter shall not apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property in the possession thereof to obtain a conveyance."

The reason that the statute does not run in such a case is that the cestui que trust has no right to sue the trustee and recover the trust fund, but whenever the right of action exists there is no reason why the trustee may not rely on the statute, if the time has run, as a bar to the recovery, for when the right of action accrues the trust terminates. It is true the manner of holding and the continued recognition of the trust might prevent the statute from running, and in cases of express trusts, where the title is in the trustee, or where the party is holding as the agent of the rightful owner, there must exist such facts as show an open renunciation of the trust brought home to the cestui que trust before the statute begins to run. (Hendrick, &c. v. Robinson's Adm'r, 7 Dana, 167; Bohannon's Heirs v. Sthreshley's Ex'ors, 2 B. M., 437.) The statute of limitations in express terms disposes of the question presented in this case. Section 1 of article 3, chapter 71, Genearl Statutes, provides: "Civil actions, other than those for the recovery of real property, shall be commenced within the following periods after the cause of action has accrued, and not after; * * * an action upon the official bond of a sheirff, marshal, clerk, * * * personal representative, guardian, committee or a trustee appointed by a court of authority of law * * * shall be commenced within fifteen years after the cause of action first accrued."

In this case the settlement was had in the year 1859, and the widow at that time had an independent cause of action against Thomas Sewell for her distributable share of the balance found due on the settlement.

Nearly twenty-five years elapsed from that time until this claim was asserted by the appellants, and not until after the death of Thomas Sewell, and then claim was for the first time asserted against his personal representative.

The period of fifteen years bars any recovery on the bond from the time the cause of action accrued to the widow. Her second marriage with John S. Hargis, her coappellant, did not prevent the running of the statute, although that took place before the year 1859. The husband, in right of the wife, or in his own right, could have settled, receipted for and collected this money at any time after the settlement. He was entitled to this fund

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by reason of the marriage, and the statute began to run as soon as this settlement took place.

There is no reason, therefore, for holding that the coverture of the wife operated to prevent the running of the statute, when at no time during the twenty-five years next preceding the institution of this action were the parties precludued from suing even at law to recover of Thomas Sewell the widow's distributable share of the estate. It can not be said that, while no action can be maintained on the bond of the personal representative, he may be sued as a mere naked trustee holding this fund for the benefit of the widow. If he is not liable upon his written obligation to pay this money and discharge faithfully his duties as administrator, we can not well see in what manner a personal liability can arise by reason of an implied undertaking to discharge similar duties. The bond is required to be executed with surety for the faitfhul performance of the trust, and on this bond the appellants must proceed, with the limitation of fifteen years applying to the principal obligor, and five years to his surety, from the time the cause of action accrued. (Section 3 of article 6, chapter 71, General Statutes.)

It matters not how just the claim after the lapse of twenty-four years, no action ought to be allowed to be maintained unless in the case of a continuing existing trust, where the one has the right to use or hold the estate as trustee for the benefit of another, the latter occupying all the while the position of cestui que turst. This rule could not have been applied to an administrator regardless of the present statute, as he was never considered as such a trustee after the settlement of his accounts and the distributive share of the heir ascertained. The heir then had the right to sue for his distributive share at law, and the statute would run from the accrual of the cause of action. (App v. Driesbach, 21 American Decisions, page 451, and cases there cited.)

It is urged lastly that the appellee's intestate, by his repeated acknowledgment of the liability, has kept the trust alive, and, therefore, the chancellor erred in dismissing the cross-petition of the widow. The effort in this case is to create a personal liability by reason of a subsequent promise that either excluded the running of the statute up to the date of the promise, or, being made after the bar, was such a promise as enabled the part to recover upon it. It is manifest from the testimony in this case that no promise was ever made to the widow or to her second husband to pay this debt, or any acknowledgment even to either of them that evidenced such a promise. The acknowledgment seems to have been made to third parties, who were neither the agents of the widow nor interested in the result, and is, at best, unsatisfactory in its character, and not such as should create an obligation to pay after the lapse of near a quarter of a century, without any reason for the failure to assert the claim at an earlier date.

Whether the promise to pay was before the running of the statute or after the bar, it must be made to the creditor or to some one authorized by the creditor to treat with the debtor as his agent in the transaction. Judge Story says "that an acknowledgment of a debt to take the case out of the statute of limitations, or bar by lapse of time, must be made not to a mere stranger, but to a creditor, or some one acting for him, and upon which the creditor is to act and confide." (Story's Equity, 1521; Truesdale's Adm'r v. Anderson, 9 Bush, 276; McKinney v. Snyder, 78 Penn. St., 497; Carroll v. Forsyth, 69 Illinois, 127; Niblack v. Goodman, 67 Indiana, 174.)

It appears that the widow received from the appellee's intes-

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tate $1,000; that her first husband was a man of only limited means, and was aided in his business affairs by his father, who seems to have been not only independent, but was in fact a man of much wealth at the time he administered, and so continued up to the time of his death. He had no motive to defraud his son's widow or his grandchildren, but, on the contrary, seems to have been providing for them by gifts of property prior to his death, and, by the deed of trust executed in the year 1882 to Wilgus, made the grandchildren equal participants in the distribution of his estate with their uncles and aunts, giving to them what would have been their father's part of the estate. No claim was at any time asserted by the widow and her second husband for this money during the life of the appellee's intestate, and after such a lapse of time, with the nature of the delay unexplained by any fact, and no obstacle in the way of proceeding to make the money, the court must necessarily apply the statute as a bar to so stale a claim.

The judgment below is affirmed.

CORNWALL, JR., v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 6, 1888.)

1. Railroads—Condemnation of street—In the absence of an express statute to that effect, a railroad company can not have condemned and appropriated to its use ad libitum land already dedicated to the public for streets, and unless such precise right be shown to exist, not only the municipal corporation, but the owner of the fee may have an injunction to prevent such condemnation, upon the ground that the use of the streets for such unauthorized purpose is a special injury to him.

2. Adverse possession of street—If a person has been permitted to remain in the continued actual adverse possession of a public street or part of a street, as embraced within his inclosure, for a period of fifteen years, such person will be vested thereby with the complete title to the ground so actually occupied by him. And while under section 1 of article 5, chapter 71 of the General Statutes, the possession does not become adverse until the municipal corporation has been notified that it is so intended, this case is to be determined by the law as it existed prior to the General Statutes, as the street in contest was inclosed in 1854, and had been in the continued actual adverse possession of the present claimant for more than thirty years at the time the cross petition was filed by the railroad company in this case seeking to have the street opened.

3. Condemnation of private property—While the power of the legislature to condemn private property for the use of a railroad can not be impaired or defeated by any private contract between the owner of the property and the railroad company, yet where the owner has ceded property for the use of the company, upon the express condition that no more of his property shall be taken for the purposes of the railroad, the company will not be allowed to condemn additional property, under authority given by the legislature, without making compensation for that originally ceded to it by the owner, and where the owner seeks in a court of equity to enjoin the company from condemning additional property, relying upon his contract with the company, the court will place the company upon the terms of first paying for the land which it has already gotten for no other consideration than its agreement not to take any more of the owner's property.

B. F. Buckner and Arthur Wallace for appellant.

Wm. Lindsay and Barnett, Noble & Barnett for appellee.

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Appeal from Louisivlle Chancery Court.

Opinion of the court by Judge Lewis.

In 1870 the city of Louisville made a contract with the Louisville, Cincinnati & Lexington Railroad Company, then owning the right of way and having its track on Jefferson street, by which the company was, upon specified conditions, given the right to construct a track from the head of that street southward to a point of connection with the line of the Louisville & Nashville Railroad Company.

The city further agreed to construct, at its own cost, by January 1, 1875, a roadbed suitable for a first-class double track railroad, north of Main street, by a route indicated in the contract, which, for some distance, was along the bed of Beargrass creek, and to convey to the company, in fee simple, the right of way, roadbed and grounds of sufficient dimensions for the purpose contemplated by the parties.

And in consideration thereof the company, besides other stipulations that need not to be mentioned, agreed, upon completion of the work, to remove its track from Jefferson street, and relinquish whatever right and francihses it owned thron, west of its grounds, at the head of that street, and to convey to the city, at a valuation to be fixed, all its grounds and improvements between Jefferson, Green, Brook and Floyd streets.

The Louisivlle & Nashville Railroad Company was also a party to that contract, but as the portion relating to it has no bearing on the question before us, it need not be mentioned.

In pursuance of that contract the city porceeded to obtain the right of way along the proposed new route, and for that purpose instituted, under legislative authoirty, a proceeding against Hall and others in the Common Pleas Court for the condemnation of such land needed for the roadbed as the owners failed or refused to cede, to which Cornwall & Brother, under whom the appellants claim, were made parties defendant. During the pendency of that proceeding one Roberts, a member of the city council, and probably induced by his desire for the removal of the railroad track from Jeffeson street, applied to Cornwall & Brother to give the right of way over their land for the use of the company. And in answer to his application they delivered to him the following communication:

"Louisville, Ky., February 23, 1872.

"Mr. D. F. Roberts:

"Dear Sir:—We say, in reply to your requst, that we shall grant the right of way to the Louisville, Cincinnati & Lexington Railroad Company to use from the center of the creek, 80 feet south of it for the base of the fill, the road being in the center of the creek; that we agree to that proposal provided the company do not take possession of more than 20 feet inside the fence as it now stands, and we consent that if nceessary their embankment may come further over, or inside our fence, more than 20 feet, we being allowed to run our enclosure or building up to within 20 feet of where the fence now stands.

"Yours truly,

"CORNWALL & BROTHER."

That communication was, by the city attorney, filed with and as part of an amended petition in the proceeding referred to, and was made the ground of an uncontroverted allegation that Cornwall & Brother had ceded the right of way over their land, and, as a consequence, the jury awarded them nominal damages merely.

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Although the new roadbed was, according to the contract of 1870, made by the city of Louisville, the L. C. & L. Railroad Company never occupied or accepted it, nor removed its track from Jefferson steet. But, in an action instituted for the benefit of its creditors, its property, rights and franchises were, in 1877, sold under judgment of court, and purchased by certain persons who organized a company with the name of the Louisville, Cincinnati & Lexington Railway Company. And to that company, which had thus acquired the property, rights and franchises of the other, the city of Louisville, by its mayor, under an act of the legislature and in accordance with an ordinance of the city council, May 6, 1880, made a deed by which it conveyed the right of way, so far as it owned the same, along the route set out and designated on the several maps filed in cases in the Jefferson Court of Common Pleas, "the City of Louisville v. Hall," being referred to as one of them, and in the several verdicts and judgments in those cases, together with the roadbed, bridges and right to operate a railway over the same.

A short time after the execution of that deed appellee, the Louisville & Nashville Railroad Company, acquired possession of the new roadbed, and has had it ever since.

This action was brought by appellants in 1887, and in their petition they stated appellee had instituted a proceeding in the Jefferson County Court to have condemned for its use a part of their land adjacent and in addition to what they ceded in 1872.

The relief prayed for is a specific execution of the contract between them and the city of Louisville, evidenced by the proposition made through Roberts and accepted, and an injunction restraining further proceedings by appellee to have their land condemned for its use.

Besides the defenses to be hereafter referred to, appellee alleged in its answer the land in contest was not rightfully in the possession of appellants, but had been dedicated for, and was, public streets, and asked that the city of Louisville, made defendant to its cross-petition, be compelled to cause them opened. No answer was filed by the city of Louisville, nor claim made by it to the land in dispute.

By the judgment rendered, the injunction was denied, and the petition and cross-petition were each dismissed, of which both parties complain.

The question of title, raised by the cross-petition, will be first considered.

We can not, however, readily see how a judgment finding the land in question to be public streets, and ordering it opened as such, would benefit appellee. For, while its statutory right to cause to be condemned for its use additional private property has not been controverted in their pleadings by appellants, it does not follow, nor, in the absence of an express statute to that effect, can it be assumed that appellee may have condemned and appropriated to its use, ad libitum, land already dedicated to the public for streets. And unless such precise right be shown to exist, not only the municipal corporation, but the owner of the fee, may have an injunction on the ground the use of streets for such unauthorized purpose is a special injury to him. (High on Injunctions, section 408.)

As this judgment appears to us, we, therefore, think the effect of a judgment in favor of the city on that issue would be to prevent the occupation of the land by appellee.

The two streets which it is claimed are unlawfully occupied by appellant are Water and Perry. By a deed made to Cornwall & Brother in 1854, under which appellants claim, the lot conveyed is described as bounded on one side by Perry street and on the

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north, "fronting on Beargrass creek or Water street when laid out."

The evidence shows that both those streets were intended by the owner of the tract of land, of which the lot subsequently purchased by Cornwall & Brother is a part, to be dedicated to the use of the public, and were designated and called for in his deeds to purchasers of lots adjacent to them. But in 1854 Cornwall & Brother extended their enclosure to the creek, including the portion of Water street between it and the north side of their lot, and, in conjunction with the gas company, enclosed Perry street on the east side, and that enclosure continued until their fence was, about 1875, moved back to the line of that portion ceded to the city of Louisivlle in 1872.

By section 1, article 5, chapter 71, General Statutes, it is provided that limitation shall not begin to run in respect to an action to recover a street until the municipal corporation has been notified in writing by the party in possession, or about to take possession, to the effect that such possession will be adverse to the right or title of the town or city. But in the case of Dudley v. Trustees of Frankfort, 12 B. M., 614, decided in 1851, by which the question before us must be determined, it was held that if a person has been permitted to remain in the continued adverse actul possession of a public street, or part of a street, as embraced within his enclosure for a period of twenty, now fifteen, years, such person will be vested thereby with the complete title to the ground so actully occupied by him.

The possession of the ground here claimed to be streets had been held by Cornwall & Brother and appellants by actul enclosure continuously for more than thirty years when the cross-petition of appellee was filed in this case, and we think there could be no more satisfactory evidence it was held adversley than is furnished by the proceeding of the City of Louisville v. Hall, &c., wherein appellants claimed, and the city admitted, the title to be in them.

The chancellor did not, therefore, err in dismissing the cross-petition. Nor need there be any confusion as to the location of the line dividing the portion of their land ceded from that reserved by appellants in 1872. For it is clearly proved that the fence was moved back to the place on the embankment that had been indicated in the communication to Roberts, and evidently agreed by the city of Louisville as the boundary line.

As the alleged contract between Cornwall & Brother and the city of Louisville is made the sole ground of the relief asked in this case, an inquiry on the main issue must be confined to the meaning and effect of that contract.

It seems to us clear that it was intended by Cornwall & Brother, for their proposition, embodied in the communication to Roberts, can not be construed otherwise, and was so understood and accepted by the city of Louisville, acting through the city attorney, that a certain designated quantity of their land was ceded to the city of Louisville for the use of the L., C. &. L. Railroad Company upon the express condition no more was ever to be taken, against their consent, for railorad purposes.

It is equally clear that if appellee is now permitted to have condemned for its use additional land of appellants, without any condition or restriction other than first paying therefor, not only will that contract be violated, but there will be the further result of giving to appellee the use of that already in its possession without any compensation whatever to the owners.

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But under the right of eminent domain, reserved by every sovereign State, and nowhere more distinctly recognized as existing than this court, it is in the power of the legislature to condemn the property of the appellants for the use of appellee which has been settled to be a public use. And this power can not be impaired or defeated by any private contract between a railroad company and the owner of property that the legislature may at any subsequent time deem necessary for public use.

We have, then, presented a rather anomalous question for our decision. Appellee, under a statutory right, the existence of which is not denied by appellants, and which the legislature had the unquestionable power to give, is proceeding to exercise that right in a way that involves a violation of a contract, connected with the land about to be taken, between appellants and the city of Louisville, under which it holds and enjoys other land of appellants, obtained in virtue of, and upon conditions contained in it.

Appellants will not, as urged by counsel, have a right of action against the city of Louisville, for the contract has not been violated by it, nor does appellee claim the right to take from appellants the additional land by reason of any authority conferred, or stipulation contained in that contract, but solely under the statutory right, independent of and beyond anything contained in the contract. But as the unqualified exercise of that right necessarily involves a violation of a constitutional right that every one has to compensation for property taken for public use, is it not in the power and the duty of a court of equity in a case like this to prescribe such terms as will do justice and assure to the property owner his right to compensation? If no such power resides anywhere, then we have a plain violation of an express provision of the Constitution, which, though indirect, is just as palpable and injurious as if done directly.

We are not to assume that the legislature intended to confer upon appellee the right to thus arbitrarily violate a contract made by its vendor, and of which the recitals in the deeds show it had notice, and as the result of such violation appropriate and enjoy private property without compensation.

While, then, we think, as the record stands, the chancellor had no right to enjoin the proceeding in the county court, absolutely, the power does not exist, and we think it should be exercised, to put appellee upon the terms of first paying for the land of appellants, ceded under the contract of 1872.

The judgment is, therefore, reversed on the appeal, and affirmed on the cross-appeal, with directions to the chancellor to require of appellee, as a condition of further prosecuting the proceeding in the county court and appropriating to its use the land in contest, to first pay to appellants the value of that ceded in 1872, and in case the parties do not agree upon the amount, an issue out of chancery in regard thereto must be had.

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KENTUCKY SUPERIOR COURT.

GERMAN INS. CO. OF FREEPORT, ILLS. v. REED, &c.

(Filed March 7, 1888.)

1. Verdicts—The word "defendants" in the answer of the jury to a special interrogatory is treated as meaning "plaintiffs," where it is plain that such was the meaning of the jury.
2. Insurance—Fraud—Where a policy of fire insurance which covers several subjects provides that any fraud on the part of the insured shall forfeit all claims under the policy, a fraudulent claim by the insured as to one of the subjects forfeits the policy as to all, although the different subjects be severally valued and insured.
3. Whether the court erred in refusing to submit to the jury special interrogatories asked to be propounded can not be considered, unless the interrogatories are made part of the record by order of court or bill of exceptions.

W. D. Greer for appellant.

Josiah Harris for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barbour.

The interrogatories which the appellant asked the court to propound to the jury are not made a part of the record by an order of court or by bill of exceptions. We can not, therefore, consider whether the court erred in refusing to submit them to the jury.

The objection to the form of the answer given by the jury to the third question is hypercritical. The question is: "Did the plaintiffs, in their preliminary proofs, * * * swear falsely as to the loss of any of the articles mentioned in the exhibit 'L. E. R.,' or did they * * * swear to any false statement in their said proofs of loss with intent to defraud the defendant company?" The answer is: "We believe that neither of the 'defendants' knowingly or willfully swore falsely, but were mistaken at the time as to the articles claimed to be lost as per exhibit 'L. E. R.,' and did not * * * swear falsely to defraud said defendant company." The meaning of the answer is too clear to admit of question—the use of the words "defendants" instead of "plaintiffs" in the first part of the answer could not possibly mislead any one.

Upon the special findings, if they are sustained by the evidence, the plaintiffs were entitled to their judgment, but it is insisted that the verdict is not sustained by the evidence, but is flagrantly against it.

The action was brought by the appellees against the appellant on a policy of insurance to recover the amount of their loss by the burning of the insured property, a dwelling house, and household furniture, wearing apparel, etc. The appellants resisted a recovery, mainly upon two grounds: First, upon the ground that the plaintiffs had themselves burned the property; and second, upon the ground that the plaintiffs had, in their proofs of loss, misrepresented the amount of household furniture, wearing apparel, etc., and that this, by the provisions of the policy, forfeited all claims under it. Upon the first issue, it must be conceded that there were some very suspicious circumstances proven on the trial against the plaintiffs, but these circumstances the jury

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may have reconciled upon some other hypothesis than that of the guilt of the plaintiffs. Upon the other issue, the finding of the jury is clearly against the evidence, and inconsistent with their finding of other facts. In their answer to the third interrogatory they say that they believe that neither of the plaintiffs knowingly or willfully swore falsely in their proofs of loss. In their answer to the fourth interrogatory the jury, in their verdict, named each of the articles and their value, which were stated in the plaintiffs' proof to have been lost, amounting in all to near $450, and say that only $60 worth of these articles were lost, and that the remaining articles were not lost. It seems to us, in view of this latter finding, it necessarily follows that the former finding can not be sustained. There is no pretense that the plaintiff labored under any mistake as to at least $330 worth of the articles which they swear were lost. This discrepancy is too great to be the result of an honest mistake. The issue was not that the articles were stolen and thus lost, in which case, nothing else appearing, the appellees might honestly have sworn that they were burned, because they were missing. But, upon the issue as made, the evidence was conclusive that there was an abundance of time to remove everything, and that everything except a roll (probably a carpet) in one room had been removed from the house. Upon this evidence and the answer of the jury to the fourth interrogatory, the conclusion is inevitable that the claim was fraudulently preferred. The policy provides, that "any fraud or attempt to defraud or deceive on the part of the insured, or any misrepresentation in the proofs or examination as to the loss or damage shall forfeit all claims under this policy." The question for our consideration is, whether this provision is to be enforced to the extent of denying to the appellees the right to recover the value of the house, and those articles, if any, which were destroyed by the fire, because they have made a fraudulent claim for other articles which were not lost. We are of opinion that not only the letter, but the reason and spirit of the contract, require us to so hold. We can not see why parties may not enter into such a contract. There is nothing in it unreasonable, or against public policy. (May on Insurance, section 477.) The Court of Appeals of Virginia, in the case of Moore v. Va. Fire and Marine Ins. Co., 28 Gratt., 514, where this identical question arose, said "a policy of insurance is a contract, in the making of which, peculiar and great confidence must, of necessity, be reposed by the insurer in the insured. Good faith and fair dealing are especially required by the former of the latter. The former must mainly depend on the oath of the latter and the account he may render, to show the fact of the loss of the property insured, and the amount of damage incurred by him, for which he claims indemnity under the policy. * * * Now where, instead of there being no good reason to suspect fraud or false swearing on the part of insured in making out his preliminary proofs, it is proved that his claim for his alleged loss on one of the subjects insured was fraudulent and false, and that the amount of loss designated in his proof of loss, sworn to by him, was fraudulent and false, so far as the said subject was concerned, is it unreasonable for the policy to provide that in such a case the insured shall forfeit all claim under the policy, not only as to the said subjects, but also as to all other subjects included in the policy? Having been proved to be guilty of fraud and falsehood in regard to one of the subjects included in the policy, it is not unreasonable to suppose that he may be guilty of the like wrongs in regard to the other subjects included therein. He may be so guilty, and the insurer may have no means of

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proving such guilt. He may himself have been the author of the burning of which he complains, or he may have obtained the insurance for the very purpose of obtaining money by committing fraud and perjury in regard to one or more of the subjects insured. He was capable of either of these crimes as he was capable of the crime which was proved upon him. We, therefore, think the construction contended for by counsel for the insurance company is a reasonable one, and that it is the true one, especially, as it accords with the literal terms of the provision in question." The court then, after saying that the counsel for the plaintiff argues, that though the policy in this case is a contract entire in form, it is in substance a several contract because it proceeds to value severally the different parts of the subject insured as the building at so much, and the contents at so much, and that, therefore, the provision of forfeiture in question must be construed precisely in the same way in this contract as a like provision would be construed in a several policy on each of the objects insured, says: "The rule applies in many cases, but not to this case, for reasons already stated it being the manifest intention of the parties, as it is the express declaration of their contract, that 'all fraud,' etc. shall cause a forfeiture of all claim under this policy. * * * There are cases in which it is held that a policy may be avoided as to a part of the subject insured, and valid as to the rest, even though the language of the policy declaring it to be void in such a case may seem to be general, and apply to the whole policy. As, for instance, in a case in which a policy declares that it shall be void for any subsequent alienation by the insured. There, if only a part of the subject be aliened, and the risk as to the rest can not be increased by such partial alienation, the policy as to the rest would not be thereby avoided, but would remain in full force, in pursuance of the presumed intention of the parties. But such a construction has never been applied to a case like this of fraud and false swearing which pervades and avoids the whole policy. To such a case the maxim, falsus in uno, falsus in omnibus, applies." The reasoning of the court in the case cited applies with peculiar force to the facts of this case.

For the reasons given the judgment is reversed, and the cause remanded, with directions to grant the appellant a new trial and for further proceedings.

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SUPERIOR COURT ABSTRACTS.

SPRINGFIELD FIRE AND MARINE INSURANCE CO. v. JENKINS.

Filed February 22, 1888. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

Insurance—Failure to deliver policy—Proofs of loss—Concealment of policy—Presumptions—Appellee made a contract with appellant's soliciting agent for the insurance of his dwelling, the agreement being that the policy was to be delivered in ten or fifteen days. The contract was subject to the approval of the company's agent at Chicago. The application and appellees' note for the premium were forwarded to the agent at Chicago, and received and approved, and the policy written out and signed. Some months after the contract was made, appellee, becoming dissatisfied, requested appellant's local agent to cancel the policy, which the agent told him he could not do without the policy. The appellee then, and subsequently, told the agent that he had never received his policy. The premium note not being paid at maturity, appellant instituted suit upon it, the appellee resisting a recovery upon the ground "that the consideration of the note had never been completed by the company." Pending this suit the insured property was burned. The next day appellee notified the agent at Chicago, by letter, of the loss, and that he would demand the insurance. Some months after the loss, appellee instituted this action in equity, asking that the company be compelled to deliver the policy, and for judgment for the amount of the insurance. After the issue had been made up appellee dismissed so much of his petition as prayed for a delivery of the policy, and the case, on his motion, was transferred to the ordinary docket, a trial by jury resulting in a verdict for the plaintiff for the amount of the insurance. The appellant defended upon the ground, first, that the plaintiff forfeited all rights under the contract by failing to pay the premium not at maturity; second, that the policy had, by agreement, been cancelled; and third, that the plaintiff had made no proof of loss, as required by the terms of the policy. Appellants' agents at Chicago testified that the policy was, as soon as made out, sent to appellee by mail in an envelope duly stamped and addressed to him at his postoffice in Kentucky, while appellee testified that he never received it. Held—

1st. The contract was complete without the delivery of the policy, and there was, therefore, no necessity for the plaintiff to go into equity, and after so much of the petition as prayed for a delivery of the policy was dismissed, there was no equitable issue to be disposed of, and the court had the right to transfer the action to the ordinary side of the docket.

2d. No legal presumption arises that the party to whom a letter is addressed has received it, from the fact that the letter duly stamped and addressed was deposited in the postoffice.

3d. To effect the cancelment of a policy, both parties must agree, and appellant's insistence of the payment of the note was inconsistent with the idea that it had agreed to any cancelment, while appellee's defense to the action upon the note was not inconsistent with the existence of the contract.

4th. The failure to pay the premium note at maturity did not work a forfeiture. Appellee was not in default until the company had delivered the policy as it agreed to do.

5th. As it does not appear what the agreement was as to the form of policy to be delivered, it must be assumed that the form of policy stipulated for was the form then in use by the company, but the continued failure of the company to deliver the policy, after repeated notifications that it had not been received, relieved the insured of the duty to comply with conditions which it can not be supposed he knew of, and, therefore, he did not forfeit any right

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by his failure to make the required proof of loss. Under all the circumstances the insured could not reasonably have supposed that the company would comply with a request for a delivery of the policy or a duplicate after his house was burned.

6th. As appellant did not claim a credit for the amount of the premium note, the court did not err in failing to instruct the jury to allow such a credit.

Brown, Humphrey & Davie and Bush & Robertson for appellant; J. P. Hobson and James Montgomery for appellee.

NORTHWESTERN NATIONAL INSURANCE CO. v. DAVIS.

Filed February 22, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

A contract of fire insurance, provided that "if the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within control or knowledge of the assured, without the assent of the company indorsed thereon, * * * then this policy shall be void." In an action upon the policy the admitted facts are that a frame building was moved, added to, and then connected with that insured, and that it was claimed to be the subject of separate insurance, and was insured for its value, and that the fire originated in that building and destroyed the other. Held—That while the question as to whether the addition did or not increase the risk may be proper for the jury to determine in many cases, yet, when it is admitted that the burning was caused by the burning of the addition, the insured can not claim that his unauthorized act in making the alteration was not the cause of the fire.

Thompson & McChord and Samuel Avritt for appellant; Harrison & Belden for appellee.

PEARCE v. COOPER.

Filed February 22, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Forcible entry and detainer—D. and C. sued out a writ of forcible entry against P. and others. The trial in the country resulted in a verdict finding the defendants guilty of the forcible entry, as charged in the warrant. The inquisition was traversed and the proceeding docketed in the circuit court. After issue joined in the circuit court, an order was made, discontinuing the proceeding as to D., on his motion. After this the trial proceeded, resulting in a verdict finding the inquisition in the country to be true, upon which the court rendered a judgment of restitution in favor of C. Held—That it was improper to dismiss the case as to D., since, by reason thereof, the case tried in the circuit court was not the case tried in the country. Nor is it material that D. was a nominal parti merely and improperly joined.

E. W. Hawkins and R. B. Hawkfns for appellant; Chas. J. Helm for appellee.

HAYDEN'S ADM'R v. PHILLIPS, ADM'R.

Filed February 22, 1888. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Damages on injunction bond—Where the injunction is to stay proceedings on a judgment, to enable the party to recover special damages on the bond, the damages must be assessed at the time the injunction is dissolved.

An injunction was obtained to stay proceedings on a judgment for the recovery of a house and lot. At the time the injunction was dissolved no damages were assessed. In this action upon the bond, Held—That there can be no recovery for rents and waste.

2. Same—The party injured can recover his costs, occasioned by reason of the injunction though they are not assessed at the time of its dissolution.

J. A. Fulton for appellant; J. D. Wickliffe for appellee.

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VONDERHIDE v. DANIELL.

Filed February 22, 1888. Appeal from Campbell Chancery Court. Opinion of the court by Judge Barbour, affirming.

Pleading—Part performance of consideration for note—Appellee's answer to appellant's petition avers, that at the time she executed the note described in the cross petition, she did not owe appellant anything, but was in arrears of payments due the plaintiff, the building association; that the appellant was an officer of the association, and that the sole consideration for the note was an agreement on the part of the appellant to pay for her to the said association the amount she was then delinquent, and to continue to pay her dues to the association until he had paid altogether $250 (the amount of the note), and that he had only paid $97 to the association. The reply merely traversed the allegation that at the time the note was executed, appellee did not owe appellant anything. The court rendered judgment for appellant for $97. Held—That the appellee's answer presented a good defense, and that the reply made no issue. The appellee was, therefore, liable for only $97.

John S. Ducker for appellant; C. J. Helm for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. BARBOUR.

Filed February 22, 1888. Appeal from Logan Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. A bill of exceptions filed in vacation, although under a previous order of court permitting it to be done, can not be considered.

2. Carriers—It is the duty of a carrier to forward and deliver goods in a reasonable time, and what constitutes, in a particular case, unreasonable delay is a question of fact for the jury.

3. Same—Where the carrier's delay, being unreasonable, has left the goods where they would not have been if there had been due diligence, and they are then destroyed by fire, the carrier is liable; and this is true, even though the contract stipulates that he shall not be liable for loss by fire, as the contract must be understood as relating to a state of case where the carrier has used due diligence.

Browder & Edwards for appellant; John S. Rhea for appellee.

HINKSON v. TREMBLESON.

Filed February 22, 1888. Appeal from Harrison Circuit Court. Opinion of the court by Judge Bowden, reversing.

Pleading—Form of action—Not even under the Code procedure can one sue in trover and recover in trespass.

This was an action to recover possession of tobacco alleged to have been wrongfully taken and detained by the defendant, if the tobacco could be found, and, if not, to recover its value, and, as incidental to the wrong alleged, to recover damages. The defendant denied that he had ever taken possession, or that he had ever detained the tobacco, or that he asserted any claim to it. The evidence showed that the defendant had had possession of the tobacco, but that he surrendered it prior to the institution of the action. The judgment is for the delivery of the tobacco, and, if not delivered, for its value. Held—That a verdict for defendant should have been ordered.

Forman & Cason and J. I. Blanton for appellant.

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The Kentucky Law Reporter

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KENTUCKY COURT OF APPEALS.

DAWSON, &c. v. DAWSON, &c.

(Filed October 29, 1887—Not to be reported.)

1. Waiver of trust—R. and wife sold a tract of land belonging to the wife, and with the proceeds paid their part of the purchase money for a tract of land which they had purchased jointly with B. R. having died, his widow sold her interest in the land to B., and both B. and the widow of R. having died, the heirs of B. in this action against the heirs of R. are claiming the entire proceeds of a certain part of the land upon the ground that as the money used by R. and wife in paying for their half of the land was derived from the sale of the land belonging to the wife a trust resulted in her favor which enures to their benefit, B. having purchased her interest in the land. Held—That as both B. and the widow of R. recognized R.'s interest in various ways, the heirs of B have now no right to ask a court of equity in the name of R.'s widow, and to the detriment of her heirs, for the enforcement of a trust which she never, in the lifetime of her husband or afterwards, asked a court to enforce, and which must be regarded as having been waived by her. Therefore, the heirs of R. are entitled to one-fourth of the proceeds of the land.

2. Res judicata—In an action in the United States Court by the creditors of B. to subject the land in controversy to the payment of their debts the heirs of R., now appellees, were made parties, and in their answer set up the same claim as they have done here, and asked that the judgment which might be rendered in favor of the plaintiffs should not affect their rights in and to the land or the fund derived from the sale of it under judgment in the State court in this action, then pending. The court rendered judgment dismissing the bill of the creditors, and there is a recital in the same judgment also dismissing the cross bill of the appellees, but in fact there was no cross bill, nor issue pending between appellants, the heirs of B., and the appellees. Held—That as the judgment of the United States Court did not reach to or affect the questions involved in this action, it constituted no bar to the prosecution of the claim of the appellees.

F. W. Darby for appellants.

Geo. W. Duvall for appellees.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Lewis.

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In 1868 David Mensor executed a title bond in which he covenanted to convey to B. N. Dawson and R. P. Dawson and wife about 250 acres of land for the price of $1,000, one-half of which was, by an arrangement between the purchasers, to be paid by B. N., and the other half by R. P. Dawson and his wife, Rebecca, and for the purpose of raising the money to pay the one-half a small tract of land belonging to the wife was sold for $500, but from the notes given for the purchase money, which seem to have been executed to the husband, only $450 was realized and paid to Mensor. The other $50 does not appear to have been paid, nor did B. N. Dawson ever fully pay to Mensor the other half. Soon after the purchase R. P. Dawson and wife removed to the land, and a dwelling house was erected thereon by him and occupied until his death in 1872. B. N. Dawson likewise removed to and built upon the land, though there never was a partition of it made. It appears that in 1870 a railroad was built over the land, and a depot and town established on it, and there were various sales of parts of it previous to the death of R. P. Dawson, but what proportion of the proceeds was received by each joint owner does not clearly appear, nor has there been filed by either party to this action an account or proof made of accounts between B. N. and R. P. Dawson at the time the latter died. After his death it seems there were four different written agreements entered into between his wife, Rebecca, and his brother, B. N. Dawson, of date respectively January 21, 1873, April 23, 1873, May 30, 1874, and September 14, 1875, and as they serve to some extent in determining the main issue involved in this action it is proper to refer to them. By the first it is agreed to authorize Mensor to make deed to the various persons who had previously purchased lots and also to those to whom B. N. Dawson might sell during that year. By the second Rebecca Dawson agrees, in consideration of the amount he is indebted to B. N. Dawson, that Mensor shall convey to him a certain boundary of the land, in area about 288 acres, and which is the principal subject of controversy in this action, it being stipulated that when he shall have received from sale of lots in that boundary an amount sufficient for one-half of it to pay him amount of R. P. Dawson's and her own indebtedness to him, he will then divide remainder with her if there be such. By the third it is agreed that they, having still an undivided interest in the balance of the land not already deeded to him in payment of the indebtedness of R. P. Dawson and herself, it is to be so divided as to pay out of her share to him $325, her additional indebtedness to him, and that he shall have of her interest in the land enough to pay him what she may thereafter become indebted to him. It is also recited therein that the amount paid by him to Mensor was $555, and by R. P. and Rebecca Dawson $450. By the fourth she acknowledges the payment by him of $360 in full for her interest in the land. Such interest is stated to be about four-tenths of the survey not already disposed of, and soon after it was executed she gave him possession of the land. She died in 1876, leaving appellees, her children by R. P. Dawson, all infants, and in 1877 B. N. Dawson died, leaving appellants his children and heirs at law, who in 1882 instituted this action for a sale of the 28 acres, then divided into valuable town lots, and division of the proceeds of such sale amongst themselves. To the action the children and heirs at law of R. P. Dawson were made defendants, and, in their answer set up claim in right of their father to one-fourth of the proceeds of the sale, and judgment having been rendered in their favor on that issue the heirs at law of N. B. Dawson appeal.

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In addition to one-fourth of the proceeds of the sale of lots within the boundary of the 28 acres, appellees in their answer also claim their proportion of proceeds of sale of other parts of the Mensor land collected by B. N. Dawson previous to his death, amounting to about $1,500, which they ask to be paid out of the fund arising from the commissioner's sale of lots, but that claim was properly disallowed by the lower court, it being correctly assumed that the evidence tended to show nearly all said sales were made in the lifetime of R. P. Dawson, and the proceeds probably applied to the payment of his indebtedness to B. N. Dawson, or otherwise accounted for to him.

The first ground relied on for reversal which we will notice is that the parties to this action have already litigated, in the District Court of the United States, the issues now presented, and the judgment rendered in that court is a bar to any recovery by appellees in the lower court.

It appears that in 1876, by proper pleadings in the United States Court, B. N. Dawson was adjudged a bankrupt, and the 28 acres of land was, by judgment of that court, set apart to him as a homestead, but after his death, and after the commencement of this action, his creditors instituted suit in the Federal Court to set aside the order allotting to him the homestead and subject the 28 acres of land to the payment of the balance of their debts. To that action appellees were made parties, and in their answer set up the same claim as they have done here, and asked that the judgment which might be rendered in favor of the plaintiffs should not affect their interests and rights in and to the 28 acres of land or the fund derived from the sale of it under judgment in the State court of this action, and those under the jurisdiction of that court. But without adjudicating or determining any issues between appellants and appellees, the United States Court rendered judgment dismissing the bill of the creditors, and there is a recital in the same judgment also dismissing the cross bill of the appellees, but in fact there was no cross bill nor issue pending between appellants and appellees, and the only effect of the judgment in the bankrupt court was to remit the trial of such issues to the State court, where this action was already pending.

We think, as the judgment of the United States Court did not reach or affect the questions involved in this action, it constituted no bar to the prosecution of the claim of the appellees.

The main ground relied on by appellants is that, as the money derived from the sale of the small tract of land belonging to Rebecca Dawson was used in the purchase of the 250 acres from Mensor, a trust resulted in her favor which enures to the benefit of appellants, heirs at law of B. N. Dawson, who purchased her interest in the land. There is evidence tending to show that the small tract mentioned was, at the time it was given to Rebecca Dawson by her father, unproductive, and the improvements put upon it by her husband, R. P. Dawson, were fully as valuable as the land. He also erected the dwelling house and other improvements upon the 250 acres, whereby the value of it was enhanced. Besides, in one of the written contracts between her and B. N. Dawson, executed after the death of her husband, it is distinctly stated that the $450 was paid to Mensor by R. P. and Rebecca Dawson. It seems to us, from the evidence, that she must have been aware of the fact that by the terms of the title bond given by Mensor she and her husband were jointly entitled to one-half the land, for not only were numerous parcels and lots of the land sold by R. P. Dawson and B. N. Dawson, and the right of the

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former to a share of the proceeds exercised and recognized, and his claim to a joint ownership in various ways asserted without objection by her or by B. N. Dawson, but the title bond remained in her possession after the death of her husband and was filed as an exhibit in this action by appellees, her and his children, but this is not an assertion of an equitable right to the land for the benefit, but by appellants, heirs at law of B. N. Dawson, against her heirs at law. Appellants occupy the precise attitude their father, B. N. Dawson, would occupy if he were alive, and as a party to this action claiming the enforcement in his favor of the alleged trust. Being aware, as he unquestionably was, of the right of R. P. Dawson by the terms of the bond to an undivided fourth of the land, having recognized his right in various ways before his death, and after that event, by contract with his widow, acquired considerable quantity of the land in payment of debts which he claimed R. P. Dawson owed him, and having, by a series of negotiations with her, that are by any means free from the taint of fraud on his part, eventually acquired the legal title to all the land unsold and the most valuable part of it, and turned her out of possession, it seems to us his heirs at law have no right to ask a court of equity, in the name of Rebecca Dawson, and to the detriment of her heirs, for the enforcement of a trust which she never, in the lifetime of her husband, or afterwards, asked a court to enforce, and must be regarded as having been waived by her. We think the heirs at law are entitled to one-fourth the fund in court arising from the sale of the lots into which the 288 acres was divided.

The alleged indebtedness of the estate of R. P. Dawson is not shown in a way to authorize any deduction from the share of his heirs to that fund, and if it was there are two sufficient reasons why it should not be done. In the first place, as before stated in the contract between B. N. and Rebecca Dawson, of date May 30, 1874, after the death of her husband it was agreed that he accepted certain parts of the 250 acres in full satisfaction of what R. P. Dawson owed to him, though the amount is not stated, nor in fact does it really appear that he did owe him. In the second place, after the death of R. P. Dawson, B. N. Dawson's estate, by the judgment of bankruptcy, passed to his assignee.

There appears to be 2⅞ acres of land which was included in the sale by the commissioner as part of the 288 acres laid off into lots and sold under judgment in this case, and it is contended that the lower court improperly adjudged to appellees one-fourth of the proceeds of the sale of that parcel. It seems that after the death of B. N. Dawson the 2⅞ acres was appropriated as vacant land and patented to W. W. and H. E. Eisón, who, during the pendency of this action, conveyed to appellants, but whether that trip is inside the boudary of the 250 acres sold by Mensor or inside the boundary of 28 acres which Rebecca Dawson attempted to sell to B. N. Dawson, does not appear, but it seems to be inside the limits of the town of Dawson, laid off and claimed by R. P. and B. N. Dawson as part of their purchase from Mensor, and was in their possession and claimed by them under their purchase from Mensor from 1868. Moreover, the same strip had been under fence and cultivated by Mensor many years before that time.

There is not enough in the record apparent to us to authorize a reversal of the judgment of the lower court in that respect, and it is affirmed.

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NEWPORT & LICKING TURNPIKE ROAD CO. v. FITZSIMMONS, &c.

(Filed March 8, 1888—Not to be reported.)

Actions to quiet title—Injunction—In this action in which a turnpike company, by a petition in form quia timet, seeks to enjoin the owner of adjoining land from encroaching upon its right of way, the exact extent and location of the plaintiff's right of way as well as its extent of possession being left in doubt by the conflicting testimony, the petition was properly dismissed. Where both the possession and ownership are involved in doubt, the doubt should be resolved by a legal investigation and not by a resort to summary equitable intervention.

J. C. Wright and Geo. Washington for appellant.

Jno. S. Ducker for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Holt.

The road of the appellant and the land of the appellees adjoin. The former, by a petition in form quia timet, sues to enjoin the latter from encroaching upon its right of way. This remedy may be resorted to in case of repeated trespass, and to prevent a multiplicity of suits. The right, however, must be clear because the remedy is summary. (Roath v. Driscoll, 52 Am. Dec., 352.)

In this instance the company claims that the appellees have been guilty of various acts of trespass upon its right of way, as by extending a brick yard thereon, laying the foundation for an icehouse thereon and entering upon the margin of it for various other purposes. Upon the other hand the appellees assert that as the land upon the opposite side of, and immediately next to, the appellant's road is not suitable for it, but is constantly giving way and falling into the river, that, therfeore, the company has been gradually shifting its road until now it is in part, at least, out of its true situs, and to this extent upon their land. The controversy is, therefore, narrowed to a strip of land of a few feet in width and running parallel with the road.

The extent of the right of way of the company is not shown by any writing. Indeed it appears that many years ago it entered upon the land by the verbal consent of the then owner, and constructed its road. A long and large fill was necessary at that point, and there is evidence tending to show that where this had to be built the company appropriated, for the purpose, from eighty to one hundred feet in width, and but sixty feet elsewhere, and that the then owner verbally gave the land for this purpose, and also for a tollhouse. The exact location or the precise quantity of the land thus acquired is, however, not shown. The testimony is quite conflicting, not only as to which of the parties to this contest has the possession of the land where the alleged acts of trespass were committed, but as to its ownership. Both questions are in doubt, and it is difficult, from this record, to determine to our own satisfaction the relative rights of the parties. There is evidence tending to show that the company at one time tried to induce the appellees to donate to it the disputed land, or at least a part of it, and failing in this, that it then sought to purchase it. Also that some of its officers, shortly after the appellees purchased their land, delivered to one of them the key to the frame building, which then stood upon the disputed land, and which had been once used as a tollgate house, and which

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the appellees subsequently, and without objection upon the part of the company, removed some eight or ten feet further back from the turnpike.

Portions of the fencing which, at places, once existed along the road have been torn away, and the testimony is conflicting whether the appellees, in making their various improvements, have entered within the line where they formerly stood or not. Other portions remain, and they tend to show that the improvements along those portions of the line are not upon the appellant's right of way. The entire testimony, however, furnishes a medley of contradictions. It leaves the question of both ownership and possession in the fog, and as the burden rested upon the appellant we can not, under these circumstances, say that the chancellor erred in dismissing its petition. Owing to the confused condition of the record, if it were clear that the company is entitled to some relief, it would be difficult to award it in this form of action.

The description of the property claimed to have been invaded is left in such uncertainty as to render it almost, if not entirely, impossible to authorize any decree at all satisfactory to our minds as to its accuracy and justice.

The facts in dispute should have been submitted to an investigation by a jury. The right is doubtful, and this form of action is peculiarly adapted to the protection of acknowledged or certain rights. Where both the possession and ownership are involved in doubt it should be resolved by a legal investigation and not by a resort to summary equitable intervention.

Judgment affirmed.

To a petition for a rehearing Judge Holt delivered the following response, filed Apirl 24, 1888:

In considering the petition for rehearing we have read the brief for appellant, which was not on file when this case was decided.

Counsel are in error in assuming that the averments of the amended petition, filed October 28, 1885, were not denied. Waiving the question whether the pleadings theretofore filed by the appellees had not in substance already put them in issue, yet, by an order, made on January 13, 1886, they were, by consent, "traversed of record."

This order certainly related to the amended petition filed in October, because the appellees pleaded to that filed on April 18, 1885.

Upon a reconsideration of the case we see no reason for not adhering to the opinion already delivered.

The action is in nature to quiet title. The remedy sought is by injunction, and summary. The party seeking such relief must show a clear right.

The exact extent and location of the appellant's right of way, as well as its extent of possession when this action was instituted, is left in doubt by the conflicting testimony.

Upon this record the relative rights of the parties to this contention are in doubt. At least the case is not clear for the appellant. It is not, therefore, one for summary equitable intervention.

The chancellor passed upon the evidence, and appears to have been of this opinion. We concur in his view, and the petition for a rehearing is overruled.

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WILLIAMS, &c. v. GLENN'S ADM'R.

(Filed March 8, 1888.)

1. In judicial sales of real estate there is no warranty of title, and after the sale has been made complete by confirmation the purchaser can not resist the payment of the purchase price on the ground that he acquired no title unless he can show that he was induced to make the purchase by the misrepresentations of the creditor or person making the sale as to the condition of the title, and that he did not discover, and could not have discovered with reasonable diligence, the true condition of the title until after the confirmation of the sale.

2. Where the purchaser acquires no title he may recover of the debtor what he has paid for the land upon the ground that he has paid the latter's debt without having received value therefor.

O. W. & A. T. Root for appellants.

D. A. Glenn and A. G. Winston for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Bennett.

In an action pending in the Campbell Circuit Court by John Glenn's Adm'r v. George B. Hodge, &c., the court decreed a sale of the land in controversy as the property of George B. Hodge to satisfy a mortgage debt thereon, which mortgage was executed by George B. Hodge to the appellee's intestate. At the master commissioner's sale of said land the appellant, Williams, became the purchaser. He executed bonds to the commissioner for the purchase price of the land, payable in eight, twelve and twenty-four months from date, with the appellant, Johnson, as his surety The report of sale was confirmed by the court After the confirmation of the sale and the maturity of the first and second bonds the appellants were ruled to show cause why they should not pay these two bonds. They filed separate responses to the rule, in which they alleged that at the time of the sale of said land George B. Hodge had no title whatever to said land; that, therefore, there was no consideration for said bonds. The circuit court, notwithstanding these responses, made the rule absolute, from which they have appealed to this court.

This court, in the case of the Farmers Bank v. Peter, 13 Bush, 591, held that after the confirmaton of the decretal sale of a peace of real estate to satisfy a mortgage debt in favor of the Farmers Bank, Peter, the purchaser of the real estate, was not entitled to an abatement of the purchase price of the real estate on account of a prior and superior lien thereon for taxes due the State and city of Henderson, this court holding in that case that after the confirmation of a decretal sale the doctrine of caveat emptor applied in all its rigor, and that the purchaser could not resist the payment of the purchase price on account of any defect in the title of the property, but it is contended that the Peter case is distinguishable from this case in this: That in that case Peter got a clear title to the land except that it was encumbered by a prior lien for taxes; that he in fact got something, which fact was sufficient to uphold the consideration, but in this case the appellant, Williams, got no title whatever, therefore, there was a total failure of consideration for the bonds. But the court, in the Peter case, announced the broad doctrine that in judicial sales of real estate there is no warranty of tilte; that while the chancellor will not compel his vendee to pay for the land pur-

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chased at his sale, if the purchaser makes known, before the sale is made complete by confirmation, that he acquires no title, yet after confirmation the purchaser will not be permitted to avoid the payment of the purchase price upon the ground that he acquired no title to the land. The doctrine thus announced is in harmony with the current of authorities and accords with reason.

Rorer on Judicial Sales, section 174, 2d edition, says: "The rule is, as to all judicial sales, except as regards fraud, that the maxim caveat emptor applies. Let the buyer beware. There is no warranty of title or quality. They are sales by the court, and there is no one to go back on if the buyer takes nothing, but, although sales. whether judicial or on execution, are made subject to the doctrine of caveat emptor, yet if misrepresentations be made by the person selling and be relied on by the buyer, to the injury of the latter, the sale will be set aside." The rule announced in Rorer is sustained by the current of authorities, and was clearly recognized as correct by this court in the Peter case, so it may be regarded as a settled rule of law that after a judicial sale of real estate has been made complete by a confirmation of the sale the purchaser can not successfully resist the payment of the purchase price on the ground that he acquired no title to the property, unless he can show that he was induced to make the purchase by the misrepresentations of the creditor or person making the sale as to the condition of the title, and that he did not discover, and could not have discovered with reasonable diligence, the true condition of the title until after the confirmation of the sale. The appellants did not allege either of the latter facts. They, therefore, can not successfully resist the payment of their bonds.

If it be true that George B. Hodge had no title to said land he or his estate will be liable to the appellants for the sum that they may pay on these bonds upon the ground that they have been compelled to pay his debt without having received value therefor.

The judgment of the lower court is affirmed.

JONES, &c v. JONES, &c

(Filed March 8, 1888.)

1. Breach of warranty of title—To enable a vendee to recover for the breach of a general warranty of title to land he must allege and prove that he has been evicted by one having the lawful title, or a title paramount to that derived from his vendor, unless he gave notice to his vendor of his adverse claim and called upon him to defend the title. It is not sufficient to allege merely that the plaintiff has been evicted and that the title conveyed to him has failed.

2. Same—It is no defense to such an action that the plaintiff knew the title was defective when he purchased.

Henry L. Stone and J. S. Hurt for appellants.

W. H. Holt and V. B. Young for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is an action involving an alleged breach of warranty by the ancestor of the appellants in the sale and conveyance of a

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tract of land in the county of Bath to the appellees. The case was heard on the equity side of the docket and a judgment rendered against the appellants, to be levied on assets descended, and from which they prosecute the appeal. There was a covenant of general warranty contained in the deed, for the breach of which the action was instituted. The appellants filed a general demurrer to the petition that was overruled, and this is the fact now complained of. It is alleged by the appellee, after reciting the deed or the covenant, that Tyding's heirs, by an action in the Bath Circuit Court, recovered a judgment against the plaintiff for seven-ninths of the land conveyed by the deed, and by reason thereof the covenant of warranty had been broken to the extent of seven-ninths of said tract, and the plaintiffs ousted of possession under the judgment on the — day of ——, therefore, he sues for the recovery of $6,826, with interest, the title to said land so conveyed to him having failed to that extent.

The objection urged to the petition is that the plaintiff fails to allege that the recovery was by a paramount title or by one having the lawful title, while the appellee maintains that the statement that the title of his vendor failed to the extent of seven-ninths of the land is equivalent to saying that the party evicting him had the superior title. The want of title in the vendor of the appellee is no evidence of title in the party evicting him. This title may have been defective, and still the title of the party suing him equally so, or the party evicting may have entered under the appellee, or the latter permitted a recovery when he could have defeated the claimant. We understand the rule to be that where there is a breach of the warranty of title the vendee, to recover of his vendor, must allege and prove that the eviction was by one having the lawful title or a title paramount to that derived by the vendee from his vendor. This is indispensable to a recovery for the breach unless the vendee has given notice to his vendor of the adversary claim and the pendency of the action, calling upon him to defend the title as he has agreed to do. When such a notice is given and averred it dispenses with the further averment of a recovery by a better title. An allegation of a defective title in the vendor, with his vendee in possession, or the want of title to the land will not authorize the vendee to sue until he is evicted by a paramount title. What is necessary to be alleged is required to be proven, and the court will not imply a better title in the party recovering than that of the one in the possession upon the naked statement that the latter's title failed or that of his vendor. This doctrine is elemetary. In Booker v. Meriwether, 4 Littell, 213, this court, in discussing the evidence necessary to recover on a breach of covenant as to title, held that the evidence was insufficient, and to entitle Meriwether to recover he must show that he lost his land by a paramount title. In the case of Patten v. Kennedy, 1 A. K. Marshall, 389, the covenant of warranty was against all persons claiming under the title of Andrew Monroe, and the breach was an eviction under an ejectment by one claiming title under Andrew Monroe. In this case it was held that the averment as to the breach was sufficient, it being a special or particular covenant against the acts of those named, an averment that the eviction was had by one claiming under Monroe was sufficient, but where an action is brought on a general covenant of warranty it is necessary to allege that the eviction was under an adverse paramount title, or that the eviction was a lawful one. Whether the eviction was by a superior title is a question for the jury, and the fact of the eviction under a judgment does not settle the

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vendee's right to recover from his vendor. In Stephens v. Pattie, 3 Bibb, 117, it was held that in an action on such a covenant "the declaration should contain an averment that the person evicting had lawful title at or before the grant to the plaintiff, and the failure to make such averment is error after verdict." To show clearly the breach assigned comes within the covenant "the declaration should contain an averment that the person evicting had lawful title at the date of the grant to the plaintiff, or some other averment from which it would be evident the claim under which the eviction was had is adverse and superior to that granted the plaintiff." The fact of the recovery and that the title of the vendor failed is not equivalent to saying that the evictor's title was adverse and superior to the title of the plaintiff. If so, the averment of the recovery is sufficient, for that implies, in one aspect of the case at least, that the trial court thought the title of the adverse claimant was superior to the title of the one in possession. In Fowler v. Chiles, 4 J. J. Marshall, 504, it is said "that a legal eviction is indispensable to the existence of a good cause of action on the covenant. If the defendant in error had been in possession of the land he could not maintain this action until he had been evicted by the judgment of a competent court founded on title paramount to that of the plaintiff in error." We think it manifest, therefore, that a recovery of the vendee or a statement that his title failed in an action against him by another for the land is not equivalent to an averment that the claim was adverse, and the title of the party recovering superior to that of the plaintiff.

The answer is as defective as the petition, save the pleader studiously avoids alleging that the title of the ancestor was superior to that of the party recovering from the plaintiff. It avers that the title of their ancestors was defective, and so known by the appellee when he purchased. This is no defense to the action, but the petition being defective no recovery can be had.

As this case must go back, it is proper to suggest that the judgment is to be made of assets descended, and, therefore, the value of the land received by each child is not involved, nor can it affect the question of contribution between them. The attention of the court is also called to the cross complaint of the appellee, made in this court, in which it is claimed that he has been made to account twice for his proportion of the recovery. His part being deducted first from the amount he was entitled to recover, and then his interest in the land owned jointly with the others sold to satisfy his own claim. If this be so it is error. We perceive no error in the judgment as to the claims of the heirs by reason of the alleged indebtedness to their common ancestor, nor is there anything in the record upon the question of mental incapacity that would defeat the recovery. The judgment, however, being reversed, because no cause of action is stated, leaves those questions open, and the suggestions are only made to prevent further litigation in the absence of additional testimony.

The judgment is reversed and cause remanded, with leave to the plaintiff to amend his petition on the return of the cause, and for further proceedings consistent with this opinion.

Judge Holt not sitting.

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SILVERS v. EDWARDS.

(Filed March 8, 1888—Not to be reported.)

1. Attachment lien—The issual of an attachment created a lien upon the debtor's land which was not defeated by a conveyance by the debtor to another which was not delivered until after the attachment was issued.
2. Same—Where an attachment was levied upon a tract of land which the debtor had conveyed to another, and also upon land which he had not conveyed, the last-mentioned tract should have been first subjected and a sale of the other directed only in the event it was necessary to satisfy the plaintiff's debt.

O. H. Waddle for appellant.

W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Lewis.

The evidence is conflicting as to the time the two deeds were delivered to and accepted by appellant, and as there is evidence showing they were not delivered until after the attachment was issued in favor of appellee, at which time a lien on the land was created, we are not inclined to say the chancellor erred in so finding, especially as appellant admits the deeds were executed without his presence or knowledge, and in the absence of any previous agreement between him and his debtor they would be executed.

But in addition to the tracts of seventy-one acres and fifty acres, which the common debtor attempted to convey to appellant, the attachment was levied on a tract of two hundred acres, or upon the interest of the debtor therein, which was not included in the deed to appellant. We think the court erred in dismissing appellant's petition to be made a party and directing the two tracts conveyed to appellant first sold. The last-mentioned one, about which there was no controversy, should have been first subjected, and the sale of the other two directed only in case it failed to bring enough to satisfy the debt of appellee.

For that error the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

KOENIG, &c. v. KRAFT, &c.

(Filed March 10, 1888.)

Construction of devise—While devises and conveyances by a husband to his wife and their children under the ordinary rule create a joint tenancy, yet the courts, in the construction of such devises or conveyances, are always inclined to construe them as creating an estate for life in the wife, remainder to the children, and where there is any language used in the instrument from which such an intention can be inferred, the chancellor will decline to follow the ordinary rule making the wife and children joint tenants.

A testator devised all his estate to his wife and her only child's sole use and benefit, and gave his wife full power to sell certain real estate, but no other. In this contest between the testator's child named in the will and the children of his wife by a second husband, Held—That the wife took a life estate, with full power to use, for the benefit of herself and child, that part of the estate which it was provided she could sell, remainder in fee to

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the child. Therefore, upon the death of the mother, her child by the testator took the whole estate undisposed of, and no part of it descended to her children by the second husband.

Frank Hagan and Chas. G. Hulsewede for appellants.

M. & D. A. Sachs and J. G. Sachs for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

This case is here for the construction of the will of Wm. H. Kraft, deceased. He died in January, 1866, leaving his widow surviving him and an infant daughter, Emma, who, at his death, was four years of age. His widow subsequently married and had children by her second husband, and is now dead. This controversy is between the child of the devisor and the children of the same mother by her second husband. It is claimed by the appellees, the children by the second marriage, that their mother, under the will of her first husband, acquired a joint interest with the appellant, Mrs. Koenig, her only child by the first marriage, in the estate devised, and that at the mother's death, she owning a half interest, it descended from her to all three of the children.

In a controversy between these same parties, in which the present appellant sought to cancel a deed made by her to her half brother and sister of an equal interest in some real estate devised to her by her father under a misapprehension of her rights, this court held that the devise to the daughter was in fee, subject to a life estate in the mother, and the conveyance to her half brother and sister upon the facts of that record should be set aside. In the present case the chancellor, being asked to construe the will, held that the mother owned an interest equal to that of the child by her first husband, and, therefore, the children by the second husband inherited a part of the estate from the mother, ignoring the construction placed on the will by this court for the reason, as suggested by counsel, that it was not necessary to the decision of the question in the case heretofore in this court, that the interest of the appellant, or that of her mother in her father's estate, should be determined.

It is plain that the extent of the interest of the mother and child in the estate under the will had an important bearing in determining the question raised in the former litigation, and as the question is again presented we find it necessary to differ from the chancellor as to its construction. The language of the testator's will is as follows: "I give and bequeath to my beloved wife, Elizabeth Kraft, all my real, personal and mixed estate of which I may be possessed at the time of my demise for her and her child, Emma Kraft's, sole use and benefit, and give my beloved wife full power and authority to sell my real estate what I now hold on Walnut, near Clay street, but no other, and I appoint my beloved wife, Elizabeth, as executrix of this, my last will and testament, without security." Under this devise, if the widow takes an equal interest in fee with the infant child of the testator, that interest extends to the entire estate, as, by the clause of the will quoted, he gives to his wife all of his estate, real, personal and mixed, and if this language is not restricted in its meaning by the use of the words in the same clause evidencing a contrary intention on the part of the testator, then the wife takes jointly with the child. The estate is devised to the wife, however, for a particular purpose, that is, "for her and her child's, Emma's, sole use and benefit," and the right of alien-

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ation withheld from his wife of all his real estate but that he holds on Walnut, near Clay street.

The limitation of the power of the wife as to the disposition of the realty is inconsistent with a grant of the fee, and evidences a plain intent on the part of the devisor to place this property under the control of his wife in trust for her and the child's sole use and benefit, and in the use of the property you may sell certain realty, but no other, the testator evidently contemplating that a necessity might exist for the sale of this realty, that it might be used, or its proceeds, more beneficially by the objects of his bounty. Besides, I desire this estate for the sole use and benefit of my wife and child, not for the benefit of her second husband or those who had no claims on his bounty, and to enable them to enjoy it the devisor placed no limitation on its use for the benefit of his wife and child, and vested in the widow the power to sell a part of the realty for that purpose. The child was then only four years of age, and the testator no doubt thought that his wife, in raising and educating it, as well as providing for her own comfort, would require the use of all his estate save the realty that he expressly said should not be sold. The use of the property thus devised was not confined to the mere income, but the whole of it might be disposed of by the wife for that purpose. The question is, what becomes of that portion of the estate unsold or undisposed of? Suppose the wife had sold more of the realty, then is it not manifest that, the mother being dead, the child would take the absolute estate, not from the mother, but from the father? The mother's right to the use and enjoyment having terminated, the whole passed to the child. It was in fact a life estate in the widow for the use and benefit of herself and child, remainder in fee to the child at its mother's death. She was then the sole beneficiary, and the restriction over the power of alienation shows a manifest purpose to place the estate in trust, to be held by the wife as long as she could enjoy it in cojnnction with the child, but no longer. In construing the meaning of a conveyance in the case of Davis v. Hardin, 80 Ky., 672, this court said: "When a husband makes a conveyance to his wife and their children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by the death of the wife, pass into the hands of a stranger." In that case the conveyance was to "Thompson in trust for the said Mary E. Jones and Wm. P. Jones and any other child she may have," this court held that the wife took a life estate. Here the devise is to the wife to be held in trust for her and the child's sole use and benefit, with the power of alienation taken from the wife of his realty except certain portions designated by the will. Did the testator contemplate the execution of a will by which the use and profits of his estate or the proceeds of its sale shall pass to the second husband of the wife on the marriage or at her death, or was he attempting to secure the estate for the child by placing it in trust to be held by the mother for the sole use and benefit of both so long as the mother lived? The latter construction should be given the instrument, and any other defeats the intention of the testator. In Foster v. Shreve, 6 Bush, 519, deed to the mother, conveying to her and her heirs forever, was held to vest in the mother an estate for life only. In Crockett v. Crockett, 2 Phill., 553, the testator directed that "all of his property should be at the disposal of his wife for herself and children." It was held that the wife was either a trustee of the fund with a large discretion as to its application, or the trust was subject to her life estate. In French v. French, 11 Sim., 256, the testator gave certain moneys

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in trust for his daughter "for the use of herself and children." It was held to be a life interest in the wife, remainder to the children. In re Harris, 7 Exchq., 344, the will read: "I give and bequeath all my property, of whatever description, to my wife for the maintenance of herself and children (naming them), and I constitute my said wife sole executrix." This was held to constitute a life estate in the wife. While gifts and conveyances to a wife and her children under the ordinary rule would create a joint tenancy, the courts, in the construction of such instruments executed by the husband to the wife and children, are always inclined to construe the instrument as an estate for life in the wife, remainder to the children, and where there is any language used in the instrument from which an inference of such an intention appears, the chancellor will decline to follow the ordinary rule making them joint tenants. In the pesent case a trust was created by the testator with enlarged powers of disposition on the part of the wife, who was the trustee. She could use not only the income but the principal for the use and benefits of herself and child, except certain real estate that she was prohibited from selling. After placing the estate under the control of his wife, the testator specifies what real estate the wife might sell, and confers upon her the express power to do so, and then proceeds to say that she shall sell no other, showing a plain purpose to limit the estate of the wife, and a direction as to its control and disposition after his death for the uses to which it was to be applied.

The judgment below is reversed and cause remanded for proceedings consistent with this opinion.

STEMBRIDGE v. STEMBRIDGE'S ADM'R, &c.

(Filed March 10, 1888.)

1. Vendor and vendee—Where A agrees to convey land to B upon condition that B exercises his option to do a certain thing at a specified time, but the contract imposes no obligation upon B to do the thing specified, no immediate interest in the land passes to B.

2. Time is of the essence of such a contract, and unless B complies with its terms he can not demand its enforcement.

A agreed to convey to B a certain interest in a tract of land, covered by a mortgage, if B would pay a certain amount on the mortgage debt when it became due. Although B failed to pay any part of the mortgage debt, either at or after its maturity, his administrator seeks by this action to have the agreement treated as investing B with an equitable interest in the land, and to enforce a specific performance of the contract. Held—That the failure of B to pay the amount specified at the time fixed for its payment amounted to a decision upon his part not to purchase the land upon the terms proposed, and deprived him of any right to enforce the contract.

Wm. Lindsay and G. W. Jolly for appellant.

W. L. Burton for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

In February, 1879, A. S. Stembridge conveyed to his wife, the appellant, a tract of land containing one hundred and twelve acres. The consideration for this conveyance was the undertak-

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ing by the appellant to pay to —— Rinehart, A. S. Stembridge's vendor, a balance of $1.500, with two years' interest thereon, due on this land by A. S. Stembridge to said Rinehart, and to surrender a claim of $500, loaned by the appellant to A. S. Stembridge, to pay on this land, and to cancel a promissory note held by the appellant on him for $646. Afterwards the appellant borrowed of G. W. Jolly the sum of $1.790, which was used to pay the balance of the purchase money, with interest thereon, due to Rinehart. She and A. S. Stembridge secured Jolly by executing to him a mortgage on this land. On the 21st day of February, 1880, after the making of said mortgage, the appellant executed a written agreement, which recites that the mortgage held by G. W. Jolly on said land for $1,790 would be due the 10th day of February, 1881. The agreement then provides that "if A. S. Stembridge will pay on said mortgage debt by the time it is due, namely, the 10th day of February, 1881, the sum of $16 an acre for all the west end of said tract of land, after setting apart to the said L. L. Stembridge fifty acres of the east end, fronting on the Calhoon road and including the house, etc., she will convey the said remainder to him, but the amount to be paid by A. S. Stembridge it not to be less than $1,000." This agreement was signed by the appellant, but not by A. S. Stembridge. At the time this agreement was made the appellant, by a judgment of the Daviess Circuit Court, had power to act as a feme sole. Also, there was a suit pending by the appellant against A. S. Stembridge for a divorce. A. S. Stembridge failed to pay the sum of money mentioned in the agreement on the Jolly note at its maturity, nor did he pay it thereafter. After the death of A. S. Stembridge the appellee, as his administrator, sought by this action to have said agreement treated as investing A. S. Stembridge with an equitable interest in said land, and to enforce a specific performance of it. The appellant paid off the Jolly note after the action was brought. She in her answer contended that the agreement did not invest A. S. Stembridge with an equitable interest in the land; that the agreement invested him with no title whatever, except upon condition that he paid said sum on the Jolly note at its maturity, and having failed to do so the title—legal and equitable—remained in her. The lower court sustained the appellee's view of the agreement, and adjudged a sale of enough of the land, except the fifty acres reserved to the appellant, to satisfy the sum mentioned in the agreement, with interest thereon, which was to be paid to the appellant, she having paid off the Jolly note, also charging her with the reasonable rent of said land. She has appealed to this court.

The said agreement did not bind A. S. Stembridge to take and pay for said land. The appellant agreed that if he should pay so much on the Jolly note at its maturity then she would convey to him all of said land except fifty acres, etc. The agreement contains no promise or obligation on A. S. Stembridge's part to pay said sum. It was entirely optional with him to pay said sum or not, nor did the agreement convey him any present interest in the land, nor did it bind the appellant to convey to him any interest in the land thereafter except upon the condition of his exercising his option to pay said sum on the Jolly debt at its maturity. This option he never exercised, nor did his representatives. His failure and that of his representatives to do so amounted to a decision not to purchase the land on the terms proposed by the appellant. As this agreement did not invest A. S. Stembridge with any immediate interest in the land, and as the appellant was not bound to convey the land, except upon the

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precedent condition of A. S. Stembridge paying the money upon the Jolly debt at its maturity, the sale was conditional, and, as he failed to comply with this precedent condition, he was entitled to no interest in the land whatever.

Again, in cases of executory sales of land, that is, where the purchaser, by the terms of the contract, receives a present interest in the land, courts of equity will not ordinarily regard time as of the essence of the contract; they will not divest the party of his title on the mere ground that he has not kept his contract to the day, but where, as in this case, the contract invests the one party with no title whatever, imposes no obligation upon him, leaves it optional with him to do a certain thing at a specified time, in such a case time, in the broadest sense of the rule, is of the essence of the contract, and the failure of such party to comply with its terms deprives him of the right to demand the enforcement of the contract.

The judgment of the lower court is reversed and the cause remanded, with directions for further proceedings consistent with this opinion.

DARLING v. BROWN.

(Filed March 10, 1888—Not to be reported.)

In this action involving a settlement of accounts between appellant and appellee the accounts are in such a complicated state as to make necessary a re reference of the case to the commissioner, to ascertain and report as near as possible their condition.

Winslow & Winslow for appellant.

Masterson & Gaunt for appellee.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Lewis.

In the fall of 1874 Darling, appellant, and Brown, appellee, made a contract by which it was in substance agreed that Brown was to buy cattle to be fed in pens with slop and offal from the distillery of Darling, the hands doing the feeding to be paid by Brown, and hay, straw, etc., out of the proceeds of the cattle, and the net profits of the cattle, when sold at the end of the distilling season, the ensuing spring, to be divided equally between them. This contract was continued for four succeeding seasons, there being four different lots of cattle fed and sold, besides a number of mules.

Darling instituted this action in November, 1879, alleging that large profits were made each of the four years, which Brown, who purchased and sold the cattle, had not fully accounted for, and that he was indebted to him on various other accounts. Brown denied profits of the amounts alleged by Darling had been made; stated he had, at various times, paid and advanced to Darling cash which exceeded the profits, and asked judgment over against him for such excess.

The master commissioner, by charging Brown with the amount of profits made each year, according to his finding, and with some other items of account, found him indebted the sum of $12,151.21. On the other hand he found against Darling items consisting of cash paid at different times the sum of $13,561.60, and the balance in favor of Brown $1,410.29, but the exceptions filed to the report

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by each of the parties were sustained by the court, the report set aside and judgment rendered in favor of Darling for $296.61, of which, however, he complains.

It is not stated in the judgment the reason for the result arrived at so different from the report of the commissioner, nor are we enlightened by counsel on either side in regard thereto. We are thus left to examine accounts, consisting of numerous items, for four or five years, neither kept nor presented in any order, and confused rather than explained by the contradictory and inconsistent statements of both of them in their pleadings and depositions. We are thus left to surmise that the conclusion of the court was reached by disallowing an item of $1,500 cash, charged by Brown and reported by the commissioner, which the proof does not seem to sustain, and increasing to the amount claimed by Darling the charge for money paid to Bealer, but even in that we say the precise amount of the judgment can not be reached.

The principal controversy, except as to the amounts of the annual profits, which we do not deem it necessary to consider, arises in regard to payments and advances alleged to have been made by Brown in 1875. According to a statement made by John I. Howe, cashier of a bank, which the parties agreed to read as a deposition, Darling received from the bank, and Brown was charged therefor, April 27, 1875, $2,000; April 30, $1,846.50, and that Brown deposited with the bank September 8, 1875, which Darling received, $4,000, and November 15, 1876, the further sum of $1,260; that October, 1875, Darling paid in the bank for Brown a draft on him for $1,650, and October 9, 1875, he paid for him $2,210. The commissioner charged Darling with $1,260, about which there seems to be no controversy, and with the two sums of $2,000 and $1,846.50, but no mention is made of the $4,000, nor is Darling credited with the two sums paid October 8 and 9, 1875, making an aggregate of $3,860, just $13.50 more than the aggregate of the two sums received by him from Brown April 27 and 30, 1875, but it seems Brown admits there is only a balance of about $206 of the $4,000 due, the other portion having been paid in manner that it is difficult to understand further than that the two amounts paid by Darling in October, 1875, were in part so applied. Darling is also charged with what is called Guthrie checks that amount to $2,014, paid by Brown about January, 1875.

In an amended petition Darling alleges that in 1872, under another contract, Brown fed cattle at his distillery and would be indebted to him on a settlement of accounts which he undertakes to set out. He also alleges that Brown was also indebted to him for money loaned previous to their contract made in the fall of 1874. To all these matters of alleged indebtedness Brown pleads the statute of limitation, but Darling alleges that the money received by him from Brown in the spring of 1875 was in fact payments on that indebtedness. The commissioner did not, however, give Darling any credit by Brown's alleged indebtedness to him previous to the fall of 1874, nor report the amount of such indebtedness, but left the question of Darling's right to appropriate money received by him from Brown in the spring of 1875 as payments on the pre-existing indebtedness to the court, but no ruling was made by the lower court on that question.

The condition of the accounts between the parties are in such a complicted state as to make a reference of the case to the commissioner to ascertain and report, as near as possible, their condition necessary, for the court can not be expected to do so, and,

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in our opinion, whatever money was paid by Brown in the spring of 1875 should be applied to the payment of his previous indebtedness to Darling not then barred by the statute, if he did in fact owe him anything.

The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

WOOD v. ELLIOTT, &c.

(Filed March 10, 1888—Not to be reported.)

1. Fraudulent conveyances—When a conveyance is actually fraudulent as to the grantor's creditors, an execution creditor is not bound to resort to an equitable action to set aside the conveyance, but may, in the first place, have the land levied on and sold under his execution.

2. Same—One who purchases land in good faith and does not know of or enter into a plan or intention upon the part of the vendor to defraud his creditors, can not be deprived of his purchase, and while circumstances that would put an ordinarily prudent man upon inquiry are sufficient to charge the vendee with notice of the vendor's fraudulent intention, the mere knowledge of the purchaser that his vendor is in debt is not sufficient for that purpose.

3. Recording of deeds—While our statute requires that a deed shall be recorded in the county where the land, or the greater portion of it, lies, yet the fact that the deed attacked as fraudulent in this case had, prior to the levy of an execution on the land in Mason county, been recorded only in Bracken county, where the smaller portion of the land lay, is immaterial, since the execution plaintiff, who became the purchaser at the execution sale, had actual notice of the deed.

W. H. Wadsworth & Son for appellant.

R. K. Smith and J. B. Clark for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Holt.

William C. Dimmitt was the owner of an undivided one-sixth remainder interest in the tract of land that had been allotted to his mother as dower, lying partly in Bracken and partly in Mason county, Ky., but mostly in the latter county. On August 27, 1881, he, for the recited cash consideration of $400, conveyed it to the appellee, John W. Elliott. The deed was properly recorded in Bracken county upon the day it was made, but not in Mason county until February 29, 1884. The appellant, V. Wood, obtained a judgment against William C. Dimmitt in the Union County Court of Common Pleas in 1878. No execution appears to have issued thereon until January 30, 1884, when one was sued out to Union county and returned nulla bona. A second one was sued out, but to Mason county, on February 11, 1884. It was levied on February 27, 1884, upon the undivided interest of the execution debtor in the land theretofore conveyed to Elliott, and when sold under the execution the plaintiff therein purchased it at more than two-thirds of its appraised value, and then procured a sheriff's deed to it. The entire debt, however, was not satisfied, and the portion of the undivided interest situated in Bracken county was, in June following, sold under another execution, is-

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sued upon the same judgment to the last-named county, and purchased by the plaintiff therein, who procured a sheriff's deed to himself therefor.

This action was brought by the appellee, Elliott, for a sale of the entire tract of dower land upon the ground that it was indivisible without a material impairment of its value, and for a division of the proceeds. All of the parties in interest were made defendants to the suit, and consented to the sale. The appellant, Wood, appeared, and by proper pleading asserted claim, by virtue of his execution purchases, to the interest of William C. Dimmitt, but consented to the proposed sale. The conveyance to the appellee, Elliott, was also attacked by him for actual fraud, upon the ground that the vendor, William C. Dimmitt, made it for the fraudulent purpose of evading the payment of his debt, and that the vendee, Elliott, knew of and participated in this design.

The only question involved, therefore, is the right to the proceeds of the sale of this interest. It was subject to be seized under execution, upon the appellant's judgment, from the time of its rendition until the sale to Elliott, a period of some three or four years. The appellant appears to have slept upon his rights, but this may have been owing to the fact that he lived remote from the land. It can make no difference, however, if he did, if in point of fact the sale to the appellee was actually fraudulent, and if so the execution creditor was not bound to resort to an equitable action to settle the rights of the parties, but could, in the first instance, have the land sold under his execution.

Our statue requires that a deed shall be recorded in the county where the land, or the greater portion of it, is situated, but the fact that the deed to the appellee had, prior to the levy of the execution to Mason county, been recorded in Bracken county, where the smaller portion of the land lay, can cut no figure in this case, as the appellee, prior to both of the execution sales, had not only notified the appellant's attorneys of his purchase, but had shown them his deed, and he also appeared at each sale and objected to it, at the same time giving public notice of his claim to the land.

There is no question but what the appellee paid the $400 for the land. The testimony shows that it was probably worth more, but it was encumbered by a dower right, which usually affects the sale of land more than it in fact decreases its value when estimated according to the life tables. Moreover, it was a cash sale. It is proven both by the appellee and the draftsman of the deed that before it was drawn or the money paid the appellee said to the vendor that if there were any liens or encumbrances on the land, or any trouble in any way as to it, he would have nothing to do with it, and he was assured by the vendor that there were none, and that there was no danger of his becoming involved by its purchase. There is some conflicting testimony as to whether the appellee knew, before his purchase, of the existence of the appellant's debt. One witness says that he had told him of it a year or two before its purchase, and he fixes the precise day when he did so without showing what enables him to be so accurate as to time. The evidence is contradictory upon this point, and not of such a satisfactory character as to enable us to say that the appellee did have such notice.

But even if the appellee knew of it, yet if he purchased in good faith, and did not know of, or enter into, a plan or intention upon the part of the debtor to defraud his creditor, he can not be deprived of his purchase. It must at least be shown that he knew of the intention or that the circumstances were such as required

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him to know it. He must at least be chargeable with notice of the fraudulent intention, and to this extent be a party to the fraud. The notice may be shown by evidence of positive knowledge upon his part, or inferred from circumstances that would put an ordinarily prudent man upon inquiry. If he has notice of the fraudulent intention of the debtor, or be chargeable with it from all the circumstances, then by making the purchase he becomes a party to the fraud. In arriving at it inadequacy of price and the insolvency of the debtor may, of course, be considered. Here, however, there was no lien upon the land, and the mere knowledge of the purchaser that his vendor is in debt is not sufficient of itself to fasten any intended fraud of the latter upon the vendee, and invalidate a sale.

In our opinion the evidence is not sufficient to authorize the conclusion that the appellee, in making the purchase, entered into any fraudulent purpose of his vendor, or that the circumstances proven are such as to charge him with notice of any such intention. The court below so found, and the judgment is affirmed.

BENTLEY, &c. v. CHILDRES.

(Filed March 13, 1888—Not to be reported.)

1. A patent is void and confers no title whatever to the extent that it interferes with a prior patent.
2. Interfering patents—Adverse possession—In this action of trespass, in which the parties claim under interfering patents, each claiming to have been in possession to the extent of his patent boundary for more than fifteen years, the rights of the parties are determined, and the instructions of the lower court approved.
3. Champerty—A purchase of land adversely held is champertous and void.

Bentley & York for appellants.

John E. Stewart for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

The appellants by their action sought to recover of the appellee damage for cutting and destroying timber on a tract of land containing fifty acres, which they claimed to own and actually possess. The appellee denied that the appellants owned or possessed the land on which the timber was cut, etc.

The patent under which the appellants claim was issued by the Commonwealth in 1858. The patent under which the appellee claims was issued by the Commonwealth in 1824. According to the evidence in this record the patent under which the appellants claim covers a part of the land embraced in the patent under which the appellee claims. The timber cut by the appellee was on the land within this interference. It appears in proof that the appellants have four or five acres of land cleared and enclosed within the interference which has been cleared and enclosed for more than fifteen years, but that the trespass complained of was not upon this portion of the land. It also appears that the appellants and those under whom they claim have claimed to the extent of their patent boundary for more than fifteen years. It also

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appears that the appellee and those under whom he claims have been in the possession of the land claimed by them to the extent of their patent boundary for at least thirty years.

To the extent that the appellants' patent interferes with the appellee's patent the same is void and confers no title whatever, and the instruction of the court in this regard is right.

But if the appellants and those under whom they claimed held the actual, adverse possession of the land within the interference, claiming to the patent boundary, for at least fifteen years, such holding gave them a legal title to the land unless the appellees also held the actual possession of the land covered by the elder patent claiming to the extent of its boundary, then such holding, although the occupancy was outside of the interference, limited the appellants' possession within the interference to their enclosure. The instruction of the court in this regard is correct, and if the appellee and those under whom he claims thus held said land they had the right to enter upon the interference, but not within the appellants' enclosure, and cut timber. The instruction of the court in this regard is correct, but if there was not such holding by the appellee and those under whom he claims, then the appellants' entry and holding within the interference, claiming to the extent of the patent boundary for fifteen years at least, would perfect their title to the land. Also if those under whom the appellees claim were not in the actual possession of the land, claiming to the extent of the patent boundary, and the appellants were in the actual possession of the interference, claiming to the extent of their patent boundary, and while they were thus possessed the appellee purchased the land from those claiming under the elder patent, but were not in the actual possession of the land, then such purchase was champertous and void as to the interference, and gave to the appellee no right of entry thereon. This matter was also submitted to the jury by the court's instruction.

The instructions asked for by appellants and refused by the court are not copied in the record. We must, therefore, presume that the court did right in refusing them.

The judgment of the circuit court is affirmed.

COOK'S ADM'R, &c. v. BRANNIN, BRAND & GLOVER.

(Filed March 13, 1888.)

1. Liens—Where A advances money to B with which to buy tobacco, B agreeing to ship the tobacco to A, who is to have a lien thereon to secure his advancements, and the tobacco is purchased with the money thus advanced, there arises an inchoate lien on the tobacco in favor of A from the moment of its purchase, and this lien becomes complete by the delivery of the tobacco to A: but such lien will not prevail as against the intervening equities of third persons.

In this case, B having died insolvent without having delivered the tobacco to A, the right of the other creditors to have the whole estate, including the tobacco, pro rated equally among all the creditors intervened, and, therefore, the incipient lien in favor of A can not prevail against that right, although the administrator of B has delivered the tobacco to A since his intestate's death.

2. Decedents' estates—The right of the creditors of an insolvent estate to have the estate equally pro rated among themselves attaches upon the death

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of the decedent, which right is subject only to the payment of funeral and administration expenses, and any prior equitable lien upon the estate.

G. W. Williams & Son for appellants.

Wm. Lindsay and W. N. Sweeney & Son for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, W. H. Murphy, as the administrator of S. C. Cook, brought his action in the Daviess Circuit Court to settle the estate of his intestate, Cook, as an insolvent estate. The appellees, as creditors of the estate, together with others, were made defendants to this action.

The appellant, having received a lot of tobacco as a part of the personal estate of his intestate, he prized the same, and after the institution of his action he shipped the same to the appellees as commission merchants, dealing in leaf tobacco in the city of Louisville, to be sold. Ater the sale of the tobacco by the appellees they filed an answer, in which they stated that S. C. Cook, in his lifetime, as a local dealer in leaf tobacco in the town of Delaware, Daviess county, Ky., made an arrangement with them by which they were to advance him money with which to buy tobacco, which he was to ship to them in the city of Louisville to be sold, and out of the proceeds of sale they were to retain the amount of advancements and interest thereon and commissions; that the tobacco shipped to them by the appellant was bought by C. S. Cook with money advanced to him by the appellees, upon which, according to the agreement with Cook, they had a lien to secure them in their advancements, which amounted to $2,621.16, besides $275 advanced to the appellant to enable him to prize the tobacco and ship it, and $11.25 insurance premium on the tobacco; that the appellant having shipped the tobacco to them pursuant to the agreement with Cook they had a lien on the same to secure said sums. The lower court having sustained the appellees' contention the appellant has appealed to this court.

The sum of $275 advanced to the appellant to prepare the tobacco for market and the sum of $11.25 paid for insurance were reasonable expenses incurred for the benfit of the estate, and the lower court did right in allowing the appellees to retain these sums out of the proceeds of the tobacco.

While the depositions of the appellees proving the agreement with Cook in reference to their advancements of money to him with which to buy the tobacco were incompetent and were, therefore, properly excluded, yet, from the other facts in the record, it is fairly established that the appellees did have an agreement with Cook to advance him money with which to buy tobacco, and that the same was to be shipped to them for sale, and out of the proceeds they were to retain their advancements and commissions, and that they were to have a lien on the tobacco thus purchased and shipped to secure their advancements and interest, and that the tobacco on hand at the time of Cooks' death, and which was thereafter shipped to the appellees by the appellant, was purchased with money advanced to Cook by the appellees, but the evidence as to whether the appellant shipped the tobacco to the appellees pursuant to their agreement with Cook

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is contradictory. It may be assumed, however, for the purpose of this investigation, that the tobacco was shipped pursuant to said agreement.

This court, in the case of Brooks, Waterfield & Co. v. Staton's Administrator, &c., 79 Ky., 174, decided that Brooks, Waterfield & Co., having advanced money to Staton with which to buy tobacco, with the agreement that Staton was to ship the tobacco to them, upon which they were to have a lien to secure their advancements, and the tobacco having been purchased by Staton with the money thus advanced and delivered to them, there arose an inchoate lien on the tobacco from the moment of its purchase in their favor, which became complete by the delivery of the tobacco to them, but such lien would not avail as against the intervening equities of third persons. The court, in the case of Hoffman v. Burns, &c., 3 Ky., 400, recognized the doctrine of Brooks, Waterfield & Co. v. Staton, but held that the doctrine of that case did not apply to a case where the commodity was not actually delivered pursuant to the agreement.

S. C. Cook having died insolvent, the question to be determined is whether the shipment of the tobacco to the appellees for the purpose of sale, conceding that it was shipped pursuant to the agreement with Cook, perfected the appellees' lien on the tobacco as against the rights of Cook's other creditors.

Section 33, article 2, chapter 39 of the General Statutes provides in substance that if the estate of a deceased person is insolvent the same, after satisfying certain expenses and prior liens, shall be equally pro rated among the creditors of the decedent. The administrator, as the representative of the decedent, holds such estate in trust for these purposes. The rights of the creditors of an insolvent estate to have the estate equally pro rated among themselves attaches upon the death of the decedent, which right is subject only to the payment of the funeral and administration expenses, and any prior enforceable lien upon the estate.

According to the doctrine of the Brooks, Waterfield & Co. case the appellees' lien upon the tobacco at the death of Cook was not complete; it was only incipient—begun but not completed—therefore, not enforcible as against the intervening rights of third persons. The right of the other creditors to have the whole estate, including the tobacco, pro rated equally among all the creditors having intervened, it follows, as a logical sequence, that the incipient lien in favor of the appellees can not prevail against that right, for, suppose the appellant had delivered the tobacco to the appellees and they had come into court asserting a lien on the tobacco as against the right of the creditors to a pro rata distribution, would it be contended that their lien should prevail? Would not the response of the chancellor that your lien never having been completed, and the statutory right of the other creditors to have a pro rata distribution of the estate, having attached upon the death of Cook, constitutes an intervening equity that your incipient lien can not overreach, be all sufficient? We think so. Therefore, as the creditors of Cook, upon his death, acquired the right, under the statute, to have his estate, including the tobacco, equally pro rated among them, and as this right was superior to the appellees' inchoate lien, it seems clear that to allow the administrator to breathe life into the appellee's otherwise unenforcible lien as against the other creditors, by delivering to the appellee the tobacco, in order to perfect their lien as against the statutory rights of the other creditors, would be in direct violation of his trust, which a court of equity would not uphold, but having the parties and the proceeds of the tobacco before it,

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for the purpose of determining how the proceeds should be applied, would direct them to be pro rated among all the creditors.

The judgment of the circuit court allowing the appellees to retain $2,621.16, the proceeds of the tobacco, is reversed and cause is remanded, with directions to compel the appellees to pay the same into court for the purpose of being pro rated among all the creditors.

HOWE v. DUPOYSTER, &c.

(Filed March 13, 1888—Not to be reported.)

Partnership—Interest in profits—B. and D. entered into an agreement whereby D. was to furnish a room in which B. was to carry on a saloon, D. to receive two thirds of the profits of the business as rent. In this action by appellant to recover of D. for whisky furnished to run the saloon it appears that D. was regarded by the agent of plaintiff, who sold the goods, as being at the head of the firm. Held—That the agreement to participate in the profits of the purchases made by B. made D. a partner as to the plaintiff, who is entitled to recover unless he or his agent, knowing of the agreement between B. an D. at the time the goods were sold, gave the credit to B. alone. But the mere fact that the goods were charged to B. is not conclusive that the credit was given to him alone.

J. W. Bugg and J. D. Wilds for appellant.

White & Warden for appellees.

Appeal from Ballard Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

Instruction No. 6 given at the instance of the defendant was calculated to mislead the jury as to the character of the transaction between the alleged partners. While the nature and terms of the contract might not constitute a partnership as between Dupoyster and Barclay, as to third persons, when connected with their mode of conducting the business, they should be regarded as partners. It is shown by the testimony of Blackwell that Dupoyster and himself entered into an agreement by which Dupoyster was to furnish the room and the groceries for the saloon, and Barclay, who was without any capital, was to render services in keeping the saloon and receive one-third of the profits and Dupoyster two-thirds; that after this agreement was entered into a writing was drawn up, by which Dupoyster was to fix up a room into a good and respectable saloon for said Barclay, for which Barclay was to pay Dupoyster the sum of two-thirds of the profits for the rent of same for one year, signed by B. S. Dupoyster, by J. C. D. The contract was not so drawn, as this witness states, and the saloon to be run in his name in order to avoid any liability on the part of Dupoyster should the law be violated in the conduct of the saloon. As between the parties to this contract Dupoyster was entitled to two-thirds of the profits for the rent, but here the plaintiff furnished the whisky, etc., to run the saloon and Dupoyster being entitled to two-thirds of the profits is liable as a partner unless the plaintiff knew of this contract, and gave the credit alone to Barclay. The appellee received much of the money, ordered the articles for the saloon through Barclay, and was regarded by Barclay and by the agent of the plaintiff, who sold the goods, as being at the head of the firm. It is difficult to perceive how a party could be deemed as

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to third parties otherwise than a partner who furnished the storeroom in which the goods purchased were sold and received two-thirds of the profits, and the real owner, as is alleged, only one-third. Here is an agreement to participate in the profits of the purchases made by Barclay, and this makes them partners as to the plaintiff, whatever may be the terms of the contract as between themselves. If the plaintiff or his agent knew of the agreement produced by the appellee, and agreed to credit Barclay alone, there is some reason for holding that appellees are not responsible.

In the case of Donley v. Hall & Long, 5 Bush, 548, certain parties agreed to purchase of D. the whisky made at his distillery at a fixed price, and to allow D. one-half the profits over and above the price paid. It was held that the parties purchasing were not liable to a creditor of D. for labor done at the distillery or barrels furnished it. In the case of Lafon v. Chinn, 6 B. M., 305, the credit was given to Caldwell alone, and the contract made by him with the creditor, and not only so, the court further finds that Chinn knew of the contract between Lafon and Caldwell, and looked to the latter alone for his pay. There can be no doubt but if Chinn had been ignorant of the terms of the agreement between Lafon and Caldwell that Lafon would have been held responsible as a partner.

Here the parties were selling some $2,000 or $3,000 per annum, with large profits realized, according to the statement of Barclay, and the party receiving the largest share is held not liable for the goods out of which these profits were made. The fact that the goods were charged to Barclay does not release Dupoyster unless the plaintiff or his agent, knowing the nature of the contract between Barclay and Dupoyster, gave the credit alone to Barclay. The court should have instructed the jury that the agreement made them partners as to the plaintiff, and the latter was entitled to recover unless he or his agent, at the time the goods were sold, knowing of the agreement between them, gave the credit to Barclay. Whether or not both of the Dupoysters were partners is a question of fact for the jury, and in regard to which this court expresses no opinion.

Judgment reversed and cause remanded for a new trial in conformity with this opinion.

FISHBACK v. GREEN, &c.

FISHBACK, &c. v. GREEN.

(Filed March 15, 1888.)

1. Jurisdiction to sell land—In an action to settle an insolvent estate the court may decree a sale of land situated in another county than that in which the action is pending.

2. Judicial sales—Statute of frauds—Where one purchases land at a judicial sale under an agreement with the owner to allow him to redeem, the agreement is enforcible, although not in writing. The purchaser holds the land in trust for the former owner, and, therefore, the statute of frauds presents no obstacle to recovery.

3. Same—Redemption—Even though such an agreement limited the time in which the owner should be allowed to redeem, he will be allowed to redeem after the expiration of that time, time not being material, but he will be required to repay the purchaser not only the purchase money with interest, but all cost he may have incurred.

4. Revivor—The fact that one had not been appointed administrator at the

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time a petition of revivor was filed in his name as such is immaterial, as he was afterwards appointed and qualified as administrator, and the defendant thereafter entered his appearance to the petition, which had remained on file.

H. Clay White and J. J. Landram for appellants.

Wm. Lindsay for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Holt.

A creditor of J. H. Fishback, by an action in proper form in the Grant Circuit Court, sought to have certain acts and transfers of the debtor declared to operate as an assignment of all his estate for the benefit of his creditors, under section 1, article 2, chapter 44 of the General Statutes, commonly known as the act of 1856. The effort was successul. A creditor holding a lien upon a tract of land in Kenton county was made a defendant. He asserted it by proper pleading, and among other relief afforded in the action this land was ordered to be sold, less, however, a homestead of thirty acres, which was set apart to the debtor, but by the judgment was not exempted as to the lien debt in case the balance of the land failed to pay it. After the rendition of this judgment, but before the sale of the land, the lien creditor died. On December 22, 1880, an order was entered reciting that a certain person as his administrator filed a petition of revivor, and that J. H. Fishback, by attorney, entered his appearance to it. This petition set forth the death of the creditor, the appointment of the party as his administrator, and asked the revivor. In point of fact the person named as administrator in this order and petition did not qualify as such until March 10, 1881. At the May term, 1881, of the court, however, this order was entered: "The petition of revivor having been filed herein, and the defendants, J. H. Fishback and W. A. Fishback, having entered their appearance thereto, it is now ordered and adjudged that the judgment herein in favor of the defendant, W. L. Roberts, be, and the same is now, revived against the said J. H. Fishback and W. A. Fishback." Thereafter the land was sold. It failed to pay the lien debt. A judgment was then entered ordering the sale of the thirty acres that had been allotted as a homestead. After this, but before the sale, it was for valuable consideration conveyed by J. H. Fishback to Annie and James F. Fishback. They were, however, pendente lite purchasers, and on September 18, 1882, it was sold under the decree and bid in by the appellee, E. J. Green, for $473.80, he being one of the appraisers, and it being appraised at $1,200. J. H. Fishback alone filed exceptions to the report of the sale, but it was confirmed. Green obtained a deed and an order for a writ of possession, but did not cause it to issue until nearly two years after his purchase. Thereupon John H. Fishback brought one of these actions, seeking the vacation of the judgments above named, and enforcing the habere facias of Green and the appellants. Annie and James F. Fishback brought the other, asking substantially the same relief. By an amended petition, however, they assert that Green bid the land in for the appellant, James F. Fishback, under an agreement with him that he might redeem it, and it is asked that Green be adjudged to be a mere holder of the title in trust.

The two cases present three questions: First. Did the court in Grant county have jurisdiction to decree the sale of the land in

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Kenton county? Second. Were all the proceedings looking to the sale of the land, had subsequent to the death of the lien creditor, void for want of a revivor? Third. If Greenup purchased the thirty acres of land under an agreement with James F. Fishback that he might redeem it, is the contract an enforcible one, and should a court of equity, under all the existing circumstances, exert itself in that direction?

Ordinarily a lien upon land must be enforced in the proper court of the county where the property is situated, and the question arises whether the law is otherwise in an action where it is sought to throw the debtor's estate into insolvency and divide it among his creditors. Section 62 of the Civil Code provides:

"Actions must be brought in the county in which the subject of the action, or some part thereof, is situated—

"1st. For the recovery of real property or of an estate or interest therein.

"2d. For the partition of real property except as is provided in section 66.

"3d. For the sale of real property under title 10, chapter 14, or under a mortgage, lien or other encumbrance or charge except for debts of a decedent."

Section 65 says: "An action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified."

It will not be questioned but what lands of a decedent, lying in other counties than that where the suit to settle his estate may be pending, may be sold under a decree rendered in it. This is necessary to save cost and multiplicity of suits. The least reflection dictates that any other course would be improper. So cogent are the reasons for it that if the statutory provision upon the subject were of doubtful construction it would be so construed. Section 3, article 2 of chapter 44 of the General Statutes, in speaking of suits to throw the debtor into insolvency, provides: "Any number of persons interested may unite in the petition, but it shall not be necessary to make any persons defendants except the debtor and the transferee, and the action and proceeding as to the mode of proving claims and otherwise shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted so far as the same are applicable." It is true that the first section of the same article says: "But nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution," but, considering the subsequent section already quoted, as well as the provisions of the Code supra, and the manifest reasons why they should be so construed when viewed together, it seems plain to us that the words "vitiate or affect," as used in the statute, relate to the validity of the mortgage, and that in an action to settle an insolvent estate the court may decree the sale of land situated elsewhere in the State than in the county where it is pending. "The subject of the action" in such a suit is the settlement of the entire estate of the insolvent, and not one particular portion of it, and the Code provides that it "must be brought in the county in which the subject of the action, or some part thereof, is situated." The object of an action, such as we are now considering, is to settle and distribute the estate of the insolvent among his creditors. The Grant court had jurisdiction of the subject of the action, and the proceeding in rem was incidental. We will suppose the insolvent debtor owns land in a dozen dif-

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ferent counties. If the construction contended for is to prevail, then that many suits will be necessary to the desired end. This can not be. Common sense forbids a construction leading to such needless expense and litigation.

With the death of the lien creditor his cross action abated. Without a revivor the subsequent proceedings would have been void. Either a service of the order of revivor or an entry of appearance to it by the adverse party was necessary to render it complete. It is evident that when the petition of revivor was filed and the appearance of J. H. Fishback entered to it by attorney there was in fact no administrator of the deceased creditor. The petition, however, remained on file, and soon after the person therein named as the personal representative did in fact become such, and the action then proceeded without any suggestion from the debtor that it had not been properly revived, although he was taking steps in it, and in fact excepted to the report of the sale to the appellee, Green. It is unecessary to determine, however, whether this was not a waiver of the statutory requirement as to the service of the order of revivor, nor does the question of the power of the attorney who entered the appearance of the debtor to the petition of revivor to do so, whether, owing to his employment by other parties to the suit, he occupied such a position that the law and public policy would not admit of his doing it, although he may have acted, as he undoubtedly did, in good faith, arise, because the order subsequently made at the May term, 1881, and cited above, shows that the debtor personally appeared in court and entered his appearance to the petition of revivor then on file.

It appears that upon the day when the Green land was sold James F. Fishback was proposing to purchase it. He applied to Green to become his security. He declined, but told Fishback that he would buy it, and he (Fishback) could become his security, and then pay the purchase money and redeem the land. It is unnecessary to review all the evidence upon this question. When all of it is considered there is no doubt but what Green bought the land in for Fishback, and under an agreement that he might redeem it by paying the purchase money with its interest. All of the circumstances strengthen this conclusion. Several witnesses, including one introduced by the appellee, Green, prove in substance that he said so. He contends that the redemption privilege of Fishback, under the agreement between them, was limited in time, to wit: If he repaid the purchase money within a year from the time of the sale, then he was to have the land back, but if he did not then Green was to hold it. This right the law already gave him in the event the land did not bring two-thirds of its appraised value. It is sufficient to say that there is some conflict of testimony as to whether the right to redeem was under the agreement thus restricted. Green allowed James F. Fishback to remain in possession of the property without any effort to disturb him for nearly two years after the sale. After it was made Fishback, at a considerable cost, built a barn upon the place and otherwise improved it. The conduct of the parties speak louder than their words even. It is perfectly evident that the purchase was made by Green for Fishback. He bid it in at $473.80, when, as one of the appraisers, he had just said it was worth $1,200. If judged by the entire transaction the land was to be held by Green merely as security for the money, then the time of redemption is not material. We are disposed to so consider it. This is equitable. If this view be not adopted then Green gets the land for a fraction of its value, together with the

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improvements put upon it, evidently in good faith, by Fishback since the sale.

An agreement by A to bid in land at a sale and hold it subject to an agreement with the owner to redeem it is enforcible. It is not a sale by A, but he holds it in trust for the former owner. The statute of frauds, therefore, presents no obstacle to a recovery in such a case. (Martin v. Martin, 16 B. M., 8; Miller's Heirs v. Antle, 2 Bush, 407; Green v. Ball, 4 Bush, 586.)

The appellants, Annie and James F. Fishback, are now asking equity, however. Their pleadings show that they were slow in setting up that the purchase by Green was for James F. Fishback's benefit. He has never brought the money into court to repay the appellee, Green, nor has he tendered it to him. If any relief be granted him it should, therefore, be upon terms that he who asks equity must do equity.

The judgment in the case of John H. Fishback against E. J. Green, &c., is affirmed, but under the peculiar circumstances the judgment in the case of James F. Fishback, &c., against E. J. Green is reversed and cause remanded, with directions to the lower court to afford the appellant, James F. Fishback, a reasonable time within which to bring the purchase money paid by the appellee, Green, into court for him, together with interest thereon from the time of payment, and Green's cost in both this and the lower court in this suit, and if he does so then the lower court will cancel the commissioner's deed to Green and set aside all subsequent proceedings in his favor, looking to the possession of the land, and order the money paid to him, but if this be not done then the court will dismiss this action at the cost of appellants.

MARSHALL'S TRUSTEE v. RASH, &c.

(Filed March 15, 1888.)

1. Trust estate subject to debts—A testator can not, nor can any one, vest property or funds in trustees for the use of another without subjecting it to the debts of the cestui que trust, and, although a discretion may be given to the trustee in the management and control of the estate, and as to the amount of profits therefrom to be paid, and the manner of paying them to the person for whose use and benefit it is held, the rights of creditors are not thereby impaired, for such discretion is subject to the control of a court of equity.

2. Same—The estate itself may be subjected and sold; or, if practicable, and to the interest of the parties, the rents, interest or profits may be subjected and applied by a court of equity to the payment of the debts of the cestui que trust.

A testator devised real estate to his two brothers, John and William, providing that John's part should be held in trust by his brother William, "who shall manage and control John's part and pay him only such parts of the proceeds and profits as in his discretion the said William may think best, the intention being to invest William with the legal title to John's part to be held in trust as aforesaid." John's creditors seek to subject his interest, the land having been divided. Held—That as it does not appear that the debts could have all been satisfied in a reasonable time from the rents and profits, the court did not abuse a sound discretion in directing a sale of the land for that purpose.

Yeaman & Lockett for appellant.

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H. F. Turner and R. H. Cunningham for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

The sceond clause of the will of J. B. Marshall is as follows: "All the rest and residue of my estate of every description, including what is left of my tract of land after laying off said fifty acres to Mrs. Hickman, I give and bequeath, subject to the payment of all my just debts, to my two brothers, Wm. J. Marshall and John H. Marshall, to be divided equally between them, but subject to this condition: That my brother John's part is to be held in trust for him by my brother William, who shall manage and control John's part, and pay him only such part of the proceeds and profits as in his discretion the said William may think best, the intention being to invest William with the legal title to John's part, to be held in trust as aforesaid."

It apears that after the death of the testator a division was made of the land by commissioners, and that part held by Wm. J. Marshall in trust separated from the other, and appellees, creditors of John H. Marshall, instituted their several actions, which were consolidated, to subject his interest in the land so allotted, and in all other property held in trust for him under the will, and whether the judgment for sale of the land to satisfy the debts was proper is the question now before us.

Section 21, article 1, chapter 63, General Statutes, is as follows: "Estates of every kind held or possessed in trust shall be subject to the debts or charges of the person to whose use or for whose benefit they shall be respectively held, or possessed as they would be subject, if those persons owned the like interest in the property held or possessed, as they own or shall own in the use or trust thereof."

That provision has been the law since 1793, and often construed and applied in cases before this court, and from the various decisions on the subject it may be regarded as settled that:

1st. As said in Samuel v. Johnson, 12 B. M., 479, "a testator can not, or can any one, according to our laws, vest property or funds in trustees for the use of another without subjecting it to the debts of the cestui que trust."

For the language of the statute is so direct and explicit as to preclude entirely the belief it was intended any conditions or restrictions contained in a will or deed should operate to exempt an estate so held from the debts and charges of the person to whose use and for whose benefit it shall be held.

2d. Although a discretion may be given to the trustee in the management and control of the estate, and as to the amount of profits therefrom to be paid, and in the manner of paying them to the person for whose use and benefit it is held, the rights of creditors are not thereby impaired, for such discretion is to be reasonably and in good faith exercised for the benefit of the beneficiary of the estate, and incidentally for the protection of his creditors, and is always subject to the control of the court of equity.

3d. As said in Eastland v. Jordan, 3 Bibb, 186, when a share held in trust was subjected and sold, "it is not the trust, but the estate itself held in trust, which is made subject to the debts of the cestui que trust," and consequently the estate, whether it consist of land or personal property, may be subjected and sold, or, if practicable, and to the interests of the parties, the rents, in-

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terest or profits may be subjected and applied by a court of equity to payment of debts of the cestui que trust.

In Pope's Ex'or v. Elliott, 8 B. M., 56, it was held that the bequest in that case was, by the terms of the will, different from a devise of property or money in trust for the use and benefit of an individual and from a devise of specific property in trust to apply the proceeds or profits to his support, and, therefore, only such interest on the fund as had accumulated and was in the hands of the trustee could be subjected.

In White v. Thomas, 8 Bush, 661, it was held that a dwelling house and land devised was not liable by reason of a proviso in the will that the property should not be subjected to alienation or sale by the cestui que trust or for her debts, and any attempt to do so should terminate her right to use and enjoy the property.

In Davidson v. Kemper, 79 Ky., 5, it was held that the beneficiaries, by reason of the peculiar provisions of the will, took no such interest or estate under it as could be made subject to their debts, or be enforced against the trustee.

It is not necessary to refer particularly to the provisions of the wills in the three cases just cited, nor to determine whether they are allowable exceptions to the rules we have laid down here, for the circumstances of these cases are wholly different from the one now before us, and would not serve to illustrate the question we are considering, for, by the will of J. B. Marshall, the estate devised is plainly, in the meaning of the statute, to be held in trust for the use and benefit of John Marshall, and can not be diverted from that object, but the trust may, if necessary, be enforced by a court of equity at the instance of the beneficiary, and as a logical result the estate may be subjected to payment of his debts.

It does not appear that the debts could have all been satisfied in a reasonable time from the rents and the profits, and the court did not, therefore, abuse a sound discretion in directing a sale of the land for that purpose.

Judgment affirmed.

SANDERS v. MOORE.

(Filed March 17, 1888—Not to be reported.)

1. Ejectment—Instructions—In this action by appellant against appellee to recover possession of land of which appellee had been in actual possession for more than twenty years, claiming it, as he alleges, as his own, neither party made out a perfect title, and the only question was whether appellee, after he entered, agreed to hold as the tenant of appellee's vendor. The court, on its own motion, instructed the jury that if appellee, after entering on the land, agreed with V., appellant's vendor, that he would hold the land for him until he completed his title and then buy it from him, then defendant (appellee) is estopped to deny the title of V., and they must find for plaintiff (appellant). This instruction is objected to because it singles out particular facts proved, and makes the right to recover depend on the truth or falsity of such facts. Held—That if the instruction is objectionable it is more objectionable to defendant than plaintiff, as the very facts recited in the instruction are those proved by the plaintiff's witnesses, and upon which his recovery depends. Moreover, it follows the instruction asked by plaintiff and refused.

2. Same—Second verdict—As there are many facts inconsistent with own-

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ership in appellant's vendor, and this is the second verdict for appellee, the court is not inclined to disturb it.

T. C. Bell for appellant.

Samuel Avritt and John W. Lewis for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is the second time this case has been brought here for revision. The real, and in fact the only, controversy in this case is whether or not the appellee entered upon the land in dispute, or having entered, agreed to hold as the tenant of the vendor of the appellant.

This action was instituted in the year 1871, and on the first trial, a judgment having been rendered for the appellee an appeal, was taken, resulting in a reversal for the reason the court below refused to tell the jury that if the appellee entered as tenant of applelant's vendor, or after entering agreed to hold under his title, he could not, under the facts proven, deny his landlord's title or that of his vendee. On the return of the cause, the evidence being in substance the same as on the former trial, a verdict and judgment were again rendered for the appellee. It is urged by the appellant that the court failed to follow the law as directed in the former opinion, and also erred in refusing to instruct the jury as asked by him.

It is evident that neither party has made out a perfect title, and the appellee having been in the actual possession of this land for more than twenty years prior to the bringing of this action, claiming it, as he alleges, as his own, the only inquiry to be considered is as to the manner of his holding after he entered upon and took the actual possession. There is no pretense that the appellee entered on the land as the tenant of the vendor of the appellant, but having gone on the land without right that he agreed with Veach to hold the land as his tenant, and to purchase it from Wm. Veach as soon as the latter obtained title from the heirs of Willis, Veach holding Willis' bond for title. The testimony of more than one witness establishes this agreement, and that of others showing an offer by the appellee to purchase the land from him after he (the appellant) purchased it from his father. The evidence makes a strong case as to the existence of the tenancy, and the recognition by the appellee of Veach as his landlord. Moore denies the tenancy, and also the agreement to hold for Veach, and says the offer to purchase was in the nature of a compromise. It is a singular but admitted fact that Moore has been in the actual possession of this land for over thirty years; that he paid the taxes upon it for twenty years and remained there unmolested until this action was brought in 1871. While on the land he purchased it of other claimants, or a part of it, and Veach wrote the bond for title. He exhibited deeds and patents covering the land that were hostile to the title of the plaintiff, and while objections were urged to the testimony as to the boundary embraced by them, we see no reason why they were not competent to show an adverse claim as well as an adverse holding. The land was termed by some as congress land, and when the appellee settled upon it it was in a wild state, and subject to the depredations of trespassers. There are many facts established inconsistent with the claim that appellee was holding under the plaintiff's title, and if the instructions were proper this case should be affirmed. A number of instructions were asked by both sides and refused, and some of them were unob-

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jectionable, still the court on its own motion gave the jury such instructions as embraced the law of the case. The court told the jury that if the appellee, after entering on the land, agreed with Veach that he would hold the land for Veach until he completed his title, and then buy it from him, then the defendant is estopped to deny Veach's title, and they must find for the plaintiff.

This instruction is objected to because it singles out from the testimony particular facts proven, and makes the recovery depend on the truth or falsity of such facts. If objectionable it seems to us the instruction is more objectionable to the defendant than to the plaintiff, as the very facts recited in the instruction are there proven by the plaintiff or his witnesses, and upon which his recovery depends. The instruction given by the court follows the instruction asked by plaintiff. The instruction by plaintiff told the jury that if the defendant occupied the land under an agreement to hold it for Veach, then Moore held as tenant and is estopped from denying his title, and must restore the possession. It is clear that the appellee made no entry under Veach, and equally clear that if no agreement was made after he entered to hold under Veach that this verdict was right. This was the only issue or fact to be established, and the subsequent conduct of the appellee as to his offer to buy was evidence to show that such an agreement was made. The agreement was proven, and the subsequent acts of Moore offered to confirm its truth. The jury believed Moore, and rejected the testimony offered by the plaintiff. Moore's testimony was strengthened by his long-continued possession; by the payment of taxes for twenty years or longer; by a possession of the land in his vendors prior to his entry upon the land in the year 1851. He went there in 1851, and was there when this suit was brought in 1871. He paid no rents. There was no cultivation of the land by the appellants' vendor; no act reducing it to possession; no claim asserted hostile to Moore, but a loose conversation conducing to show the understanding of parties as to the mode of Moore's holding. There are many facts inconsistent with ownership in Veach, and as this case has been tried a second time, resulting in a second verdict for the defendant, we are not disposed to disturb it.

Judgment affirmed.

PRYOR v. CASTLEMAN, &c.

(Filed March 17, 1888—Not to be reported.)

Deeds—Reversion—A conveyance by a father to another in trust for his daughter for life, and upon her death to her children, but if no children, then to the legal heirs of the grantor created a reversion in the grantor which he could pass by deed.

John Carroll for appellant.

Wm. Carroll for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Lewis.

In 1852 Peter Foree, in consideration of love for his daughter, Frances Crutcher, conveyed a tract of about 300 acres of land to her husband, James Crutcher, the habendum clause of the deed

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being as follows: "To have and hold the land unto said James Crutcher in trust for the use and benefit of the said Frances Crutcher and any children which may be lawfully born of her body during the natural life of the said James Crutcher and Frances Crutcher, his wife, but it is distinctly understood that at the death of the said Crutcher and wife said trust shall cease, and the fee simple title shall vest absolutely in the children of said Frances, born in lawful wedlock, and if no children, then to my legal heirs." In 1866, in virtue of a judgment of court, the land was sold and the proceeds invested in the tract in contest lying in the same county, and a deed was executed therefor by one Gist to said Crutcher for the same purpose, and containing the same terms and limitations as were in the one first mentioned. In 1876 Peter Foree, together with his children then living, and all his grandchildren, except the two who are defendants to this action in the lower court and now appellants, executed a deed to Frances Crutcher, her husband, James Crutcher being dead, by which they conveyed, or undertook to convey, to her the absolute title to the tract which had been previously conveyed by Gist. In that deed the conveyance by Peter Foree in 1852, the exchange of the tract of 300 acres for the one conveyed by Gist, the fact that Frances Crutcher had no children, and the desire of her father, who was still living, as well as the other parties who, at his death, would inherit as his heirs at law, to invest her with the fee, were recited as the inducement and consideration moving the grantor. This action was instituted in 1885 by Frances Crutcher and her then husband, George C. Castleman, against appellants, Mary and Sallie Pryor, the only two of the heirs at law of Peter Foree who had refused to unite in the deed of 1876, and in the petition the plaintiff asked that the title of Frances Castleman to the land be quieted, and it be adjudged the defendants had no estate or interest in it, and the demurrer to the petition having been overruled and judgment rendered as prayed for the defendants appeal.

By the terms of the deed of 1852, upon the death of Frances Crutcher the fee simple title to the land conveyed was to vest absolutely in her children born in lawful wedlock, but if no children, then to the legal heirs of the grantor. Upon the death of Frances Crutcher, having had no children, the grant would be determined, and the land would have returned to the grantor if then living. If not, to his right heirs, and thus at common law, and as here understood and recognized, an interest in reversion was retained by him, for a reversion is nothing else than "a return of the estate to the original owner after the limited estate carved out of it had determined."

"At common law if a man seized of an estate limited to one for life, remainder to his own right heirs, they would take not as remaindermen, but as reversioners, and it would be, moreover, competent for him, as being himself the reversioner, after making such a limitation, to grant away the reversion, and when he made the limitation, after a life estate to his own heirs by will, they took as reversioners and not as purchasers." (Washburn on Real Property, volume 2, page 395.) In Alexander v. De Kermel, 81 Ky., 345, the testator had conveyed a lot of land to a trustee for his own use during life, and to his issue, if any, in fee. If none then in equal parts to two half brothers, or the survivor, or to the issue of either; and if both of them should die before him without issue said property to go to his heirs. The two half brothers having died without issue, he afterwards made a will devising the lot to another than his heirs at law, and it was held by this court the common law doctrine of reversion prevails in

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this State, and that the deed made by the testator created a reversion in him, which he had the right to pass by will. It seems to us the ruling in that case is decisive of the question of the right of Peter Foree to convey the reversion in fee to his daughter, and that she has, by virtue of that conveyance, an absolute title to the land. We do not think it makes any difference that the tract conveyed in 1852 was exchanged for the one now in contest, for by the exchange Peter Foree acquired the same interest in the second that he had in the other tract.

Judgment affirmed.

Chief Justice Pryor not sitting.

KENTUCKY SUPERIOR COURT.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. HOUSEMAN.

SAME, &c. v. SAME.

(Filed Feburary 23, 1888.)

1. Railroads—Rights of creditors—Property owned by a railroad company not pertaining to the operation of the road, nor capable of being so used, may be taken in execution and sold.

Therefore a creditor may, by a proceeding under section 439 of the Code, subject a debt due the company, when it is conceded that the debt sought to be subjected is not needed for operating purposes, the other earnings being more than sufficient.

2. Same—Mortgage of income—Although a railroad company has mortgaged its income under authority conferred by its charter, the income, until the mortgagee either takes possession under the provisions of the mortgage or invokes the judicial power, belongs to the company, is subject to its control and is liable to its creditors.

Holmes Cummings for appellant.

Robertson, Smith & Robbins for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Bowden.

1st. The rule in Phillips v. Winslow, 18 B. Mon., 431, and similar cases, is for the protection of the public against the calamity of delaying or stopping transportation, and not to shield the company from the ordinary process by which debtors are compelled to pay. Property owned by it, not pertaining to the operation of the road nor capable of being so used, may be taken in execution and sold. (Lincoln County Court v. Louisville & Nashville R. R. Co., 3 Ky. Law Rep., 438.) The same principle will sustain a proceeding under section 439 of the Code, when it is conceded, as in this case, that the debt sought to be subjected is not needed for operating purposes, the other earnings being more than sufficient. It would be a misapplication of a salutary rule to require holders of small claims to go into equity to have a receiver appointed, or even to proceed against the company to have a statement of its chief officers showing a surplus over running expenses, so as to reach that surplus by process of contempt,

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when there is no question as to the existence of net earnings. We are not aware that this exact question has been decided by our Court of Appeals. In Wilder v. Shea, 13 Bush, 128, it was not presented. Shea did not seek to garnish a debtor to the company, but one of its officers. As the officer was not a debtor to the company there could be no garnishment. It was really an effort to compel an officer of the company to pay its debt, and with regard to that effort it was held that he could not be required to pay when the earnings were not sufficient for running expenses, and, moreover, that such a proceeding should be against general officers and not against a subordinate who may be found with money in his custody, but all of this presupposes, and it was so held, that a company with net earnings can be forced to pay. In this case the company's answer in the attachment suit, the petition of the company and mortgagees, to have the attachment proceedings enjoined, admit that the earnings were more than enough to pay running expenses. In the face of this admission we see no reason why the cheap and ordinary method of enforcing judgments against debtors having no property subject to execution may not be permitted. In Emerson v. E. & N. A. Ry. Co., 67 Me., 387, its property was not questioned. So in Gilman v. Tel. Co., 91 U. S., 603.

2d. The charter does not seem to authorize a mortgage of income to secure the bonds referred to in section 5, and even if it does so with regard to those referred to in section 6 the evidence shows that the net earnings, exclusive of the sum attached, was more than enough to pay the interest on debts incurred under section 5, but if the authority existed it is manifest the intention was that the company should remain in possession and receive the income until the mortgagees either took possession under the provisions of the mortgage or invoked the judicial power to secure the income, and in such case, until action is taken, the whole income belongs to the company, is subject to its control and is liable to its creditors as if no mortgage existed. (Gilman v. Tel. Co., 91 U. S., 603; Melendy v. Rice, 94 U. S., 800; Fosdick v. Scholl, 99 U. S., 253.) The mortgage prescribed the manner in which the mortgagees might assert their claim to the income, and it had not been so asserted. Having no right to control the conduct of the company with regard to earnings while they permit it to remain in possession and operate the road for its own benefit, they can not availably intervene between the company and its creditors, to whom the company might make payment, notwithstanding the intervention. They bring no right of their own to strengthen the company's objection, nor any that could overrule its consent to the payment demanded. What right they have can not be asserted against the creditor of the company so long as they decline to assert it against the company itself. (Douglass, &c. v. Cline, &c., 12 Bush, 613; Newport & Cin. Bridge Co. v. Douglass, Trustee, &c., 12 Bush, 673.)

The judgment in each case is affirmed with damages.

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SUPERIOR COURT ABSTRACTS.

ELKIN v. GILL.

Filed February 29, 1888. Appeal from Garrard Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. The rule of caveat emptor generally applies to judicial sales, and whether or not this case is an exception to that rule is not necessary to be determined, as the action by the purchaser to recover what he paid for the land is barred by limitation.

2. Limitation—Where the purchaser is put in possession of the land but afterwards evicted by one having a better title, in determining whether his action to recover what he paid is barred by limitation his right of action is to be deemed to have accrued at once upon the payment of the money and not when he lost the land, the persons who received the money not being parties to the deed or bound by the covenants therein.

W. O. Bradley for appellant; R. P. Jacob and Anderson & Herndon for appellee.

BARBER v. EDELIN, &c.

SAME v. SAME.

Filed February 29, 1888. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Ward, reversing in former, and affirming in latter case.

1. Supersedeas—Injunction—If an appeal be taken with supersedeas from a judgment dissolving a temporary injunction, the injunction is continued in force by the supersedeas bond.

If the judgment be affirmed, it must follow that the supersedeas bond covers the damages sustained by reason of the injunction during the pendency of the appeal, and, therefore, the appellants, whether or not they have signed the supersedeas bond, may be sued with the surety in the supersedeas bond for such damages.

2. Damages on injunction bond—No attorney's fee can be recovered as a part of the damages on an injunction bond when the purpose of the injunction was for a perpetual injunction, and the temporary injunction was sued out with a view to its being made perpetual. That the attorney's fee may have been paid for the sole purpose of having the temporary injunction dissolved does not alter the rule.

3. Depositions—As there is nothing to show why witnesses whose depositions were offered and rejected were not examined in person, the court did not err in rejecting them.

John Kelly for appellant; John Fulton for appellees.

BAILER v. LEATHERS, &c.

Filed February 29, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Failure of sheriff to return execution—On issue joined as to whether the sheriff's failure to return an execution for more than thirty days after the return day was without any reasonable excuse, it was improper to allow the sheriff to testify as to what the deputy sheriff said when he delivered the execution to the sheriff, the delay having then already occurred. What he may have said to the sheriff was not a part of the act to be proved, but was a mere declaration concerning a past transaction.

2. Same—A capias ad satisfaciendum is a "writ of execution" within

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the meaning of the statute which denounces a penalty against sheriffs who fail to return writs of execution within thirty days after the return day.

2. Same—It was error for the court to instruct the jury "not to find for the plaintiff more than one cent damages." If the plaintiff was entitled to recover at all for the failure to return the execution within thirty days after the return day, he was entitled to recover 30 per cent. on the sum named in the execution.

4. Same—As the failure to return was admitted, the plaintiff's case was made out unless the defendant showed a reasonable excuse for the failure. While plaintiff must allege that the failure to return was without reasonable excuse, that allegation is supported by proof that the execution was placed in the officer's hands while in effect, and was not returned within thirty days after the return day.

5. Same—Under the second count of the petition claiming damages by reason of the failure of the sheriff to arrest the defendant in the capias, the plaintiff was entitled to recover all damages, not exceeding the amount of his debt, which he probably sustained by reason of the failure of the sheriff to arrest the defendant. The fact that the defendant was insolvent is not conclusive against plaintiff's right to recover more than nominal damages.

Simmons & Schmidt for appellant; Hallam & Myers for appellees.

OWENTON, SQUIRESVILLE AND BALL'S LANDING TURNPIKE ROAD CO. v. SMITH.

Filed February 29, 1888. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Subscription to turnpike—Variance between petition and exhibit—In an action by appellant against appellee it alleges in its petition a written contract by appellee to pay to the plaintiff for the construction of its road a certain sum, and to take stock in the road for that amount. The route and termini of the road named in the writing filed as the basis of the action do not appear to be the same as those of appellant's road, and there is no allegation showing that they are the same, or that they are embraced or included in appellant's road. Held—That the court can not judicially know that they are the same, and, therefore, a demurrer to the petition was properly sustained.

J. J. Orr and J. W. Greene for appellant; Montgomery, Lindsay & Botts for appellees.

ALTER, FORWOOD & CO. v. HOLLIDAY & CO., &c.

Filed February 29, 1888. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Bowden, reversing.

Sales of personal property—Passing of title—Appellants sold goods to W. in July to be delivered not earlier than September 15. There is testimony conducing to show that the goods were to be sent in September, billed as of October 1, and that it was agreed that W. should have the right to decline taking them if he then did not want them. The goods were delivered about the middle of August and W. at once declared that he would not take them and ordered his clerk not to open the boxes, which were placed to themselves and not opened. September 11 or 12 W. ordered his clerk to mark them back to appellants, and send them to the depot "by the first chance." Before September 15 the goods, not having been returned, were attached by creditors of W. as his property. In this contest between appellants and the attaching creditors, Held—

First. If the agreement giving W. the right to elect to take or not to take the goods existed, appellants could not require him to make a decision before October 1, and in the meantime there was nothing of which it was necessary for him to give appellants notice. He had no duty to perform except to see that the goods were properly housed.

Second. If there was no such agreement, W.'s conduct in holding the goods for nearly a month without giving appellants notice that he did not mean to accept the delivery as that for which he contracted would preclude him from relying on the premature delivery, and, therefore, the claim of the attaching creditors must prevail.

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When goods are ordered, and a date is fixed for their delivery, and they are sent earlier, the purchaser should give notice if he does not mean to accept the delivery then made as that for which he contracted.

Third. The court having erroneously instructed the jury to find for the "defendants," in a certain event, it can not be assumed, upon the idea that "plaintiffs" was intended, that the jury so read the instructions, as such an assumption would make the jury the judges of the law under conditions excluding the power to except.

Lockhart & Lyng for appellants; Emmet M. Dickson for appellees.

MURPHY v. CLUTTERBUCK, &c.

Filed February 29, 1888. Appeal from Boone Circuit Court. Opinion of the court by Judge Bowden, reversing.

Taxation—Appellant, by her petition, sought to enjoin the sheriff from selling her property under his levy for $316.50, a special tax in aid of a turnpike, and to enjoin the commissioners from seeking otherwise to enforce that tax. She also sought to enjoin the commissioners from proceeding to enforce any tax. The answer showed that the tax of $316.50 was illegal, and, therefore, showed that the plaintiff was entitled to the relief sought against it. The commissioners filed a cross petition, asking the chancellor to make an assessment, which was done. Held—That this was error. The county court alone had power to make the assessment.

Hallam & Myers for appellant; J. J. Landram for appellees.

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KENTUCKY COURT OF APPEALS.

MADDOX, EX'OR, &c. v. WILLIAMS, &c.

(Filed March 27, 1888.)

Void judgment—Bill of review—R. died intestate, leaving four heirs, E. and A. being two of the four. A. qualified as administrator, and, by consent of the other heirs, took charge of the real estate. A. died testate, E. being the devisee of almost his entire estate, of which she, as his executrix, took control. Appellees, the other two heirs of R., brought this action against E. as an individual, seeking a settlement of the accounts of A. as administrator of R., and asking that she be made to account for whatever may have come to her hands belonging to R's estate, and praying for a sale of his lands and a division of the proceeds among the heirs. Various defenses were presented, among which was the claim that appellees had received their full portion of the estate of R. Upon a settlement of the accounts judgment was rendered against E. for a large amount, with direction that it be paid out of her half of the proceeds of R.'s land, which was ordered to be sold. Upon appeal that judgment was affirmed. Thereafter E. offered to file an amended answer and cross petition as executrix of A., and also her individual answer and cross petition, both of which were rejected. Her individual answer alleged that she had not been proceeded against as heir of R., but only as executrix of A., and that, therefore, the judgment should be modified in so far as her interest in R.'s estate was ordered to be subjected to the payment of the judgment. By her answer and cross petition as executrix, she avers the insolvency of the plaintiffs and set up various claims against them, which she asks to have audited and allowed prior to the distribution of any part of the estate of R. Held—

1. The judgment was not void in so far as it subjected the interest of E. in the estate of R., and the question is res judicata.

2. A judgment that has been affirmed by this court, or which has been rendered in pursuance of its mandate, may be vacated by a petition in the lower court, but it must be done upon some of the grounds enumerated in section 518 of the Civil Code, and for such errors as could not be noticed by this court upon the appeal. The insolvency of the plaintiffs is not a ground for annulling or modifying the judgment.

A. E. Richards and Thos. R. Phister for appellants.

O'Hara & Bryan for appellees.

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Appeal from Campbell Chancery Court.

Opinion of the court by Judge Holt.

Robert Maddox died intestate and unmarried in 1868, leaving as the heirs of his estate, which consisted of both realty and personalty, his three sisters, the appellant, Eliza Johnson, the appellees, Elizabeth Williams and Artemesia Durst, and his brother, Alexander Maddox. The latter qualified as his administrator, and as such representative obtained control of the personal estate, and also, by consent of the other three heirs, took charge of the real estate. He not only rented it out and collected the rents, but sold a portion of it and collected the purchase money. He never made any settlement of his accounts either as administrator or agent, and died testate in 1874, his sister, the appellant, Eliza Johnson, being, with the exception of two small legacies, the devisee of his entire estate. She, as his executrix, took control of it. In 1874 the appellees brought this action against her, asking a settlement of the accounts of Alexander Maddox as administrator of Robert Maddox; that she be made to account for whatever may have come to her hands belonging to the estate of the latter, and praying also for a sale of his Campbell county lands, and a division of the proceeds among the heirs.

The suit appears, from the petition, to have been brought against her as an individual. She is not styled in it as the executrix of Robert Maddox. It, however, avers that she had qualified as such under a pretended will, and the security of Alexander Maddox, as the administrator of Robert, was made a party, but no decree rendered against him. Various defenses were presented, among which was the claim that the appellees had received their full portion of the estate of Robert Maddox. The cause was referred to a commissioner to settle the various claims and accounts arising out of both the administratorship and agency of Alexander Maddox. It resulted in a decree in January, 1879, for a sale of the land and a judgment in favor of the appellees for one-half the proceeds, and for about $2,700, with interest, against the appellant individually, with the direction that her half of the money arising from the sale be held to satisfy the judgment against her. She appealed to this court, and the judgment was affirmed on February 9, 1884. The mandate of this court was filed in the lower court on May 12, 1884, and thereafter, but upon the same day, the appellant, as the executrix of Alexander Maddox, offered to file an amended answer and cross-petition. Two days thereafter she also moved to file her individual answer and cross-petition. Both were rejected, and of this she now complains.

The last named pleading avers that she had not been proceeded against as an heir of Robert Maddox, but only as the executrix of Alexander Maddox; that as such heir she had inherited one-fourth of the land, and that the judgment of 1879 should be enjoined or so modified that her interest derived from Robert might be allotted to her and not sold subject to it. It had, however, been rendered five years before. She was individually a party defendant to the suit. It proceeded upon the ground that Alexander Maddox had, as administrator, obtained the most of his brother Robert's estate, and that then the appellant acquired the estate of Alexander, including that acquired by him as administrator. The assignment of errors upon the former appeal was in the name of the appellant, both individually and as executrix. It substantially presented the same question as does this pleading, and it was then relied upon in argument by her coun-

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sel. Beyond doubt the judgment was not void, and the question is res judicata.

Turning now to the consideration of the amended answer and cross-petition offered by her as executrix, we find that it avers the insolveny of the appellees; sets up various claims against them, and asks that they be audited and allowed in her favor prior to any distribution of the estate of Robert Maddox. Among them is one for compensation to her for caring for and renting out his real estate since the death of Alexander Maddox; another for taxes thereon paid by her, a portion of which occurred prior to Alexander's death, and the balance during the time the appellant was in charge of the property; also for her attorney's fees in this suit and in another suit by the appellees against her, in which they were unsuccessful, and for her costs in it; also for money advanced by her in September, 1874, to the appellee, Artemesia Durst, for rent of a house occupied by her since the death of Alexander Maddox, belonging to the appellant, and for an account of Alexander Maddox against Robert Maddox.

The pleading having been rejected by the court, its averments upon the question now presented must be taken as true. Under the old practice these claims, so far as they arose subsequent to the judgment of 1879, could not furnish ground for a bill of review. Those then in existence might, upon a proper state of pleading and facts.

Upon the affirmance of a judgment by this court, or a direction from it to enter one of a particular character, the lower court could not disobey the mandate. It was imperative. The proper practice was and is to file the mandate and enter a judgment accordingly, but even after this was done a bill of review under the old practice could be maintained upon a proper state of case. Newly discovered facts, or the recent discovery of written testimony of a permanent and unerring character, would authorize it. No error could be relied upon, however, which might have been presented and decided by this court upon the appeal.

In other words, if the bill was of such a character that it would have authorized a review and vacation of a judgment after the expiration of the term at which it was rendered, then it was maintainable even to the extent of avoiding the mandate of this court. (Denny v. Wickliffe, 1 Met., 216.)

This practice and these principles of courts of equity have not been changed by the Code of Practice, although a bill of review, eo nomine, is unknown to it.

Under the present practice a judgment that has been affirmed by this court, or which has been rendered in pursuance of its mandate, may be vacated by a petition in the lower court, but it must be done upon some of the grounds enumerated in section 518 of the Civil Code, and for such errors as could not be noticed by this court upon the appeal.

In the case now before us the appellant is seeking to modify or annul, at least pro tanto, the judgment of 1879. She can only do so upon some ground which then existed and which is embraced by the Code provision. Her pleading does not come within it. It sets forth none of the grounds upon which, by the Code, a judgment may be vacated or modified after the expiration of the term at which it was rendered. So far as the claims asserted in it may have existed when or before the judgment was rendered in 1879, no reason is given why they were not then asserted.

The judgment and its subsequent affirmance by this court ended the case, subject only to be opened and the litigation continued in this particular case upon some of the grounds provided by the

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Code. Unless this were the rule a suit might be protracted almost without end.

The appellant appears to rely upon the insolvency of the appellees as a ground for annulling or modifying the judgment. Indeed this is the only reason presented.

Whether by an independent action she could have made her claims available as against the judgment against her, is not now a question before us, as such mode of proceeding was not adopted. In support of these views see McLean v. Nixon, 18 B. M., 768; Speak, &c. v. Mattingly, &c., 4 Bush, 310, and Scott, &c. v. Scott's Ex'or, &c., 9 Bush, 174.

Judgment affirmed.

CHAPMAN'S DEVISEES v. CHAPMAN'S ADM'R, &c.

(Filed March 27, 1888.)

Devise—Life estate—Interest—When one is entitled to the interest on stocks or bonds during his life, the interest that has accrued thereon at the time of his death goes to his representative and not to the remainderman.

A testator directed that his real estate be sold and the proceeds converted into bank stock, "the proceeds" thereof to be enjoyed by the testator's sister during her life, and at her death "said estate" to go to certain collateral kindred. The testator further provided: "It is not my wish that the principal of my estate, nor any part of it, shall be used or spent by my sister, deeming the proceeds thereof a full and sufficient support." Held—That the life tenant took an absolute estate in the dividends arising from the bank stock during her life, and any of the dividends remaining undisposed of at the time of her death go to her representatives and not to the remaindermen.

Cassidy & McCartney and T. L. Given for appellants.

W. A. Sudduth for appellees.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Bennett.

After the death of A. B. Chapman, his will was admitted to probate by the Fleming County Court. Said will provides: "After the payment of any just debts that I may owe, funeral expenses and expenses of administration, I will and bequeath to my sister, Cynthia Chapman, all my estate, real, personal and mixed, during her natural life, on the following terms: I desire that all my real estate be sold at the best price that can be had for it, and the proceeds thereof, together with the balance of my estate, I wish to be converted into the stock of some of the banks of Kentucky, and the proceeds thereof to be used and enjoyed by my sister during her life. At her death I will my said estate to the children of Basil Browning, Jr., deceased, and their heirs forever (said children being cousins of mine.) It is not my wish that the principal of my estate, nor any part of it, shall be used or spent by my sister, deeming the proceeds thereof a full and sufficient support."

Pursuant to the foregoing provision the testator's estate was converted into bank stock, and Cynthia Chapman received the dividends arising from the stock to the time of her death, which

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occurred in September, 1886, except the sum of $3,705, which was in the hands of David Wilson, the administrator, with the will annexed, of A. B. Chapman. Cynthia Chapman, in her lifetime, purchased some real estate with a portion of the dividends she had received on said bank stock. She devised all of her estate, including this real estate, to the appellee, J. B. Jackson. The children of Basil Browning, the devisees of A. B. Chapman, claim the $3,705 remaining in the hands of David Wilson, at the time of the death of Cynthia Chapman, and said real estate, upon the ground that Cynthia Chapman only took a life estate in the dividends arising from the bank stock for a support during her life, and whatever portion of the dividends that remained unexpended for her support, at her death, belonged to them; also she being only entitled to a life estate in the dividends, the real estate that she purchased with a portion of them belonged to the appellants at her death. The lower court having held that Cynthia Chapman took an absolute estate in said dividends during her life, and that she had right to dispose of the $3,705 and the real estate, by will, the appellants have appealed to this court.

Said will is not susceptible of the construction that Cynthia Chapman was only entitled to a mere support out of the dividends of the bank stock. If it were, then she would only take a life use therein to the extent of a support, and whatever of it remained unused for that purpose, at her death, would go to the remainderman under the will. But the dividends arising from the bank stock were willed to her during her life as a distinct estate, and the corpus of the estate—the bank stock itself—was willed to the appellees, to take effect at the death of Cynthia; so, by the will, the two intersts in the estate were severed—Cynthia taking the dividends as a separate and distinct estate, and the appellees taking only the body of the estate—the bank stock itself as a separate and distinct estate. It is well settled that where one owns a life estate in land, the rent thereof, due at the time of his death, goes to his representative and not to the remainderman. And where one is entitled to the interest on stocks or bonds during his life, the interest that has accrued thereon at the time of his death goes to his representative and not to the remainderman. So where one is entitled to the interest arising from any particular fund during his life, whatever interest that may be due at the time of his death, goes to his representative and not to the remainderman. In all such cases the life-tenant takes an absolute estate in the interest or dividends for life, and, if any of the interest or dividends remained unconsumed or undisposed of at the time of the death of the life-tenant, the same goes to his representative and not to the remainderman. If, out of the proceeds of the estate, the life-devisee is limited to a support, and all of the remaining interest at his death is devised in remainder, then the devisee in remainder will take all the proceeds of the estate remaining at the death of the life-devisee. But, where the proceeds themselves are given to the life devisee, and the corpus of the estate is given the devisee in remainder, then the life-devisee takes an absolute estate in the proceeds for life, and the devisee in remainder takes the corpus of the estate. Thus each takes an absolute estate—the one takes the proceeds absolutely during his life and the other the corpus. It is clear, therefore, that Cynthia Chapman took an absolute estate in the dividends arising from the bank stock during her life.

The mere fact that the appellees joined as plaintiffs in this action, which involved the construction of A. B. Chapman's will, as to whether Cynthia Chapman was entitled to an absolute

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estate in the dividends during her life, and the decision thereon can have no effect upon any question that may arise in contesting her will.

The judgment of the lower court is affirmed.

ESTES, &c. v. McINTOSH, &c.

(Filed March 27, 1888—Not to be reported.)

Under a warrant of forcible entry, obtained by appellees against appellant, the jury returned a verdict of guilty, which was traversed by appellant and taken to the circuit court. Pending this proceeding the present action in equity was instituted by appellants to quiet their title, and asking the chancellor to consolidate their action with the case of forcible entry, which the chancellor did. The case was submitted without proof except the exhibition of a deed to appellants embracing the land in controversy. Held—That this was no such evidence of the possession as to cause the chancellor to disregard the verdict that had been rendered finding the appellants guilty of an unlawful entry on the possession of appellees, and, therefore, the chancellor properly dismissed appellants' petition and remanded the parties to a trial of the writ of forcible entry, which it was error in the first place to consolidate with the equity action.

Riddell & Fluty for appellants.

John Bennett for appellees.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Pryor.

The court below erred in consolidating the proceeding under the warrant of forcible entry with the equitable action to quiet the title. The appellees had instituted the warrant for the unlawful entry, and the jury returned a verdict of guilty that was traversed and taken to the circuit court. While this proceeding was pending the present action was instituted by the appellants, who had been found guilty of the unlawful entry against the appellees, who were the plaintiffs in the warrant, asking the chancellor to quiet their possession and to consolidate the case of forcible entry with the equity action. The appellees, as the proceedings stood, had evidenced their right of possession at least by the verdict in the country, and its effect could not be destroyed, and the right of a trial by jury denied by a proceeding in equity on the part of the appellants to quiet their claim and possession. No other ground is relied on giving the chancellor jurisdiction to take from the appellees their right to proceed with the writ of forcible entry. The case was submitted without any proof except the exhibition of a deed to the appellants, or one of them, embracing the land in controversy, which was no such evidence of the possession as to cause the chancellor to disregard the verdict that had been rendered finding the appellants guilty of an unlawful entry on the possession of the appellees. All that the chancellor has done is to dismiss the petition and remand the parties to a trial of the writ of forcible entry.

The title may be in the appellants and the possession in the appellees, or some such equitable title in the latter as would prevent a recovery by the one holding the legal title.

The judgment below was proper and must be affirmed.

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CHAMBERS' G'D'N v. CHAMBERS.

(Filed March 27, 1888.)

Interest on legacy—A testator devised to his grandduaghter $1,000, "to be held by my executors hereinafter named, but not to be paid until my estate shall be finally divided. My executors shall hold said one $1,000 in trust for her, and pay her the interest annually on said amount until she shall have issue born alive, and in the event she shall die without issue, then the same shall revert to my estate and be equally divided among my cihldren." Held —That as no time is expressly stated when the executors were to take and thenceforth hold the fund in trust for her, the necessary conclusion is, that the testator intended it to be done within a reasonable time after, by qualifying, they acquired the legal right to take and hold it, which, in analogy to section 2, article 2, chapter 50, General Statutes, should be fixed at one year after the death of the testator, and a fair construction of the will gives to the legatee the right to interest on the legacy from that time.

Yeaman & Lockett for appellant.

Montgomery Merritt and Jas. F. Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

The question in this case is from what time the legacy of $1,000, devised to Beulah Chambers by her grandfather, Boyd Chambers, began to bear interest, the decision of which depends upon the 12th clause of his will, as follows: "I give and bequeath to my granddaughter, Beulah Chambers, $1,000, to be held by my executors hereinafter named, but not to be paid until my estate shall be finally divided. My executors shall hold said $1,000 in trust for her, and pay her the interest annually on said amount until she shall have issue born alive, and in the event she shall die without issue, then the same shall revert to my estate and be divided equally among my children, or their descendants, named in the 10th section of this will. This amount shall be in full to the said Beulah of all or any interest in my estate."

There is obviously a difference between the time the legacy was intended by the testator to be separated from the general estate, and thereafter held by the executors as a distinct fund in trust for her and the time it was intended to be paid over to her. The final division of the estate is prescribed as the time or event when the legacy is to be paid, not to the executors who already have it, but by them to her, and can not, without perverting the language used, be made to apply to any thing else directed by that clause of the will to be done in reference to it. For the plain direction is, that the fund devised is to be held by the executors, but not paid until the estate shall be finally divided. In the second sentence of the clause quoted, the executors are again directed to hold, not $1,000 as part of the general estate, but "said $1,000" in trust for her, and to pay her the interest annually on said amount, not from the date of the final division, but during the time they were authorized to hold it in trust, and until she shall have issue born alive. There may be some doubt whether or not the testator intended the principal sum should be paid over to her upon a final division of the estate, in case she had then no issue born alive. But there is nothing in the will from which it can be fairly inferred it was intended to make the

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payment to her of interest await, or depend upon either the final division of the estate which the widow, in virtue of other clauses of the will, has the power to practically postpone indefinitely, or the birth of a child alive from her. On the contrary, the language used shows the testator intended she should receive interest before the legacy becomes due and payable, otherwise the provision made for the payment of it would be useless, as the statute makes a legacy bear interest after it becomes due. No time being expressly stated when the executors were to take and thenceforth hold the fund in trust for her, the necessary conclusion is, the testator intended it to be done within a reasonable time after, by qualifying, they acquired the legal right to take and hold it, which, in analogy to section 2, article 2, chapter 50, General Statutes, should be fixed at one year after the death of the testator. And in our opinion a fair construction of the will gives to Beulah Chambers the right to interest on the legacy from that time.

It seems to us the 13th clause of the will, quoted by counsel for appellees, sustains the views we have expressed. It is as follows: "I give and bequeath to my daughter, Matilda Hicks, $1,000, which amount shall be paid to her when my land shall be sold or my estate divided, as herein provided, and this amount shall be in full of her interest in my estate." Clearly Matilda Hicks will not be entitled to interest on her legacy until it becomes due, because no provision is made for the payment of it to her. Yet if the constrution of the 13th clause contended for be correct, Beulah Chambers is in no better position, although the executors are expressly directed to pay interest on her legacy.

We do not think it was necessary to make any statement in the petition in regard to the indebtedness of the estate in order to present a prima facie right to recover.

The judgment sustaining a demurrer to the petition and dismissing the action is reversed, and cause remanded for further proceedings consistent with this opinion.

DEGMAN v. ELLIOTT.

(Filed March 29, 1888—Not to be reported.)

Boundary—Adverse possession—Change of bed of stream—This action of trespass involves the true location of the boundary line between adjoining tracts of land. The real dispute is as to where, at the date of the original deeds, was the channel of a creek, the north bank of which is the dividing line. There is evidence tending to show that the course of the creek was, some years before the institution of this action, suddenly changed. The parcel of land in contest is, at times of high water, and when not inundated itself, an island. It has only recently been rendered fit for cultivation by alluvial deposit, and no one ever attempted to cultivate it until a short time before this suit, when the plaintiff attempted to do so. The only other occupancy or exercise of ownership by the plaintiff or those under whom she claims consisted of occasional cutting and removing of timber from the land. Held—

1. There is nothing in this case to make it an exception to the well-settled rule of law that the proprietors and occupants of two adjacent tracts of land are considered as being respectively in the actual possession up to the boundary line, and that neither can acquire a possessory title beyond such line without an actual inclosure coupled with an adverse claim for fifteen years.

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2. The occasional cutting of timber is not such continued occupancy as will bar recovery.

3. As the defendant and those under whom he claims have, during the whole period of the illegal acts of ownership by the plaintiff and those under whom he claims, had the legal title and been in the actual possession up to the dividing line, wherever it may be, no question of the defendant's right of entry on the disputed land, if on his side of the dividing line, can arise.

4. The rule that applies where one side or bank of a water course has gained by the gradual washing away of the opposite bank has no application at all where the stream itself has shifted from one bed or channel to another, leaving the intervening land comparatively undisturbed. In the latter case, whether the change has been made gradually or suddenly by an unusual flood, there is neither a gain of soil to the one nor the other owner, nor a change of the boundary line between them.

5. The only question for the jury was as to where the boundary line runs according to the calls of the deeds, and it was error to instruct them as to adverse possession and as to the rule where one side or bank of a water course has gained by the gradual washing away of the opposite bank.

Cochran & Son and T. C. Campbell for appellant.

Whitaker & Robertson for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Lewis.

If the lower court erred in this case it was in complicating with other questions not proper or relevant the main inquiry by the jury as to the true action of the boudary line between the two tracts of land owned respectively by the plaintiff, Lavinia Elliott, and Clarissa Sweet, by whose authority the alleged trespass was committed by the defendant, Degman. There is no controversy about the title of either owner of the two tracts. Mrs. Elliott claims under a deed made by one Bruce to her father in 1835, and Mrs. Sweet claims under a deed from Farron made to her in 1861, though he, and those under whom he claimed had the title and possession for many years before. Nor is there any real difference in the calls of the deeds of the two owners in respect to the dividing line, which, as described, begins at a hickory on the north bank of Cabin creek, identified as a corner; running thence with the creek to another corner, also recognized. But the dispute is where the main channel of the creek is, or more properly, was, at the dates of the original deeds, whether north or south of the small parcel of land in contest, which has been, and is at times of high water, and when not inundated itself, an island. If it was on the south side when the dividing line, which follows the north bank, was established, then the disputed land is inside the boundary of the tract of Mrs. Sweet, otherwise not. There is evidence tending to show it was formerly south of the island, and the present bed of the stream then had no running water in it except during a freshet. There is also evidence the course of the creek was changed about the year 1875, at a time of very high water, and ever since the main channel has been north of the island, the old bed being so filled up that no water flows in it except during a freshet.

In the first instruction the jury were told in substance that if the plaintiff was in possession of the land in contest, having a crop of turnips thereon, and she and those under whom she claims had been continuously in possession for over fifteen years next before the alleged trespass, and the defendant entered, took

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and carried away her turnips, they must find damages, etc. In the second, that if at the time of the sale and conveyance by Farron to Mrs. Sweet, the father of the plaintiff was in possession of the land in contest, claiming it as his own, to a well defined or marked boundary, the deed of Farron conveyed no title to Mrs. Sweet, though the land was embraced by it. The third is as follows: "That if * * * the plaintiff and her father * * * were in possession of the land of which the land in contest forms a part and adjoining it for more than fifteen years continuously, claiming it as their own next previous to the alleged trespass by using it in such manner as land, situated as it was, was capable of, and plaintiff was so in possession at the time of the alleged trespass, the jury will find for plaintiff." It appears that within a few years, probably since 1875, the land in dispute has been considerably elevated by alluvial deposit.

But it was originally so sterile, by reason of the swift current over it during an overflow of water, as to be unfit for cultivation, and no one ever attempted to cultivate it until a short time before the commencement of this action, when the turnips were raised on it, by direction of appellee. And the only other occupancy or exercise of ownership of it by either appellee or her father, at any time, consisted of occasional cutting and removal of timber from it.

There being no claim of an elder and superior title by either appellee or Mrs. Sweet, nor any lap or interference of their surveys, we see nothing in this case to make it an exception to the well settled rule of law that the proprietors and occupants of two adjacent tracts of land are considered as being respectively in the actual possession up to the boundary line, and that neither can acquire a possessory title beyond such line without an actual enclosure coupled with an adverse claim for fifteen years.

In the case of Webb v. Hynes, 8 B. M., 388, the land in dispute was an island in the Ohio river, the possession of which was vacant at the time the junior patentee entered on it, and, being subject to overflow, could be neither fenced nor used at all seasons of the year. It was then held that "if a fence was unnecessary to its enjoyment, and if it was used by the defendants in the way most appropriate, considering its nature and liability to be inundated, and that use was continuous whenever the condition of the land would permit, we entertain no doubt such use would constitute an adverse possession, which, if continued uninterruptedly for twenty (now fifteen) years before suit brought, would be sufficient to toll the right of entry of the elder patentee." But a distinction was made by the court between that case and those in which it had been decided that the occasional cutting of timber, or the occasional use of a sugar camp, was not such continued occupancy as would bar recovery, in the following language: "In the cases last mentioned, the mode of using the land was not the actual appropriation of the land itself, but rather of some of its incidents merely." There is, moreover, between the case cited and the one before us, a material difference. In that "the plaintiff, although investd with the legal title, had never entered on the land sued for, so that the possession was vacant when the defendant, claiming under the junior patent, entered and took possession." In this case Mrs. Sweet and those under whom she claims have, during the whole period of the alleged acts of ownership by appellee and those under whom she claims, had the legal title and been in the actual possession up to the dividing line, wherever it may be. Consequently no question of her right of entry on the disputed land, if it be on her

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side of the dividing line, can arise, nor was the sale and conveyance to her by Farron in 1861 champertous, as indicated in the second instruction.

The court further instructed the jury that although the creek may have run on the south side of the disputed land in 1861, yet if it gradually washed to the north and by gradual accretion on the other side the channel has been changed to the present bed, leaving the land in contest south of the creek, "the land belonged to the ancestors of the plaintiff and to plaintiff owning land on the south side of the creek as it runs at present."

A fatal objection to that instruction is that even if the proposition of law intended had been actually stated, there is no evidence whatever in the record before us to sustain it. The rule attempted to be stated in that instruction applies when one side or bank of a watercourse has gained by the gradual washing away of the opposite bank, but has no application at all when the stream itself has shifted from one bed or channel to another, leaving the intervening land comparatively undisturbed. In the latter case, whether the change has been made gradually or suddenly by an unusual flood, there is neither a gain of soil to one nor the other owner, nor a change of the boundary line between them.

The evidence in this case tends to show that the change of the course of the creek was not made gradually, but suddenly. However, be that as it may, the land, in dispute was not made by either the gradual or sudden wearing away of the bank on one side of the stream and deposition of soil upon the other. But the stream has been changed from the original bed on the south side, which is yet definable, to another distinct bed on the north side of the land in contest, which now exists as it did before the change took place.

It seems to us, as the record stands, the only question for the jury is where the boundary line runs according to the calls of the deeds, and it was error in the lower court to give any of the instructions we have referred to.

The judgment is reversed for a new trial and further proceedings consistent with this opinion.

SMOOT v. SCHOOLER.

(Filed March 29, 1888.)

In proceeding to establish a public road if the writ of ad quod damnum follows the statute, the exception that it is not sufficiently descriptive is unavailing. The same particularity is not required that is required in the application and the report of viewers.

In this case the writ directs the sheriff to summons a jury to meet on the land of the proprietors over which it is proposed the road shall run, and to assess the damages in the mode specified by the statute, that mode being distinctly set forth in the writ. Held—That the circuit court erred in quashing the writ.

Evan E. Settle for appellant.

J. W. Greene for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Pryor.

This appeal is from a judgment of the circuit court reversing

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an order of the county court establishing a public road. There is no evidence found in the record applying to many of the exceptions taken to the proceeding in the county court, and the result of the controversy must, therefore, depend on the regularity of the proceedings, consisting of the application for the appointment of viewers, their report and the judgment based upon it.

The application made in this case for the appointment of viewers could not well be more definite in the absence of an actual survey, and the report of the viewers, accompanied by the survey made, shows the entire line of the contemplated road by courses and distances. The statute has been strictly followed, both in the application and the viewer's report, and the only question left for this court to pass on arises from the action of the circuit court in reversing the order of county court, because the writ of ad quod damnum was not sufficiently specific. The writ directs the sheriff to summon a jury to meet on the land of the proprietor, over which it is proposed the road shall run, and to assess the damages in the mode specified by the statute, that mode being distinctly set forth in the writ. The day was fixed and the appellee notified. The writ was asked for by the appellee, and under it the inquest was held and returned to the county court, where, upon evidence being heard, the road was established.

When the writ and inquest were returned the exception was made that it was too indefinite, and a motion made to quash it for that reason. It is not urged here, nor was it insisted on in the county or circuit court, so far as appears from this record, that the jury went upon and assessed other land of the appellee than that proposed to be condemned. They were required to meet on this land and no other, and it was the duty of the sheriff (or the appellee, if he desired it) to point out the land, which he did, and the inquest held. The appellee, as well as the sheriff, could have obtained a copy of the survey or the viewer's report. The quantity of land, the route and the distance appeared on its face. And, while they may not have seen proper to do so, the fact exists that the sheriff complied with his duty, and this is the more patent as the only exception made is to the writ itself.

The requisites of a petition for the recovery of land or of a viewer's report are not required in a writ of ad quod damnum. If the sheriff fails to peform his duty, or the jury have valued other land than that authorized, it is the subject of an exception, but where no such objection is made, the writ following the statute, the exception that it is not sufficiently descriptive is unavailing. In all such proceedings the particularity required applies to the application and to the report of the viewers, constituting, as they do, the foundation of the proceeding, and upon that the writ issues.

The circuit court erred in quashing the writ, and for that reason the judgment is reversed and cause remanded for procedings consistent with this opinion.

BEADLES, WOOD & CO. v. JONES, &c.

(Filed March 31, 1888—Not to be reported.)

1. Fraudulent conveyances—In an action to set aside an alleged fraudulent conveyance, where no attachment on the ground of nonresidence has been levied, a general demurrer to the petition should be sustained, if there has

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not been previously a judgment and return of "no property found." Or, if the allegations being controverted in the answer, are not sustained by the proof, the action must be dismissed.

2. Infants—Pleading—As all the defendants in this case to whom the property was conveyed, except one, are infants, they did not waive any right or any ground of defense they had, by their failure or the failure of their guardian ad litem to answer or demur; and it was, therefore, the duty of the lower court to dismiss the action as if the demurrer had been duly filed, and for the additional reason of a failure of proof to sustain the allegations, just as if they had been controverted.

A. R. Boone for appellants.

W. W. Tice for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Lewis.

In an action to set aside an alleged fraudulent conveyance and subject the property conveyed to satisfy the plainitff's debt against the grantor, where no attachment on the ground of nonresidence has been levied, a general demurrer should be sustained to the petition if there has not been previoulsy a personal judgment against the debtor and an execution thereon returned no property found. Or if the allegations, being controverted in the answer, are not sustained by the proof, the action must be dismissed.

No demurrer to the petition was filed in this case, though, if filed, it would and ought to have been sustained, nor were the allegations of the plaintiffs denied, nevertheless the action was, we think, properly dismissed. For all the defendants, to whom the property was conveyed except one, are infants, and they did not nor could waive any right or any ground of defense they had, by their failure, or the failure of their guardian ad litem to answer or demur. But it was the duty of the lower court, as it did do, to dismiss the action, as if the demurrer had been duly filed, and for the additional reason of a failure of proof to sustain the allegations just as if they had been controverted.

Judgment affirmed.

KINCAID, &c. v. McGOWAN, &c.

(Filed May 31, 1887.)

1. Deeds—Reservation of minerals and timber—The owner of land may convey a surface estate in fee in it and reserve to himself an estate in fee in the minerals or any particular species of them, in which case the vendee holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, devise and conveyance.

2. Same—An estate in fee in land carries with it all metals and minerals thereunder unless the metals and minerals are excepted in the conveyance, or have before been severed in ownership and the right thereto vested in some other person.

3. Same—Where the mines form part of the general inheritance they will be transferred along with the lands without being expressly mentioned in the conveyance, but when they have a distinct possession or inheritance, a distinct title to them must also be established.

D. sold and conveyed to M. a parcel of land out of a larger boundary which he owned, reserving to himself "all the minerals and mines in the bowels of

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the boundary," one-half of the timber and a mill seat thereon. He afterward conveyed to K. the boundary of which this parcel was a part, excepting from the conveyance so much of the boundary as had been previously conveyed to other persons, naming them. K. claims that under the conveyance from D. to him he is entitled to the minerals and timber which D. reserved to himself in the conveyance to him. Held—That neither the timber and mineral interest nor the mill seat passed by the conveyance to K., as these interests were separate and distinct from the surface right conveyed, and apt words were required to convey them.

4. Actions to quiet title—Any person having the legal title and possession of lands may bring an action in equity in the circuit court of the county where the land or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to the land; and all of the adverse claimants, whether by independent titles or not, may be joined as defendants.

Wm. Lindsay and S. F. J. Trabue for appellants.

Peters & Tyler, H. C. Lilly and T. Turner & Son for appellees.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Bennett.

The appellants' petition contains three paragraphs—the first against William Gray, the second against the appellees and the third against John M. Clayton. The allegations of the petition, which are common to all of the paragraphs, are, that on the 4th day of January, 1786, the Commonwealth of Virginia granted to Dean Timmons twenty-two thousand acres of land which lie in Menifee and Wolfe counties—this State—and that Thomas Duckham, on the 9th day of June, 1843, he being the owner thereof, sold said survey of land to Edward Kincaid, the appellants' ancestor, and Samuel Plummer, except the tracts previously sold by Thomas Duckham to Powell Rose, James Cox and J. P. McGowan. That on the 4th day of October, 1846, Samuel Plummer sold his undivided interest in said land to Edward Kincaid, who thereby became the owner of the whole and held and owned said land at the time of his death, except the tracts which he had previously sold to Dr. William Congleton, Spencer and John ——— and George Centers. That the appellants, as the children and grandchildren of Edward Kincaid, he having died intestate, inherited said land from him, and that they own and are in the actual possession of the same, except said parcels sold by Edward Kincaid, and the tracts sold by Duckham to Powell Rose, James Cox and J. P. McGowan.

The first paragraph of the petition alleges that Wm. Gray holds a deed to five hundred acres of said land; that the deed purports on its face to have been executed by Thomas Duckham as the attorney in fact of Edward Kincaid, but that said Duckham had no authority from Edward Kincaid to make said conveyance, and that the deed is void, but nevertheless casts a cloud upon their title, which the appellants ask the chancellor to remove by declaring said deed to be void, etc. The second paragraph alleges that the appellees are setting up some sort of claim to some part or interest in the said balance of the said twenty-two thousand acre tract under some contract made with Thomas Duckham, the vendor of Edward Kincaid. Appellants also allege "that they do not know the exact nature of the appellees' claim, but do know that they are giving out in speeches that they own and have the right to hold, possess and sell portions of said plaintiff's lands, the minerals under and timber upon certain

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other parts of said survey of twenty-two thousand acres, which minerals and timber belong to these plaintiffs." It is also alleged that the claim of the appellees, although groundless, impairs the value of the appellants' land and casts a cloud upon their title. The chancellor is asked to compel appellees to exhibit any title they may have to said land, or to the minerals and timber under and upon any land within the said twenty-two thousand acre survey, and that the appellant's title be quieted, etc. The third paragraph alleges "that John M. Clayton asserts that he holds title to some portion of said balance of the twenty-two thousand acre survey as the remote vendee of Thomas Duckham, and gives out publicly that he can sell and pass a good title to purchasers, and that the plaintiffs have not a good title," whereby he greatly impairs the vendible value of their estate. They also allege that the claim of Clayton is groundless. They ask that he be required to exhibit his claim of title and that their title be quieted, etc.

Upon motion of the appellees the lower court required the appellants to elect to proceed on the first paragraph or second and third paragraphs.

The appellants excepting to the ruling of the court, elected, under protest, to proceed on the second and third paragraphs. Thereafter the appellants amended the second paragraph of their petition. The appellees then entered a general and special demurrer to the second paragraph of the appellants' petition as amended. Both of which was sustained by the lower court, and the appellants electing to stand by their pleading, the second paragraph was dismissed. They have appealed to this court.

The amended petition sets out a more specific description of the land claimed by appellants. It also exhibits two deeds of conveyance from Thomas Duckham to James P. McGowan—the first dated the 2d of February, 1842, and the second dated the 21st of November, 1842. The first deed conveys a certain boundary within the twenty-two thousand acre survey, but "reserves" to the grantor "all minerals and mines in the bowels of the boundary" conveyed, "and one-half of the timber included in said boundary and a mill seat on Glady creek." The second deed conveys a certain other boundary of land within said twenty-two thousand acre survey, but reserves to the grantor "one-half of all the mines and minerals in the bowels of the earth" within said boundary, and "one-half of the timber" thereon, except on the south side of the river. On that side he reserves all of the timber except that which is "on Swift camp."

It is alleged in the appellants' amended petition that the minerals and timber claimed in their original petition are the minerals and timber reserved in these two deeds. The special demurrer raises the question of the appellants' right to these minerals and timber. We will dispose of that question first. The appellants' contention is that they are entitled to the minerals and timber reserved by Duckham in said conveyances by virtue of his deed to Edward Kincaid and Samuel Plummer, dated the 9th of June, 1843, which conveyed to them all of the twenty-two thousand acre survey of land, only deducting therefrom "what" Duckham had sold and made deeds to prior to that date. In other words, that Duckham's reservations in said deeds being a landed estate of inheritance in himself were included in his conveyane of the entire twenty-two thousand acre survey, which conveyance to Edward Kincaid and Samuel Plummer only excepted the surface conveyances previously made by him.

An estate in fee in land carries with it all metals and minerals thereunder, unless the metals and minerals are excepted in the conveyance or "have before been severed in ownership and the

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right thereto vested in some other person." The surface and the metals and minerals may be a distinct property from each other by separate conveyances from individuals. (Bingham on Sales of Real Property, 288.)

Minerals, in place, are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both, in such a case, are land owners. They own separate and distinct corporeal hereditaments. (Caldwell v. Fulton, 31 Penn. St. R., 473.)

The owner of land may convey a surface estate in fee in it and reserve to himself an estate in fee in the minerals or any particular species of them, in which case the vendee holds a distinct and separate estate in the surface or sale, and the vendor holds a distinct and separate estate in the minerals. By this severance each estate is subject to the laws of descent, of devise, of conveyance. (Adam, &c. v. Briggs Iron Company, 7 Cush., 361.)

Also by the severance each estate is as distinct property in the respective owners as is the property in a two-story house where the title to the lower story is in one person and the title to the upper story is in another person. An action of ejectment will lie in behalf of the owner of the sufrace to recover it. Also an action will lie in behalf of the owner of the mineral estate to recover it. Also the right of either owner may be barred by the statute of limitations.

Now, then, Duckham sold to McGowan two parcels of land out of a large boundary which he owned. The two parcels of land were each designated and set apart by metes and bounds, thereby becoming separate and distinct tracts of land, not only from each other, but from Duckham's remaining portion of the survey. The title to the surface or soil, however, was only conveyed to McGowan in each of these boundaries, together with such portions of the minerals and timber as above set forth. Duckham retained his title to the other minerals and timber, also a mill site on one of the tracts. The interest that he retained was a separate and distinct interest in the two boundaries, which interest, by the said conveyances by metes and bounds, became separate and distinct from the remaining portion of the survey. Indeed it not only became a distinct interest from the remaining portion of the survey, but a distinct and separate estate from the surface estate which was conveyed to McGowan. So Duckham owned, after these two conveyances, an absolute estate in all of the remaining portion of the twenty-two thousand acre survey, and also owned a distinct estate in the other two parcels, consisting of minerals, timber and a millsite. He sold to Edward Kincaid and Samuel Plummer the remaining survey which he called, in the deed of conveyance, land. Of course this, by operation of law, passed title within that boundary to the vendees to the center of the earth and included the minerals therein. In that deed he expressly deducted the parcels of land theretofore conveyed. In these parcles he owned a mineral and timber interest and a mill site. These parcels were separate parcels from the portion sold to Kincaid and Plummer. Also Duckham's interest therein was separate from said portion. Now it seems to us clear that the deed from Duckham to Kincaid and Plummer did not embrace the separate and distinct mineral and timber interest and mill site that Duckham owned in these two tracts of land which had been previously separated from the portion of the survey sold to Kincaid and Plummer.

Bainbridge, on the Law of Mines and Minerals, American Ed., side page 129, says: "When the mines form part of the general inheritance, they will, of course, be transferred along with the

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lands without being expressly mentioned in the conveyance, but when they form a distinct possesson or inheritance, a distinct title to them must also be established."

"In the latter situation the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made." So it seems that the mineral and timber interest and mill site, reserved by Duckham in these two tracts of land, being a distinct interest from the surface right conveyed, and also being separated from the balance of the twenty-two thousand acre survey by designated boundaries, it would require apt words to convey. To illustrate, suppose the mill site reserved had had upon it a fine flouring mill, or there had been a valuable stone quarry, which is a mineral interest, opened on the land, or a fine lead or silver seam on it, worth thousands of dollars, would it be contended that the conveyance of the adjoining portion of the survey (we say adjoining, because the two tracts had become separated from it by metes and bounds), would include these interests? Surely not. The unhesitating answer would be, that these were distinct and separate interests, which could only be conveyed by apt words.

We think, therefore, that the lower court did right in sustaining the special demurrer to the second paragraph of the petition.

The next question is, was the general demurrer rightfully sustained?

It is distinctly alleged in the petition that the appellants have the legal title to all of the balance of the twenty-two thousand acre survey after deducting the parcels previously sold by Duckham, and the parcels sold by Edward Kincaid after his purchase, and that they are in the actual possession of said balance, less about one thousand acres occupied by squatters. It is also alleged in substance in the first paragraph that Gray claims title to five hundred acres of this balance under a deed which is void.

It is alleged in the second paragraph that the appellees claim some of this balance by some kind of title derived from Thomas Duckham. It is also alleged that Clayton claims a part of said land by some kind of title derived from Duckham.

By an act of the legislature approved March 9, 1854, it is provided: "That hereafter it shall and may be lawful for any person having both the legal title and possession of lands, to institute and prosecute suit, by petition in equity, in the circuit court of the county where the lands, or some part thereof may lie, against any other person setting up claim thereto, and if the plaintiff shall be able to establish and does establish his title to said land, the defendant shall be, by the court, ordered and decreed to release his claim thereto." This act was not repealed by the General Statutes, and is now in full force. Pomeroy, in his work on Remedies and Remedial Rights, section 369, refering to actions to quiet title, says: "The very object of the proceeding assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land or other subject matter hostile to his. Of course all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants." He further says, on the same page, that "this action has been greatly extended by statute, especially in the western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of

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session, and must assert a hostile title or interest. In this condition, the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted against him, may take the initiative, and by commencing an equitable action may compel his adversaries to come into court, assert their titles, and have the controversy put to rest in a single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment."

So it is clear that by the act of the legislature of the 9th of March, 1854, any person having the legal title and possession of land may bring an action in equity in the circuit court of the county where the land, or some part of it may lie, against any person setting up claim thereto, for the purpose of establishing and quieting his title to said land. But for this remedy, what remedy would the owner of the legal title and possessor of the land have? He can not bring an action of ejectment, because he has the possession of the land. The adverse claim, however worthless it may be, clouds his title, and may be used injuriously to embarrass and belittle it, and to greatly depreciate its market value, for prudent persons would neither buy the property at a fair value while thus affected nor loan money upon its security, although assured by the best lawyers that the adverse claim was worthless. The object of the statute was, therefore, to provide a certain remedy, notwithstanding the fact that equity, independently of the statute, affords substantially the same remedy.

The suit authorized by the statute of the 9th of March, 1854, is the converse of the legal action of ejectment. (Pomeroy, supra.)

And this court, in Woolfolk v. Ashly, &c., 2 Met., 288, having decided that an action of ejectment will be against as many persons as hold an adverse possession of the land, although each one holds the possession of a distinct parcel from the other, and by a distinct claim of right, it follows that under the statute, supra, in an action to quiet the title to land, all persons setting up claim thereto, whether or not each claims a separate parcel of the land by distinct right, may be joined in the suit as defendants.

Also it seems clear that in an equitable action to quiet the title to land, independently of statutory authority, all of the adverse claimants, whether by independent titles or not, may be joined as defendants. Indeed as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper to make all adverse claimants defendants. (Pomeroy, supra.)

In the case of Scott, &c. v. Means, &c., 80 Ky., 460, the petition did not disclose that there was a controversy between the parties as to the location of the boundary. It simply alleged that defendants had trespassed upon plaintiff's lands and slandered their title. For trespass upon land or the slander of title an action at law for compensatory damages is ordinarily an adequate remedy. Therefore, this court held in that case that an action in equity to quiet title and settle the question as to the alleged trespass would not lie. Also that as the plaintiff's right to the possession of the land in dispute could be settled by an action at law, such action at law should have preceded an action in the nature of a bill of peace. The other cases relied on by appellees involved the same principle. Those cases are unlike this. Here the appellants, as alleged by them, are the legal owners of the land, and have the actual possession of it. The appellees are not complained of as trespassers or slanderers of the title, but as adverse claimants of title which beclouds the appellant's title,

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and injures the market value of their land. For this wrong, there is no redress, except by an action in equity to quiet title.

We think that the lower court erred in sustaining the general demurrer to the second paragraph of the petition, and in ruling the appellants to elect.

For these reasons, the judgment of the lower court is reversed, and the cause is remanded, with directions for further proceedings consistent with this opinion.

Judge Holt not sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. CONNELLY.

(Filed March 31, 1888—Not to be reported.)

1. Reversible error—Weight given second verdict—Although the weight of the testimony is, perhaps, in favor of appellant, the court will not disturb the verdict on that ground, there having been three trials, with two verdicts in favor of appellee, the verdict in each instance being approved by the trial court, the other trial resulting in a failure of the jury to agree.

2. Same—A new trial ought not to be granted merely because the appellate court would have decided otherwise on the facts, when a jury and the trial judge have passed upon the merits.

3. Same—A mere semblance of error in the instructions that could not have controlled the verdict, ought not to be seized on to disturb the finding of the jury where there have been three trials by jury, not one of them resulting in favor of the party complaining.

4. Instructions—Appellee, a laborer on a railroad hand car, was injured by a collision of the hand car with a freight train on another railroad, at a point where the roads crossed. In this action by appellee against the latter road, the defendant's theory and main ground of defense was that the plaintiff's own neglect caused, or contributed to, the injury. The court, in its instructions to the jury, given on motion of plaintiff, did not present this theory of the case, but did so in the instructions given on motion of defendant. Held—That the jury could not have been misled by the failure to so qualify the plaintiff's instructions as to preclude him from recovering in the event his own negligence contributed to the injury.

5. Railroads—Negligence—Those in charge of a train of cars propelled by steam should be held to a greater degree of care when approaching a crossing with another railroad than would be required of those in charge of a hand car on which laborers are transported from one part of the road to another. And in case of a collision between the hand car and the train of cars, it would seem that those on the hand car should be treated as travelers upon an ordinary highway passing over the track of a railway, and should not be held to the exercise of a greater degree of care, but it is not necessary to determine that question in this case.

Wm. Lindsay for appellant.

O'Hara & Bryan for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

This case has gone to the jury as often as three times, upon issues of fact, and there must be an end to the litigation.

On the first trial the jury failed to agree. The second trial resulted in a verdict for the appellee that was brought to this court and reversed, and on the return of the case it was again passed

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on by the jury, and a verdict again returned for the appellee. It is apparent, therefore, that the testimony authorized a verdict for the plaintiff, and while there is much testimony on the part of the appellant, and perhaps the weight of it, this court should be careful not to interfere with a verdict that has been more than once passed on by the triers of the facts, and their verdict each time approved by the trial court. The witnesses being present and examined in the presence of the jury and the presiding judge, the bearing and manner of each, in detailing what he knows, often fixes with the jury the weight to be attached to the statements made by the witness in making up the verdict, and this court should be reluctant to send the case back for another trial, unless there has been a palpable error on the part of the court in the instructions given. This is a case where there was a collision between a freight train of the L. & N. R. R. and a hand-car on the Kentucky Central at a point where the roads cross at or near the town of Milldale. in the county of Kenton.

There were only two questions presented in this case to be determined by the jury. One is as propounded for the plaintiff: Did the injury complained of result from the negligence of the appellant's employes? The second is, propounded by the defendant: Was the injury the result of appellee's own neglect, and such that ordinary care and prudence on the part of the appellant could not have prevented?

The appellee, together with other laborers, had been working on the Kentucky Central R. R., and in the evening when returning from their labor on their way to Covington on a hand-car, going at the rate of four or five miles an hour, was run over by the steam car of the appellant at the crossing, and severely injured. It appears that the steam car was running but little, if any, faster than the hand-car, and had stopped at a station about two hundred yards from the crossing. There were two hand-cars on the Kentucky Central filled with men going in the same direction, and it was on the hindmost car that appellee was injured. It is plain that the hands on these cars were not aware of the danger, and were approaching the crossing at a rate of speed not unusual. They heard no train approaching on appellant's road, nor did they hear the blowing of a whistle or the ringing of a bell, and while the weight of the testimony conduces to show that these signals were given, there is proof conducing to show by one witness at least, and that not of a negative character, that no such signals in fact were given. A wtiness who was on the steam car says that no signals were made, and it may well be assumed, from the testimony, that after the train stopped to put off some parties about two hundred yards distant from the crossing, that it approached that point on its way to Newport without giving any warning to those approaching the crossing from the Kentucky Central road. The engineer did not even see the first hand-car that passed, and while his statements in that regard explain the reason, the entire question was with the jury on the question of diligence, and we are not disposed to disturb the verdict for want of evidence to support it.

We perceive no objection to the instrution No. 1 asked by the appellee, basing his right of recovery on the ground alone of negligence on the part of the appellant. His cause of action originated, as alleged, from the want of care on the part of the employes of the appellant, and it was not required from appellee's theory of the case, that any qualification should have been made by the court in giving that instruction, to the effect that if appellee, by his own neglect, contributed to or caused the injury, he could not recover. This constituted the defendant's theory of

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the case, and the main ground of defense. That defense is embodied in instrucion No. 1, asked by the defendant, by which the jury was told, in substance, that if the negligence of the plaintiff caused the collision resulting in the injury, the verdict must be for the defendant, "unless they further believe, from the evidence, that the employes of the defendant managing the train, saw, or could have seen, with ordinary care, the perilous condition of the plaintiff, and could have prevented the injury by the exercise of ordinary care." The law of the case was, in this manner, asked by counsel for the appellant, and in conformity with the opinion of this court, rendered at the first hearing. Whether or not the concurrent negligence of the two parties contributed to or caused the injury was, we think, fully presented by the instructions, and the jury told that if the plaintiff's own act caused it, or contributed to the accident, he could not recover, unless the defendant, seeing the peril (or by ordinary diligence could have seen it), could have, by exercising a like degree of care, avoided the collision. It is apparent that a line of cars, propelled by steam, should be held to a greater degree of care, when approaching such a crossing, than would be applied to an ordinary hand-car on which laborers are transported from one part of the road to the other. The one being more dangerous than the other, signals that give warning of its approach are required in case of cars propelled by steam, while as to ordinary hand-cars going at a speed of three or four miles an hour, but little, if any, danger is to be apprehended from those crossing the line of the track. The appellee had the right to pass this crossing, and it may be said is to be treated as the traveler upon an ordinary highway passing over the track of a railway, as it seems to us these laborers should not be held to the exercise of a greater degree of care. But whether so or not, as it is not material to the controversy to decide it, we think the jury could not have been misled by the instructions, and the real question at last is: Does the evidence support the verdict? This court, in Dorsey v. Doherly, 3 Litt., 448; Gore v. Ross, 2 B. M., 299; Ross v. Ross, 5 B. M., 20, held in effect that a new trial ought not to be granted, because a highter court would have decided otherwise on the facts, when a jury and the trial judge has passed upon the merits, having, as is ordinarily the case, a knowledge of the parties, the witnesses, and the circumstances attending the trial. Where the court has misdirected the jury, by an erroneous instruction, a different rule would prevail, but a mere semblance of error that could not have controlled the verdict, ought not to be seized on to disturb the finding of fact in a case where there has been three trials by jury, and not one of the three resulting in favor of the party complaining.

The judgment below is, therefore, affirmed.

McCLINTOCK v. EMICK, STONER & CO.

(Filed March 31, 1888.)

1. Warranty in sales of personal property—No particular form of words is necessary to constitute a warranty in the sale of personal property, and while a mere expression of opinion is not sufficient to constitute one a warrantor, a clear, positive affirmation by the vendor made during the negotiation will be treated as an express warranty, and in this respect there is no difference between written and parol contracts, nor is the intention of the vendor material.

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2. Same—Where, upon the evidence, it is doubtful whether the vendor, by the language used, intended to assert a fact or merely express an opinion, and it is uncertain how the parties understood it, then the question of warranty or no warranty should be left to the jury; and in such a case if the petition sets forth merely the language of the vendor it should also aver his intention in order that the testimony may be supported by pleading. But where there is a positive, unequivocal representation of a fact it is not necessary that the vendee, in suing upon the warranty, should allege that the vendor intended that the plaintiff should rely upon it.

In this suit for damages, resulting from the unsoundness of a lot of mules purchased by plaintiffs from defendant, it is alleged in the petition "that the defendants represented to these plaintiffs that said mules were all right; * * * that they relied upon the said statements made as aforesaid, and were induced thereby to make said purchase." Held—That this was a sufficient averment of a warranty of soundness. There being a positive, unequivocal representation by the vendor that the mules were sound, it was not necessary for the plaintiff to allege that the defendant intended that he should rely upon that representation.

3. Same—In determining whether or not words constitute a warranty, they should receive their common acceptation; therefore, as the vendor in this case stated, in response to a direct question, that the mules were "all right," there was a warranty of soundness by an absolute and unqualified representation to that effect.

J. Q. Ward for appellant.

L. M. Martin for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Holt.

The appellees sue for damages resulting from the unsoundness of a lot of mules purchased by them of the appellant.

The first paragraph of the petition, as amended, avers that "the defendant represented to these plaintiffs that said mules were all right; * * * that they relied upon the said statements made as aforesaid, and were induced thereby to make said purchase." It does not allege that the appellant "warranted" them, or that he "represented" in what particular respect they were "all right," or that he expected or intended the appellees to rely upon the representation in making the purchase. In a second paragraph a cause of action for deceit, false representation and fraudulent concealment in making the sale is pleaded.

The evidence conduces to show that while the negotiation as to the purchase was in progress, the appellant, in response to a question upon that point from one of the appellees, said that the mules were "all right."

The jury were, in substance, instructed to find for the appellees if the appellant, at the time of the sale, warranted the mules to be sound when they were unsound, and that "a representation as to soundness, quality or condition made by a seller at the time of the sale with the intention that the purchaser shall rely upon the same, and upon which he does rely in the purchase, amounts to a warranty."

It is urged that the averments of the petition do not constitute a warranty, or state a cause of action upon one; that the instructions presented a case to the jury not supported by pleading, and that, conceding the evidence of the appellees to be true, no warranty is shown. A review of the cases as to what constitutes one, exhibits much learning and diversity of opinion. Indeed they

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can not all be reconciled. The report of an early and celebrated case says: "All the justices and barons (except Anderson) held that for this cause (the want of an averment that he warranted it to be a bezoar stone) it was error, for the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action, and although he knew it to be no bezoar stone it is not material, for every one, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound, yet if he does not warrant them to be so it is no cause of action, and the warranty ought to be made at the same time of the sale. (Chandelor v. Lopus, Cro. Jac., 4.) Although it adhered to from rather than reason, and the argument was, at least, of doubtful legal morality, yet it was followed by other cases both in England and in this country. Thus early in judicial history the rule was announced that a mere representation or affirmation by the vendor, however positive as to the character or condition of an article, could not constitute a warranty.

In line, and based upon the case last cited, is that of Leixas v. Woods, 2 Caines, 48, although in it the Chief Justice dissented, and chancellor, then Judge Kent, intimated that he would have done so had the question been res integra. Some of the more modern cases, as Weimer v. Clement, 37 Penn. St., 147, hold that a naked affirmation is not an express warranty or evidence of it, but that, if it amounts to a deceit or fraud, the remedy is by an action ex delicto. As early, however, as the cases of Chapman v. Murch, 19 John, 290, and Sweet v. Colgate, 20 John, 196, if not before, many of the courts of the country began to hold that sense should not be sacrificed to technical language, and that no particular form of words was necessary to create a warranty. Indeed no valid reason can be given why, if A, in selling his horse to B, says "I warrant him sound," it should be held a warranty, but not if he says "he is sound." This court, in the early case of Bacon v. Brown, 3 Bibb, 35, held that while no particular words were necessary to create a warranty of soundness, yet there must be a promise or undertaking as to it, and that a bare representation or affirmation was not sufficient. The subsequent case of Dickens v. Williams, &c., 2 B. M., 374, decided, however, that the affirmation of a fact in a bill of sale as to an article sold was a warranty in that respect; that it imported a covenant to that effect, and that thereby the vendor agreed it was true. The case of Lamme v. Gregg, 1 Met., 444, not only affirmed that doctrine, but held it to apply to verbal contracts where the representation or affirmation, as to the kind, quality or condition of the article sold, is made during the negotiation of the trade.

There is no reason why the rule should not apply to verbal as well as written contracts, if the sale be as effectual in the one case as in the other. The interests of trade, the necessity of uniformity of decision, and the rights of parties, require it. If the language used by the parties be binding in the way of trade, why should not a statement, then made as to the soundness of the article, be equally so? Of course, if it be the expression of a mere belief or opinion, it will not constitute a warranty.

Here A is selling a lot of mules to B. The trade is in progress, and the contract being made, the latter asks the former, "are they all right?" The answer is: "They are." It is urged that this statement is too indefinite to constitute a warranty of soundness, and that the petition, in stating only it, is defective. In applying the law to the business transactions of men the dictates of common sense and understanding should control. Busi-

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ness and trade forbid much technically. Warranties enter largley into the trade of the country and it is proper and best for its fairness and promotion that the language used by those so engaged should, in law, receive its common acceptation and be construed as ordinarily understood by them. Can there be any doubt how men generally would have understood the question put and the answer given in this instance? One man is selling his horse to another, and, when particularly asked, he says "he is all right." Would not the purchaser understand this as embracing the question of soundness, and would not the vendor be understood as thereby saying to him, in effect, "he is sound." It seems to us, and the conclusion is inevitable, that here there was a warranty of the soundness of the mules by an absolute and unqualified representation to that effect. They were either right or wrong, sound or unsound, and there was no such ground for diversity of opinion as exists when value or quality is in question. The language was used as to a matter of fact, and not merely as expressing an impression or opinion, or by way of mere praise or commendation.

If, however, it were of an uncertain character, and even if the petition, by merely averring what was said, had been defective for uncertainty as to what was embraced or intended by it, yet this would have been cured by the amended answer and the issue fully joined. It says: "He denies that they were unsound or that he had any sufficient knowledge or information to form a belief that they were unsound at the time of the sale. Defendant says it is not true, and he denies that plaintiff relied upon a statement made by this defendant to the effect that said mules were sound." It is evident what interpretation the pleader placed upon the representation that the mules were "all right," and we think it was correct.

It may be regarded as settled law that no particular form of words is necessary to constitute a warranty, and that the mere expression of an opinion does not make one a warrantor. Some of the cases, however, seem to make the existence of a warranty depend upon the intention of the vendor, and it is urged, in this case, that the petition is defective in failing to aver that the appellant expected or intended the appellee to rely upon his representation in making the purchase. If the true construction of this class of cases is that the decision did not turn upon whether the party intended to be held by a warranty, but whether he intended to affirm a fact or merely express an opinion, then they are reconcilable with the cases which, in our opinion, correctly hold that if one even supposes that he is not making himself liable upon a warranty, yet, if he makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article, or merely expressed an opinion as to it.

If it be conceded that a clear, positive affirmation by the vendor, made during the negotiation, that the article is sound be an express warranty, that it is as much so as if he were to say "I warrant it to be sound," then it is required of the vendor, in suing upon it, to aver that the vendor intended he should rely upon it?

If the vendor expressly warranted the article to be sound, and did not merely express a belife as to it, then he is liable without regard to his intention. He has lulled the vendee into security as to its condition, and he will not, and ought not, in good

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morals, to be heard to say that he did not intend the purchaser to rely upon the warranty. This being so, is it necessary to the sufficiency of the pleading to aver what the vendor will not be allowed to dispute? We think not. We are aware that some cases seem to draw a distinction between written and parol contracts, holding that if the contract be in writing it is for the court to say whether there was a warranty, but if in parol that it is for the jury to determine. We see no reason for this distinction where it is clear, in the case of an oral contract, that the vendor has warranted the condition of the property. It was said, in the case of Hawkins v. Pemberton, &c., 51 N. Y., 198: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing, and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares, and so if it be by parol, and the representation, as to the character or quality of the article sold, be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and can not escape liability by claiming that he did not intend to convey the impression which his lanugage was calculated to produce upon the mind of the vendee."

This view is also supported by the cases of Morrill v. Wallace, &c., 9 N. H., 111, and Strand v. Pierce, 6 Allen, 413. Where the case is of such a character that, upon the evidence, it is doubtful whether the vendor, by the language used, intended to assert a fact or merely express an opinion, and it is uncertain how the parties understood it, then the question of warranty or no warranty should be left to the jury, and in such a case, as the question is to be determined from all the evidence, if the petition merley sets forth the language of the vendor, it should also aver his intention in order that the testimony may be supported by pleading. Here, however, there was such a positive, unequivocal representation of a fact that it constituted a warranty. One side affirmed that the language was used by the vendor, while the other denied it. If used by him it was a warranty of the soundness of the mules, and yet the court, instead of so declaring, properly treated it as a case where it was doubftul whether the vendor intended to assert a fact or express a mere opinion, and submitted to the jury the question, not only whether the words were used, but whether the appellant warranted the mules to be sound. Of this he can not complain.

An insturction as to deceit and fraudulent concealment was also given. It is unobjectionable in form when considered in connection with the first instruction given at the instance of the appellant. If there were any circumstances in evidence, however slight, to support it, it was proper to give it. We can no say that, upon the entire record, they were entirely absent.

Judgment affirmed.

THE FIRST NATIONAL BANK, &c. v. WALKER, &c.

(Filed March 17, 1888—Not to be reported.)

Assignments by operation of la w—J., who was insolvent, was indebted to C. & Co. C. desiring to secure the debt to this firm, of which he was a

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member, became the surety of J. in a note executed for money borrowed from bank, the amount borrowed being used by J. in paying the debt to C. & Co., a debt to the bank and a debt to W. To secure C. a mortgage on real estate was executed to him by J., it being agreed between C. and the bank that C. was not to be held personally liable to the bank on the note, but if the mortgaged property failed to pay the note then the loss was to be sustained by the bank and the firm of C. & Co., the latter to bear only such a proposition of the loss as their debt bore to the whole amount. Held—That J., by executing the mortgage to C., committed an act of insolvency which operated as an assignment for the benefit of all his creditors, but W. can not be compelled to restore the money that he received in payment of his debt. All the court can do is to compel the surrender of the property mortgaged and such other property as J. may own to be pro rated among his creditors.

D. W. Lindsey, E. E. Settle and J. J. Orr for appellants.

J. J. Landram and Orrine B. Hallam for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, W. B. Roberts and others, by their actions in the Owen Circuit Court against J. M. Walker and the appellants, attacked a mortgage executed by J. M. Walker to the appellant, Attilla Cox, to secure the latter against loss by reason of going the surety of the former, the appellant, the First National Bank, for the sum of $3,340, upon the ground that J. M. Walker made said mortgage in contemplation of insolvency and with the design of preferring the appellants over other creditors. Upon the hearing of the cause the lower court adjudged that the said mortgage was made by J. M. Walker in contemplation of insolvency, and with the design of preferring the appellants over his other creditors. From that judgment the appellants have appealed.

The evidence, as it appears in this record, shows, beyond question, that J. M. Walker, at the time he executed the mortgage to the appellant, Attilla Cox, was insolvent, for it appears that his indebtedness, excluding the interest thereon, amounted to over $9,000, and that his property of all kinds was not sufficient to pay said indebtedness. As a part of this indebtedness he was indebted to the firm of F. & A. Cox & Co., of which firm the appellant, Attilla Cox, was a member, in the sum of $1,691.25, which debt was of long standing. He was also indebted to the appellant, the First National Bank, in the sum of $976.40, for the payment of which May Tomlinson was surety. This debt, however, was not due. He was also indebted to the appellant, Witherspoon, in the sum of $397.75. The appellant, Attilla Cox, desired said Walker to settle his indebtedness due the firm of F. & A. Cox & Co. As a means of doing this Walker desired the assistance of the appellant, Attilla Cox, in order to raise the money with which to pay the debt due said firm and the two others above named. So the plan agreed upon was to borrow $3,340 from the appellant, the first National Bank, with Walker as principal, and the appellant, Cox, as his surety, Walker to give the appellant, Cox, a mortgage upon all his real estate which constituted nearly all of his estate, to indemnify him against loss as surety. With this sum, after deducting the bank discount the firm's debt of $1,661.25 and the First National Bank's debt of $976.40, and with Witherspoon's debt of $397.75, were to be paid. The appellant, the bank, assented to this arrangement, so it loaned Walker the $3,340, on his note with the appellant, Cox, as his

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surety, and the money loaned was appropriated as above set forth.

On the 13th of September, 1884, the day that the note was executed to the bank, Walker executed to the appellant, Cox, a mortgage on all his real estate as an indemnity against loss by reason of signing said note as surety. At the time this arrangement was executed the appellants, Cox and the bank, entered into an agreement by which it was agreed that the appellant, Cox, was not to be held personally liable to the bank on the note, but if the property mortgaged to the appellant, Cox, failed, from any cause, to satisfy the said sum of $3,340, then the loss was to be sustained by the bank and the firm of Cox & Co., in proportion to $1,691.25 and $3,340. The three debts above named were existing demands at the time said arrangement was made. The appellant, Cox, was, as a member of the firm of F. & A. Cox & Co., interested in one of these debts. As a stockholder in the bank he was interested in the debt of $976.40 which Walker owed the bank. He was not to be personally bound on the note to the bank, but the property mortgaged was to be bound for the payment of this sum. The arrangement thus made was a device to secure, by mortgage, the debt that Walker owed the firm of Cox & Co., the appellant, Cox, being a member of that firm, and to secure the debt of $971.25 that he owed the bank, for, as to the latter debt, it was discharged simply in form, but the substance remained and was secured by the mortgage. Walker was insolvent, and he made the mortgage in contemplation of insolvency and with the design to prefer the appellants, Cox, the bank and Witherspoon, and Cox and the bank certainly aided him to make the arrangement. In view of article 2, section 1, chapter 44, of the General Statutes, which provides that "every sale, mortgage or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor," etc. Walker, by making said mortgage, committed an act of insolvency, and the lower court did right in adjudging that the making of said mortgage operated as an assignment and transfer of all his property for the equal benefit of all his creditors.

The lower court did not adjudge that the appellant, Witherspoon, should refund, for the benefit of all the creditors, the money that he had received from Walker, nor did it render any judgment in reference to that matter. The only final judgment rendered was that Walker had committed an act of insolvency which operated as an assignment of all his property for the benefit of his creditors. Therefore, we can not pass upon the question as to whether the appellant, Witherspoon, should be compelled to refund the money that he received from Walker in payment of his debt. It is proper to suggest, however, that all the court can do is to compel the surrender of the property mortgaged and such other property as Walker may own to be pro rated among the creditors of Walker in proportion to their respective demands.

We think the court did not err in permitting the deposition of Walker to be read as evidence. Besides, the evidence, outside of Walker's, shows that he made the mortgage in contemplation of insolvency, and with the design of preferring the appellants to the exclusion of his other creditors.

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The other grounds relied upon by the appellants for reversal are equally unavailing.

The judgment is affirmed.

BLEDSOE v. COMMONWEALTH.

(Filed March 17, 1888—Not to be reported.)

Self-defense—When one is assailed in his own home or on his own premises, and thereby put in danger of loss of life or great bodily harm, he is not required to flee in order to avoid his assailant, but has the right to stand his ground and use such means as are reasonably necessary to his protection, even to the extent of taking life. Therefore, the doctrine of safe, or apparent safe means of escape, does not apply in such a case.

R. F. Spencer for appellant.

P. W. Hardin for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Holt.

The lots of the appellant, Milton Bledsoe, and the deceased, Harriet O'Bannion, and upon which they respectively resided, adjoin. Trouble arose between them as to a division fence, the deceased claiming that it was upon her land, and the appellant had no right to join his fencing to it. It had, however, existed at the same place, and as their division fence for a good many years. The deceased, by reason of some fancied or perhaps real wrong done to some stock belonging to her or her husband by some of the family of the appellant when trespassing upon his premises, went upon them and tore down several panels of his fencing where it united with the division fence, thus exposing his lot or garden to the depredations of stock running at large when this was done. The accused remonstrated with the deceased, and declared that he would rebuild the fence, and unite it to the division fence, while the deceased forbid him doing so. A considerable quarrel of words took place at this time, but the appellant desisted and left the fence down. Upon the next evening he went to the spot and began to rebuild it. The deceased at once appeared, and a wordy quarrel ensued. There is some testimony tending to show that the accused finally raised a piece of plank, the deceased being then upon his side of the division fence, as if to strike her. Other evidence contradicts this, but in any event, she at once sent her daughter to her house for a pistol, and thereupon the accused went to his house and got his gun. The pistol was brought and given to the deceased, she, by this time, having gotten back upon her own side of the division fence. When the accused returned with his gun he set it down against a portion of the fence he was rebuilding, and proceeded with his work. Just at this time the husband of the deceased appeared upon the ground, and taking in the situation, he at once ran to his house near by as if for a weapon. Seeing him do so, and fearful that he would shoot him from out of the house, the accused seized his gun and presented it in the direction of the house, and for the purpose of commanding the windows. This brought the deceased also somewhat within its range. In a moment the husband, as the testimony tends to show, did fire upon the appellant from one of the win-

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dows. At this time the deceased had the pistol in her hand, two or more witnesses testifying that she was holding it down at her side, while circumstances, rather conclusive in character, indicate that she must then have had it presented at the appellant. At this juncture he changed the range of the gun directly at the deceased, and fired, killing her. During the entire difficulty, the accused was upon his own premises. The record presents but one question for consideration. Others have been discussed by counsel, but as they were, for the first time, raised by and determined upon the motion for a new trial, they are not available upon this appeal.

After giving the usual instruction as to murder and manslaughter, the lower court gave this additional one: "The court instructs the jury that if they believe, from the evidence, that at the time the accused shot Harriett O'Bannion, if he did shoot her, he then had reasonable grounds to believe, and did believe, he was then in immediate danger of losing his life, or receiving great bodily harm at the hands of said 'OBannion, and that he then had no other safe, or apparently safe means of avoiding the danger than to shoot her, then he had the right to shoot her to rid himself of said danger, on the ground of self-defense and apparent necessity, and the jury should acquit him." The accused objected to the portion of the instruction which we have italicized. Evidently the jury may, from it, have believed that if flight would have afforded him a safe or apparently safe means of avoiding any existing danger at the hands of the deceased, that then the accused, although he may have been the party assailed, was bound to flee. The law did not require him to leave his own premises. He was at his own home. If there assailed and thereby put in danger of loss of life or great bodily harm, he had the right to use such means as were reasonably necessary to his protection, even to the extent of taking life. While in such a case he could, of course, resort to no unreasonable or unnecessary force, yet he was not required to leave his own premises and flee, but could stand his ground and strike in his necessary self-defense. The doctrine of safe, or apparent safe means of escape, does not apply in such a case. One is never required to desert his own home or flee from his own premises to avoid an assailant. The law requires no such duty of him, and the safety of society would be endangered rather than protected by its imposition. We do not mean to say who was in fault, or the aggressor in this instance, but only to determine that upon this record the instruction in question was erroneous. The whole law was not given to the jury. Without passing upon the facts of the case, which must undergo another investigation, it is sufficient to say that there was sufficient evidence to have authoirzed the court to have, in substance, told the jury that if they believed, from the evidence, that the deceased and her husband, acting in concert, intentionally provoked the difficulty and made an assault upon the accused, or that she so provoked it, and her husband joined with her in a joint attack upon the appellant, that then he was not required to flee, but had the right to use such means as were reasonably necessary to protect his life or himself from great bodily harm, and if, under such circumstances, and when he had reasonable grounds to believe, and did believe, that he was in immediate danger of death or great bodily harm at the hands of the deceased, he shot her, that then he was excusable, and the jury should acquit him. It is true, that generally speaking, no one can take human life when it can be reasonably avoided, but this does not require one to flee from his home or his own premises when he is there assailed by another,

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but in such a case he may stand and defend himself, using, however, no more force than is reasonably necessary to do so.

For the error indicated, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

WINSTON v. COMMONWEALTH.

(Filed March 22, 1888—Not to be reported.)

Criminal law—Stealing from office—The indictment in this case charges defendant with feloniously stealing $2 from an office. Held—That the indictment charges a misdemeanor only, and not the offense denounced by section 4 of article 6, chapter 29, General Statutes.

J. K. Hendrick and T. E. Moss for appellant.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Pryor.

The question in this case has been determined by the opinion this day rendered in the case of Webb v. Commonwealth, from the Livingston Circuit Court. The charge contained in the indictment is only petty larceny. The accused is said to have feloniously taken $2 in currency from the office of Wisdom. The punishment inflicted is under a statute providing for breaking a warehouse, office, etc., with the intent to steal. The gravamen of the offense is the breaking with a felonious purpose. Where the breaking with the intent to steal is established, the offense is complete, but the law making power saw proper to add to the statute, or steals therefrom, so that no question could be raised as to its proper meaning. However trifling in value the article stolen may be, the party breaking with the intent to steal is guilty of a felony. Here the charge is only that of stealing $2, the property of Wisdom, from his office. It is a misdemeanor only.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

BULLOCK v. GRAHAM, & CO.

(Filed March 17, 1888.)

1. To authorize the enforcement of a vendor's lien he must set out the contract, and, if he has not already conveyed, the character of the title to be made. If he has conveyed, that fact should be stated, and if not he must allege that he is able and willing to do so according to the terms of his contract.

2. Where the vendor seeks both a personal judgment and a judgment for the enforcement of his lien, he is entitled to the judgment in personam if the allegations of the petition are sufficient to authorize it, although they may not be sufficient to authorize the judgment in rem. And if the defendant desires to raise the question of want of consideration for the note, he must do so by answer and not by demurrer, the note itself importing a sufficient consideration.

J. W. Thomas for appellant.

Nat. W. Halstead for appellee.

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Appeal from Nelson Circuit Court.

Opinion of the court by Judge Holt.

The appellant, James Bullock, executed his promissory note to one T. E. Boone, and the latter assigned it to the appellees, Graham & Co. It specifies that it is for the second payment on land, and that a lien is retained theron to secure its payment. The appellees sued the appellant upon it, asking in their petition both a personal judgment, and that the lien be enforced against the land. The averments of the petition are sufficient to authorize a judgment in personam upon the note, but are insufficient to authorize one in rem. The appellant filed a general demurrer to the petition. It was properly overruled, because, while the pleading was insufficient to authorize the enforcement of the lien, it did set out in propria foma a cause of action in personam. He declined to plead further, and a personal judgment only was rendered upon the note, the appellees dismissing the action without prejudice so far as it sought the enforcement of any lien.

As to it the petition merely averred that the note was given for the purchase money for the land, describing it; that the appellant was then in possession of it, and that the note had retained a lien upon it for its payment. It does not set forth the terms of the contract between the vendor and the vendee, or whether the vendor has already conveyed, or whether, if not, he is able and willing to do so in conformity to his contract.

It is necessary to the enforcement of the lien to set out the contract, the charcter of the title to be made, if it has not been aleady done, in which event it should be stated, and if not done then it must be averred that the vendor is able and willing to do so according to the terms of his contract. (Williams v. Abraham, 3 Bush, 186; Colvin v. Duncan, 12 Bush, 101.) The petition was, therefore, insufficient to the enforcement of any lien, but this was not ordered. The omitted averments were only neccessary to authorize a judgment, in rem. They relate to it only, and their absence did not prevent a personal judgment upon an obligation which in itself imported a sufficient consideration. The averments of the petition being sufficient to authorize a personal judgment, and the appellant having been duly summoned, he should, if he desired to raise the question of consideration for the note, have done so by answer. He could not do it by demurrer.

Judgment affirmed.

[A rehearing having been granted in this case the opinion now published was delivered upon the second hearing. The former opinion (ante, page 215) was published by mistake, the fact that time for filing petition for rehearing had been extended, being overlooked.]

SMITH v. COMMONWEALTH.

(Filed April 7, 1888—Not to be reported.)

1. Criminal law—Continuance—Threats—The court erred in refusing a continuance applied for on the ground of the absence of a witness who, it was stated by affidavit, would prove the deceased had threatened to whip appellant if he voted at the election, just past, for a certain candidate, as something more than a mere threat was involved in this statement. It showed a

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disposition and intention on the part of the deceased to hector and bully the appellant, and would have been corroborative of the testimony of appellant to the effect that the deceased began the difficulty. Therefore, and in view of the short time which elapsed from the killing to the trial, and the want of opportunity afforded appellant to prepare for his defense, he having been in jail, the case ought to have been continued.

2. Misconduct of the Commonwealth's attorney not excepted to below is not ground for reversal.

3. Instructions—An instruction telling the jury that they are the sole judges of the weight of the evidence and credibility of the witnesses ought never to be given, as it may be prejudicial.

R. L. Ewell and Smith & Perkins for appellant.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

The homicide with which appellant is charged was committed Novemebr 26, 1886, and the indictment against him was returned December 7, 1886, when the case was set for trial to take place during that term.

In his affidavit for a continuance appellant stated the absent witness, Walters, would prove that the deceased had threatened to whip him if he voted at the election, just past, for a certain candidate.

There is proof in the case of previous hostility between the appellant and the deceased, who were brothers-in-law, and also of threats by each against the other. But something more than a mere threat was involved in the statement of the deceased, which appellant swore he could prove by Walters. It showed a disposition and intention on the part of the deceased to hector and bully the appellant and would have been corroborative of the testimony of appellant, supported by that of his son, that the deceased commenced the difficulty by advancing upon and striking him with a club before the latter made any hostile demonstration. For, notwithstanding there were several pesons in the store-room where the killing took place, none of the witnesses state that appellant advanced upon the deceased or commenced the difficulty, though some of them, except appellant and his son, are clear or precise in their testimony as to how the fight did really begin. We think, in view of the short time which elapsed from the killing to the trial and the want of opportunity afforded appellant to prepare for his defense, having been in jail, that the case ought to have been continued. For the facts, even as proved on the trial, do not by any means clearly show the killing was not done in self-defense, and reasonable opportunity ought to have been given the defendant to exculpate himself, which, under the circumstances, we think was not offered to him.

We perceive no other error occurring at the trial which constitutes a ground for reversal. The conduct of the Commonwealth's Attorney complained of, can not be considered by this court, because it was not excepted to at the time and passed on by the lower court.

The instructions are all good except the fifth, in which the jury are told they are the sole judges of the weight of the evidence and credibility of the witnesses. That instruction is unnecessary and ought never to be given, for while it may not in every case be taken by the jury as an intimation by the court some of the witnesses are not entitled to credit, and some of the testimony is without weight, it is sometimes so interpreted by them, and when such is the case, it is prejudicial and erroneous.

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For the errors indicated, the judgment of conviction is reversed and cause remanded for a new trial.

WEBB v. COMMONWEALTH.

(Filed March 22, 1888.)

Criminal law—Stealing from warehouses—The mere taking of property of value from a warehouse or room mentioned in section 4 of article 6, chapter 29, General Statutes, is not sufficient to constitute the offense for which that statute provides a punishment. To constitute that offense there must be a breaking.

The indictment in this case charges that the defendant did feloniously steal from a warehouse "one sack of tobacco of the value of forty cents." Held—That the offense charged is only a misdemeanor.

J. K. Hendrick for appellant.

Appeal from Livingston Circuit Court.

Opinion of the court by Chief Justice Pryor.

The grand jury of Livingston county returned into court an indictment against the appellant, Wm. Webb, charging him with the felonious taking from a warehouse property of value, committed as follows: "The said Wm. Webb, in the county of Livingston, on the 20th of January, 1888, did, feloniously steal, take and carry away from the warehouse of C. B. Davis, one sack of toabcco of the value of forty cents, the personal property of C. B. Davis," etc. It is also charged in the indictment that the accused had been indicted, tried, convicted and sentenced to imprisonment in the penitentiary for the crime of house-breaking, the judgment being confinement at hard labor for three years, and rendered by the Livingston Circuit Court in August, 1871, etc. The object of the second charge in the indictment was to have a double punishment inflicted on the offender, as provided by section 12 of chapter 29. General Statutes. That provision reads: "Every person convicted a second time of felony, the punishment of which, is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction," etc. The accused having been convicted under the first indictment and sent to the penitentiary for three years, the jury under the present indictment doubled the period and sent him for six years. The indictment is based on section 4 of article 6, chapter 29, General Statutes, that provides, "if any person shall feloniously, in the night or day, break any warehouse, store-house, office, shop or room on a steam, wharf or other boat, whether such place be or be not a depository for goods, * * * with intent to steal, or shall feloniously take therefrom or destroy any goods, wares, etc., of value, whether the owner or other person be or not in such house, office, room or shop, he shall be confined in the penitentiary not less than one and not more than five years." It is nowhere charged in the indictment that the accused broke into the warehouse of Davis, but an averment charging him only with feloniously stealing and carrying away from the warehouse of Davis, tobacco of the value of forty cents, the property of Davis.

The gravamen of the offense under this statute is the breaking with an intent to steal or feloniously taking therefrom property of value. The mere taking from a warehouse the property of another with a felonious intent is not the offense created and

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punished by this statute. In such a case the offense would be either grand larceny or a misdemeanor, to be determined by the value of the property stolen. In this case the felony charged is the felonious taking from the warehouse of Davis, tobacco of the value of forty cents, and the offense, if proven, being that of petty larceny, it was error to charge the jury or to adjudge from the facts alleged in the indictment that the offense was a felony punishable by confinement in the State prison.

A statute will be found on page 424 of General Statutes, chapter 29, article 11, section 4, providing: "Any person for stealing money, goods or chattels of the value of $4 or upwards (now changed to $10), either from the possession of any one or from his home, without violence or putting in fear, by confinement in the State prison not less than two nor more than five years." It is plain, therefore, that the legislature never intended to make the taking of personal property from a home, although with the intent to steal, a felony, if the value of the property was such as constituted the offense of petty larceny. The offense here charged is a misdemeanor and nothing more, and in order to constitute it a higher degree of offense, the fact of breaking the house, if true, should have been alleged, as that under the statute is the substantial cause of complaint. The judgment below is, therefore, reversed and remanded with directions to award a new trial and for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

LOUISVILLE & NASHVILLE R. R. CO. v. WILSEY.

(Filed February 22, 1888.)

1. Compensatory damages—Ejecting passenger from railroad train—In an action against a railroad company to recover compensatory damages for being wrongfully ejected from one of the company's trains, it is proper, in estimating the damages, to consider the humiliation and degradation imposed upon the plaintiff by the wrong done him, although vindictive damages can not be given.

2. Same—Since in such cases the passenger can leave the train upon being notified that he will be required to do so, and have a complete cause of action against the company without requiring the conductor to resort to force, it seems that if he refuses to leave, and the force used is no greater than is necessary to remove him, the injuries growing out of such force can not enter into the question of damages. But it is not necessary to determine that question, since no instruction was asked excluding from the consideration of the jury, as an element of damage, the physical force used in ejecting the plaintiff, and there was no objection to the evidence.

3. Same—Excessive verdict—In an action for the recovery of compensatory damages for mortification and injury to the feelings of the plaintiff, caused by a wrongful ejection from a train, there being no claim of loss or damage growing out of the delay, and nothing to show any extreme mortification or mental pain or anxiety growing out of the manner of the expulsion, a verdict of $2,500 is so excessive as to make it appear that the jury were influenced by passion or prejudice.

Hill & Alcorn for appellant.

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W. O. Bradley and F. H. Reppert for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Barbour.

Upon a former appeal in this case the Court of Appeals held that the appellee, having paid his fare from Danville Junction to London, and the train upon which he had taken passage having been delayed at Mt. Vernon in the afternoon, and it being ascertained that it would not be able to proceed further until early the next morning, the appellee, who was sick, had the right to go to a hotel and spend the night there, and to resume his journey afterwards upon a different train, and without the repayment of fare.

A trial after the return of the case to the circuit court having resulted in a verdict and judgmnt for $2,500, the appellant prosecutes this appeal. As it must be conceded that the appellant's employes had no right to expel the appellee from its train, the principal question, and the only one we will consider is, as to the damages he is entitled to recover.

From the testimony in the record we fail to find the slightest evidence of any intentional indignity offered to the appellee, or any thing tending to show that he was wantonly or maliciously ejected from the train. The petition, as originally drawn, charged that the appellant's conductor "forcibly, maliciously and unlawfully ejected the plaintiff" from the train, but, upon appellant's motion, the word maliciously was stricken out, and the action, as tried, was for compensatory damages alone. For the purpose of this appeal, we will assume that the facts, as testified to by the plaintiff, were true. These facts are substantially as follows: Appellee bought of appellant a ticket at Danville Junction, which entitled him to travel upon appellant's train from that point to London. He took passage on one of appellant's trains and proceeded as far as Mt. Vernon, when the train was delayed on account of the wrecking of a freight train near that place. About dark, and after it was ascertained that the train could not proceed until after midnight, appellee, having delivered to the conductor his ticket and having received a conductor's check, informed the conductor that he was sick and could not set up in the car all night, and asked him for a stop over ticket, which the conductor refused him. Appellee then said he would stop off and try it any how, and if the conductor on the train next day didn't carry him on the conductor's check which he retained, he would sue the company. He then went to a hotel and remained there that night. In the morning he learned that the train had left at 4 o'clock that morning. He remained in Mt. Vernon that day until 2 p. m., when he got on a passenger train going to London. When the train had got about two miles, the conductor took from the appellee his conductor's check, and before appellee could explain why he was entitled to travel on it, tore it up, and asked him for his fare. Appellee replied that he had paid his fare to London once, and did not intend to pay it again. The conductor said if he didn't pay he would put him off. Appellee then asked what the fare to London was, and the conductor told him $1.15. He then asked what was the ticket fare, and was told that it was 85 cents. He tendered to the conductor 85 cents, which he refused to receive, demanding the 30 cents additional, saying "you are the man who is going to sue the company. I've heard of you. I got a telegram about you. Pay or I will put you off the train." Appellee said he would not get off; that he would have to be put off. The train

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was then stopped, and the conductor and a brakeman picked him up and put him off. After being put off, he walked back a short distance and got upon a construction train and returned to Mt. Vernon. The court, at the conclusion of the evidence, instructed the jury to find for the plaintiff "any sum they might think proper under the testimony by way of compensation for mortification to his feelings, or mental humiliation. pain or anxiety suffered by plaintiff, as may be shown by the testimony by reason of his ejection." * * * This instruction it is insisted is objectionable, because it does not, as it should, limit the recovery to an amount which will compensate the appellee for the injury sustained. While not as guarded in its phraseology as perhaps it should be, we are of opinion that under the evidence it is substantially correct. It has been held that in estimating compensatory damages in such cases, it is proper to consider the humiliation and degredation imposed upon the injured person by the wrong done him. The fact that the wrong is done under circumstances of peculiar indignity and degradation is to be considered as an element of compensation, even in case where vindictive damages can not be given. In Faber v. Butson, 5 Ind., 322, the court held that only compensatory damages were recoverable by the plaintiff, but said: "He was not, it is true, confined to the proof of actual pecuniary loss. The jury might have taken into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind—in short his individual happiness." (Lake Erie & Western R. R. Co. v. Fixie, 11 Am. and Eng. R. R. Cases, 114.) But in this connection an interesting question might arise. Should the jury be allowed to consider an element of the plaintiff's damages, the mortification or humiliation which he might have felt by reason of the physical force used by the conductor in expelling him from the train?

That the appellee was wrongfully ejected must be conceded, but it is not pretended that the conductor's acts were wanton or malicious. He was simply acting under what he erroneously believed to be his duty, and when he required that the appellee should pay the usual train fare, the latter had the right to refuse to do so, and if, without doing it, he was not allowed to proceed, he could then have left the train and the company would have been liable to him for the injury he sustained in consequence of such expulsion. It was not necessary, to enable him to have a cause of action, that he should have subjected himself to physical force. Though rightfully on the train, was his position that of one in possession of his own property? Do not the necessities of the case, the safety of the traveling public, require that the conductor shall have the control of the train and the persons on it? His right to expel persons violating the reasonable rules of the company—his right to require persons, who refuse to pay their fare, to leave the train—is every where recognized by the courts. If he exercises this power wrongfully his company is liable. As we have said the appellee rightfully refused to pay the fare demanded of him, and when he was told unless he did pay it he would be required to leave the train, he could have then left it in a peaceable manner, and would have had a complete cause of action against the company. But when he refused to leave and required the conductor to resort to force, and the force used was no greater than was necessary to remove him, should he be allowed to recover for the supposed injury to his feelings caused by the use of the force which he voluntarily brought upon himself—which he himself invited?

In the Pennsylvania R. R. Co. v. Connell, 18 Am. and Eng.

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R. R. Cases, 344, in a case very much like this, the Supreme Court of Illinois held that the injuries growing out of the use of such force, which was voluntarily brought upon himself by the plaintiff, could not enter into the question of damages, the court saying that "a train crowded with passengers, often women and children, is no place for a quarrel, or a fight between a conductor and a passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should, in a peaceable manner, leave the train and seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained." But this question we do not feel called upon to determine, as there was no objection to the evidence, nor did the appellant ask the court to instruct the jury to exclude from their consideration, as an element of damage, the physical force used by the conductor in ejecting the appellee from the train.

The only question, then, remaining for our consideration is, were the damages excessive? This we feel constrained to answer in the affirmative.

After a careful examination of all the cases at our command, we have failed to find a single case, in an action for the recovery of compensatory damages for mortification and injury to the feelings of the plaintiff, caused by a wrongful ejection from a train, where a verdict, awarding damages so large as were awarded by the jury in this case, has been sustained. Here there was no claim or evidence of loss of damage growing out of the delay caused by the expulsion. The only physical injury or inconvenience sustained was the walking a short distance and the ride upon a construction train of not exceeding two miles. There was nothing to show any extreme mortification, or mental pain, or anxiety, growing out of the manner of the expulsion. In view of these facts "it strikes us, at first blush," that the verdict for $2,500 is so excessive as to make it appear that the jury were influenced in their action by passion and prejudice.

The judgment is reversed and the cause remanded for a new trial.

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SUPERIOR COURT ABSTRACTS.

ECKLAR v. WOOLERY.

Filed March 7, 1888. Appeal from Harrison Chancery Court. Opinion of the court by Judge Bowden, affirming.

Vendor's lien—Waiver—A vendor who had a lien upon land for the purchase money accepted from one to whom the vendee had sold a part of the land a note with surety secured by a mortgage on that part of the land. This note was accepted in payment of the balance of the purchase money due from the vendee, and the vendor released on the record his lien. The purchaser from the vendee also executed to the latter, his vendor, his note for the balance of the purchase money which he owed for that part of the land purchased by him. In this action by the surety on the note secured by mortgage, who seeks to be substituted to the rights of the mortgagee, Held—That the original lien was released, but the note given by the purchaser from the vendee to the original vendor, and also that given to the vendee, were both purchase money notes secured by a common vendor's lien, the evidence being sufficient to justify the chancellor in holding that the original vendor did not intend to accept the note from the purchaser from his vendee without a vendor's lien on the land for which it was executed, for while taking the mortgage indicates that he did not suppose that he had a vendor's lien, yet it seems probable that he did not mean to entirely give up a lien that secured him beyond all question, considering that the arrangement was not at all for his benefit, but to enable his vendee to close his sales to other parties.

I. Irvine for appellant; L. M. Martin for appellee.

McDORMENT, &c. v. HICKSEN.

Filed March 7, 1888. Appeal from Owen Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Partnership—In this action against appellants to recover damages for their failure to deliver tobacco, which it was alleged they, as partners, had sold and agreed to deliver, each was properly treated as the other's agent to sell and as liable for all damages that resulted from a failure to deliver, they having failed to deny the allegation that they were partners.

2. Amendment of pleadings—As it seems that the failure to deny the allegation that defendants were partners was merely an oversight, they should, upon the return of the case, which has to go back for another trial, be allowed to amend their answer.

3. Measure of damages—For the breach of a contract in not delivering the thing sold, the measure of damages is the value of the property at the time of the breach.

E. E. Settle & T. R. Gordon for appellants; Montgomery, Lindsay & Botts for appellee.

GARVEY v. GREEN, &c.

Filed March 7, 1888. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Parties to actions—Peremptory instructions—Where the evidence shows that the plaintiffs have no interest in the subject-matter and no right to sue there is not simply a defect of parties plaintiffs, but a failure to make out a cause of action, and a peremptory instruction to find for the defendant is proper.

T. R. Gordon and E. E. Settle for appellant; J. W. Green for appellees.

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WARE v. WITHERS.

Filed March 7, 1888. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

Deeds—Fraud—In this action by the grantor to have a conveyance set aside upon the ground that it was obtained by fraud the evidence fails to sustain the allegations of the petition, which was, therefore, properly dismissed.

John W. McPherson for appellant; Breathitt & Stites for appellee.

COLLINS v. WHEELER.
SAME v. SAME.

Filed March 7, 1888. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Practice—As the law and facts in these ordinary actions were submitted to the court, and there was no separation by the court of its conclusions of law and fact, nothing remains to be considered by the court except the sufficiency of the pleadings, and as they make an issue the judgment must be affirmed.

Kennedy & Son for appellant; W. W. Kimbrough for appellee.

CLORE & SONS v. SCOTT, &c.

Filed March 7, 1888. Appeal from Henderson Circuit Court. Opinion o the court by Judge Bowden, affirming.

Husband and wife—Rights of creditors—While an insolvent debtor can not, as against his creditors, use his means in adding to the value of his wife's or of his child's land, yet if creditors consent that it shall be done, relying on his personal assurance that satisfactory security shall be given, they must look to him for performance.

The husband contracted for lumber to build a residence on his wife's land, promising that he and his wife would give a mortgage to secure the bill. The mortgage was never executed. Held—That the creditor can not subject either the land or the rents to the payment of his debt, but must look to the husband.

Sol. S. Sizemore for appellants.

BUCKLER v. BREWER'S ADM'R, &c.

Filed March 7, 1888. Appeal from Robertson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Fraudulent assignment of note—B. transferred a note to D. without consideration, and for the purpose of cheating and defrauding his creditors. D transferred the note to R., who gave to him, as the ostensible consideration for the transfer, his check for a certain amount. The weight of the evidence shows that soon thereafter D., at the request of B., returned to R. the amount R. had paid him. R. having collected the note, a creditor of B. seeks by this action to recover judgment against R. for the amount of his debt, which is less than the amount of the note collected by R. Held—That R. was acting with B. for the purpose of aiding him in his attempt to defraud his creditors, and, therefore, the plaintiff is entitled to the relief sought.

2. Evidence—R. was a competent witness for himself as to the transaction between him and B., as the issue was between him and appellant and not between him and B.'s estate.

Kennedy & Son and W. S. Bayne for appellant.

PERRY, &c. v. McHATTON'S ADM'R.

Filed March 7, 1888. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Landlord and tenant—Partnership—Appellants rented to W. and J. a tract of land for the cultivation of a crop of tobacco, appellants to have one-third of the crop. It is admitted, for the purpose of this decision, that W. and J. were partners. Before the termination of the lease J. died. The crop was sold and W. received $100 of the proceeds, appellants receiving the balance.

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Appellants then settled with W. for one-third of the proceeds and he fell in debt to them in the sum of $150.

J.'s administrator seeks by this action to recover of appellants is one-third of proceeds. Appellants seek to obtain a credit by one-half the $100 paid W. and by one-half of an account against W. and J. Held—That as appellants evidently undertook to settle with W., as if he owned one-third of the tobacco and J. one-third, they are not entitled to a credit for either of the amounts claimed, except so much of the account as was contracted by J. and as to that they could have no set-off in this aciton, because there was no affidavit or proof of the claim.

Montgomery, Lindsay & Botts for appellant; J. W. Green for appellee.

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